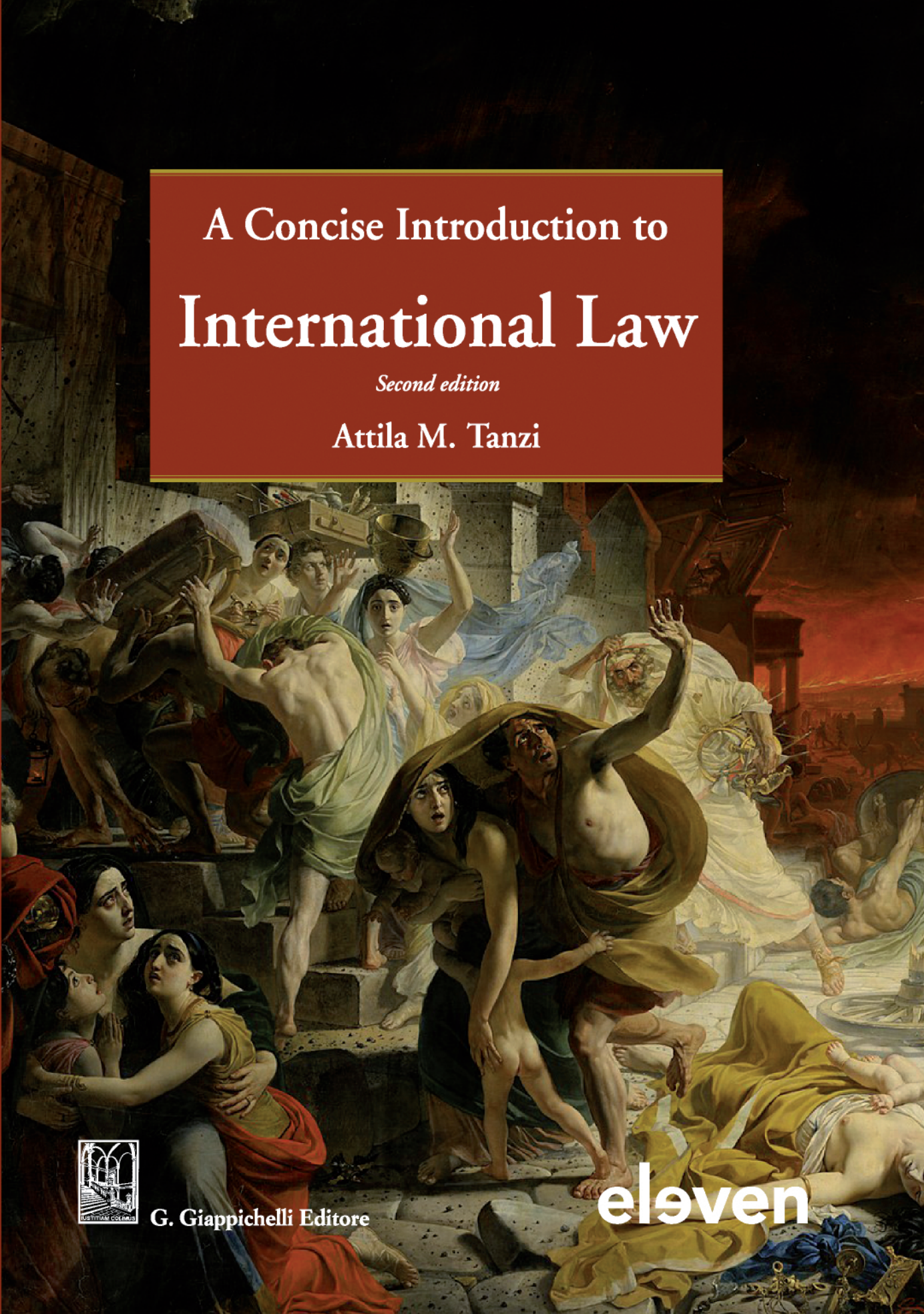
A Concise Introduction to International Law

Second edition

Attila M. Tanzi



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Chapter 1

What is international law

1. Who needs a basic knowledge of international law and why

A basic knowledge of international law, as with any body of the law, is necessary, in the first place, for legal practitioners.

Because of its primarily international and public law configuration, one would assume that a purely domestic lawyer would be spared of the need to know international law. That is a wrong assumption, as there is hardly a domestic legal issue – be it of a commercial, criminal or labour law nature, let alone of a constitutional law character – which is not connected with a rule of international law whose interpretation is relevant to the application of a domestic rule, or the settlement of a domestic dispute in such matters.

The point has been addressed in impassionate terms by Professor Shabtai Rosenne, one of the most thorough international legal scholars and practitioners of recent times. His acceptance speech at the presentation of The Hague Prize, which he received in 2004, precisely revolved around the importance of international law for the legal practice. Professor Rosenne lamented that the average practitioner of our time is often hardly qualified to identify an international law problem when professional advice would so require. [1] He observed that:

> '[A]n attorney can[not] be fully qualified if he or she is unable to identify an international law element in a client's problem. I do not expect every attorney to be able to solve that international law prob-

[1] 'The Hague Prize for International Law 2004 Awarded to Professor Shabtai Rosenne' (2004) 51 Netherlands International Law Review 475, especially at 482-485.

> lem (…). But the least that can be expected is that the attorney will identify that the international law problem is part of the complex to be resolved (…).' [2]

Within the domestic legal community, the prominence of the judiciary should not be lost sight of, since domestic courts and tribunals play a significant role in the application, or violation, as well as in the making and changing of international law. Notice should also be taken of the increasing legal representation of the Government before international courts and tribunals by the Office of the Attorney General, due to international litigation involving sovereign parties, which is developing to an extent unknown in the past. [3]

The increasing global interdependence in time of economic growth, and, paradoxically all the more so, in time of economic and environmental crisis, has added an international dimension to the work of a wider spectrum of governmental administrations traditionally devoted to domestic affairs, such as Treasury, Health, Environment and even the Interior.

Much the same applies to members of the civil society organised within NGOs, which, as we shall also see, are taking an increasingly prominent stand in promoting the making and enforcement of international law on the domestic and transboundary levels. That is especially the case in the field of environmental and human rights law. At the same time, we are witnessing a new corporate role in the promotion of new international economic law standards through BINGOs. In both areas, lawyers who are knowledgeable of the basics of international law are in demand.

Lastly, a basic knowledge of international law is required for those who want to work in media communication and journalism, given the ever-increasing international interdependence of the great and dramatic challenges confronting our societies. From climate

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[2] *Ibidem*, 482.

[3] See Chapter 6.

change to military or digital security, access to essential natural resources, demographic growth, pandemics, finance and economics, or the use and management of artificial intelligence and neuro-sciences, all such challenges cannot be effectively tackled by individual nation-states, without internationally regulated cooperation. The related international law-making, and implementation, policies, while involving national and transnational civil societies, require highly competent media, including in the field of international law.

2. Regulating the relations between states and constraining their external sovereignty…

One can say that international law consists of a set of rules made by states in order to regulate the legal relations between them. Such rules belong to one legal order shared by each and all members of the international community of states, even if a state may differ from another with regard to the interpretation and application of these rules. That is to say that international law is not to be confused with anything to do with foreign laws, as is sometimes the case with beginners to the subject. The study of foreign laws pertains to the subject of comparative law, public or private.

Nor should international law be confused with **private international law**, more properly known as ***conflict of laws***. This body of law is to be found in each national legal system, each with its own differences, with a view to guiding the domestic judge in deciding *a*) whether it has jurisdiction, and if so, *b*) which law – domestic or foreign – to apply to any given legal case between private individuals, or companies, containing a foreign element. Such foreign element may pertain to issues of contract law, when one of the parties is a foreigner and/or the contract is to be performed abroad; to tort law, when the damage is suffered or caused by conduct carried out abroad; to marital law, when one of the spouses is a foreign national, or the marriage was celebrated abroad; or in cases of cross-border inheritance. Namely, if you have connections, in terms of nationali-

ty or residence, with more than one country, you need to know which country's law will govern who inherits your assets when you pass away.

Each national legal system, through its body of rules on conflict of laws, provides for connecting factors – *e.g.* citizenship or habitual residence of either parties, the place of conclusion, or of performance, of the contract, the place where the damage was caused, or suffered – in order for the domestic judge to choose the applicable legal order among those connected to a given case, including its national law. Given the uncertainties and complications deriving from the fact that each national law may provide different connecting patterns in relation to the same legal relationships, states and international organisations, including the EU, have promoted the adoption of international conventions on uniform domestic rules of private international law.

Defining international law – or any other legal order – as a set of rules is a useful simplification. But an incomplete one. Next to its rules, a legal system is defined by the process which produces, uses and applies such rules, as well as by the social, political, economic factors which underlie such process. That inevitably requires a degree of interdisciplinary approach to the law,[4] even by black-letter practitioners, as no persuasive legal argument may be made without

[4] The New Haven School of legal thinking, gathered around the Yale School of Law, has been a precursor to this approach, see MS McDougal, HD Lasswell and WM Reisman, 'The World Constitutive Process of Authoritative Decision' (1967) 19 Journal of Legal Education 253. For a clear illustration of international law as a process of authoritative decisions, see, by Dame Rosalyn Higgins – an epigone of the New Haven School on the British legal scene and former President of the ICJ – *Problems and Process: International Law and How We Use It* (Clarendon Press 1994). See also JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013). See also, more recently, P Palchetti, 'An Interdisciplinary Approach to International Law? Some Cursory Remarks' in M Meccarelli (ed), *Reading the Crisis: Legal, Philosophical and Literary Perspectives* (Editorial Dykinson 2017), 199ff.

a sufficient grasp of the social, economic, policy, technical or scientific aspects underlying the making or application of the law.

The prevailing **inter-state nature** of international law is apparent from the diplomatic settings in which inter-state agreements are negotiated and entered into by state organs in charge of foreign relations. Its international character is evidenced by the international scope of application of most rules of international law. One may consider the rules governing the terrestrial and maritime delimitation of sovereignty between states; those on the use, management and conservation of shared natural resources, such as transboundary watercourses and aquifers, or oil and gas. The same applies to the currently much debated rule banning the use of force, or acts of aggression, 'against the territorial integrity and political independence' of other states as enshrined in Article 2(4) of the *UN Charter*.

The above may lead one to think of international law as a body of law merely confined to diplomatic and transboundary relations. Namely, one regulating only the **external sovereignty** of states. However, one ought to consider that most rules of international law are applied, misapplied, or infringed upon, within the domestic legal orders of the recipient states, hence, by state officials in charge of domestic affairs, either legislative, executive or judicial. As it will be illustrated in the next section, this naturally flows from the contents of most international rules which impinge upon domestic sovereignty, on a daily basis.

3. …And internal sovereignty

In fact, a large number of international rules provide, through their obligations, constraints over the internal sovereignty of the recipient states, whether this is in relation to the jurisdiction to prescribe, to adjudicate, or to enforce. That is corroborated by most of the bodies of international law illustrated in a summary fashion in Chapter 7.

By way of anticipation, apart from the self-evident case of the in-

ternational body of human rights rules, one may single out the traditional international rules on the treatment of aliens, according to which states cannot treat foreign individuals and companies in an arbitrary or discriminatory way; similarly, one may point to the rules on the treatment of foreign states and intergovernmental organisations, whose standards, given the superior need to protect the state functions exercised by foreign officials, are higher than those applicable to foreign private individuals and companies. To that end, for example, foreign Heads of state and of Governments, foreign Ministers and accredited diplomatic envoys enjoy jurisdictional immunities from the domestic courts and tribunals of foreign countries.

One may also look at most international environmental rules. They usually require the passing of domestic legislation and administrative conduct, to be taken by state agencies in charge, and local entities, with special regard to authorisation procedures, including EIA. International trade law is made up of international obligations on tariffs and non-tariff barriers that require domestic legislative and administrative regulatory action on the importation and treatment of foreign goods and services that, even when appropriately adopted, further requires application by custom, or other, officers. When such legislative and/or administrative action is deemed to be in contrast with international legal standards by the private beneficiaries of the rules in question – *i.e.* domestic import companies, as well as foreign export, industrial or service corporations – the latter may resort to the local domestic judiciary asking for redress. When redress is accorded to the claimant by a domestic court in such a case – usually brought against a branch of the public administration – the domestic judiciary would be mending state conduct inconsistent with an international obligation by other state organs, eventually bringing the state in compliance with such obligation before an internationally wrongful act is completed.

This aspect will be taken up and elaborated upon in Chapter 4 on the relationship between international law and domestic jurisdictions.

4. Why do states undertake international obligations?

As much as **the 'duty' side of international rules** is usually emphasised, generally legal obligations are created by such rules as a consequence and **a mirror of the rights** they produce by way of reciprocity. That is to say that, generally, states produce international rules providing for self-constraints in exchange for a corresponding advantage deriving from reciprocity. Formally, this is reflected on the **bilateral obligations** based on reciprocity – so-called *synallagmatic* (*quid pro quo*) – stemming from most of the rules of international law producing rights for the recipient states that are symmetrically corresponding to their international obligations. This corresponds to the traditional civil law like approach followed unswervingly by international law – *i.e.* by the states making up the international community – for about three centuries since its inception in the 17th century. We shall see in due course that, particularly after the scourge of the crimes committed during the Second World War, new rules have been brought about that provide for obligations that each state owes towards the international community of states, as a whole. They are so-called *erga omnes* obligations, which in Latin translates to 'towards everyone.'

Reverting to the traditional bilateralism of international law, the *quid pro quo* nature of the rules on the treatment of aliens is evident from the fact that they have been created by the practice of states engaging in a number of obligations to abstain from treating foreign nationals below certain international standards both for the purpose and following the condition that the same treatment is ensured to their nationals abroad.

Likewise, states accept their obligation not to use military force in their international relations as an immediate consequence of their right that their territorial integrity and political independence be respected by other states.

4.1. *The example of the Rio Grande Agreement*

It is a well-known fact that, in the not-so-distant past, riparian states involved in disputes with their neighbours over transboundary waters used to take rigid stances, to the extreme, with respect to the use of disputed shared waters. Similar attitudes were based on extreme interpretations of the concept of state sovereignty over the portion of the transboundary waters flowing or lying in the national territory, which held that watercourses were part of the territory of the state, and hence, subject to the exclusive territorial sovereignty of that state.

Upstream countries claimed absolute freedom to use transboundary waters regardless of downstream impact according to the so-called *absolute territorial sovereignty theory*. This approach is best expressed in the notorious opinion rendered in 1895 by the Attorney-General Judson Harmon in the dispute between Mexico and US over the use of the Rio Grande River.[5] Conversely, downstream countries claimed the right to receive perfectly unaffected waters from upper countries, following the so-called *absolute territorial integrity theory*.[6]

One of the factors behind such irreconcilable claims, apart from the political lack of good will and the wrong perception by both parties of the means to pursue their best interest, was to be found in the underdeveloped and unclear state of international water law un-

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[5] 'The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the United States which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature has endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that the United States exercise full sovereignty over its national territory' quoted in A Boyle and C Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment* (4th edn, OUP 2021), 576.

[6] See *Ibidem*, 576-577.

til the early 1900s. Emphasising how similar situations of non-co-operation led to the worse-off scenario for all the states involved, the former President of the ICJ, Judge Jiménez de Aréchaga recalled how such absolute claims 'may operate to the detriment of the State invoking [them] and, carried to an extreme, would lead to reciprocal reprisals whereby States would injure each other and use a watercourse uneconomically, instead of seeking an integral and co-ordinated utilization of the whole basin.' [7] This was the situation that could characterise the relations between Mexico and the US over their conflict of interests concerning the use of the Rio Grande at the end of the 19th century.

Starting from the most extreme situation of disagreement, based on mutually irreconcilable claims – as it emerged from diplomatic exchanges in 1895 – the representatives from the two countries gradually realised that they would only have to lose from insisting their positions based on absolute sovereignty claims. Therefore, they eventually engaged in negotiations on how to best allocate to each other the quantity of water flowing through the shared river culminating ultimately, eleven years after, on 21 May 1906, in the conclusion of the *Convention concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes*. This treaty, by recognizing the rights of both parties to the use of the waters of the Rio Grande, settled an age-old dispute creating new obligations formally constraining the sovereignty of the parties with a view to pursuing substantive mutual benefits.

One can say that the history of international law, not just international water law, is characterised by states **promoting and accepting constraints over their sovereignty in exchange for comparable benefits**. This applies *inter alia* to the freedom of navigation and trade, to the treatment of aliens, or the prohibition on the use of force.

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[7] E Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 Collected Courses of the Hague Academy of International Law 3, 191.

5. Why do states comply with and breach international law?

The large majority of international rules are silently complied with every day. That is to say that states exercise their rights under international law as a matter of course without much notice being given by the public to this matter of fact. It is mostly when a rule is breached that international law comes to the fore and its effectiveness is questioned. This accounts for the fact that it is the **'duty' side**, rather than the 'rights' aspect, of international rules that is usually emphasised, while it is the **'right' side** that lies behind the utilitarian motives why states enter into international rules and generally comply with them.

As already alluded, the international community of nation-states have not provided their legal system with a centralised law-enforcement mechanism. However, given **the participatory nature of the sources of international legal rules**, the high degree of compliance is spontaneous and not induced by the prospect of legal sanctions. Despite the major structural differences between international law and domestic jurisdictions, provided with centralised enforcement, it is fair to say that also in domestic legal systems, generally, individuals spontaneously comply with the law, not so much because of fear of legal sanctions, as much as because the legal rules in question reflect the interest and social values of the subjects involved.

As observed by a great lawyer of the last century, Professor Louis Henkin:

> 'The preoccupation with "sanctions" seems largely misplaced. The threat of such sanctions is not the principal inducement to observe international obligations. At least, the absence of sanctions does not necessarily make it likely that nations will violate law. There are other forces which induce nations to observe law.' [8]

[8] L Henkin, *How Nations Behave* (2nd edn, Columbia UP 1979), 49.

There is no denying that also in international law we are confronted with breaches of the law, some of which are egregious, and even dramatic. Two brief general considerations are called for on the point at issue.

The first one, ties in with the above-mentioned twofold dimension of international legal rules. Namely, their 'right' side and the 'duty' side. It appears that, when negotiating and adopting treaties – as well as when carrying out implementation practice which may result in the formation of customary rules – the political and administrative apparatus of states involved in such law-making processes have mostly in mind the creation of rights for their country and their nationals, while at a later stage, different state organs involved in the implementation of the rules in question are confronted with the obligations stemming from the same rules, and see them through a lens different from the one of the officials involved in the making of same rules.

This accounts for the first of the two general answers to the question of why states sometimes find themselves infringing the obligations stemming from rules of their own making, or even rejecting the same rules altogether, as we shall see more in detail in Chapter 5. The risk of this apparent political and administrative contradiction is ever-increasing with the widening of the subject matters falling under international regulation, which were once exclusively of domestic relevance. This has the implication of requiring Ministries (such as the Ministries of the Interior, Health, Justice, Environment, Finance, or Culture) to increasingly involve themselves with international affairs concerns, in a manner which, until recently, they were seldom called upon to do so. This requires a level of **administrative coordination** within states that is often difficult to attain.

One should add the often complex scientific, technological or financial nature of certain international obligations. The combination of the above factors may produce state conduct which is only inadvertently in breach of certain international obligations.

As we shall see in Chapter 5, this is particularly the case in the

field of environmental law. MEAs address cases of state conduct at variance with their standards through so-called non-compliance mechanisms in preference to the hard and fast rules of the law state responsibility for internationally wrongful acts. Compliance mechanisms may even result in scientific, legal and financial assistance to the non-complying state, whilst the law of state responsibility would apply on a subsidiary basis. Namely, in case of lack of cooperation with the treaty body in charge of the mechanism in point by the state which is in non-compliance.

The second general consideration about the reasons why states may breach international law is one which applies to infringements of the law in any legal system. And it consists of the tension which may arise at any point in time between the perception of one's self-interest and the obligations stemming from the law.

Under such circumstances, two sceneries may alternatively present themselves which concern the attitude of the wrongdoing state.

Under one scenery, a given state may infringe a certain rule relying on a wrong interpretation of it, or by justifying its conduct invoking a circumstance precluding wrongfulness.[9] A recent egregious example of this attitude is given by the armed attack on Ukraine by the Russian Federation. Russia has not waged the attack in denial of the validity of the ban on 'the use of force against the territorial integrity and political independence' of other nation-states, under customary law and Article 2(4) of the *UN Charter*.[10] On the contrary, Russia has tried to justify its conduct by putting forward two arguments which fully acknowledge the validity of the rules in question. Namely, self-defence under Article 51 of the *UN Charter*[11]

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[9] On internationally wrongful acts and circumstances precluding wrongfulness, see Chapter 5, Section 2.1 (especially 2.1.2).

[10] Article 2(4) of the *UN Charter* reads as follows: 'All Members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, on in any other manner inconsistent with the Purposes of the United Nations.'

[11] Article 51 of the *UN Charter* reads as follows: 'Nothing in the present

and humanitarian intervention for the protection of Russian nationals from acts of genocide allegedly attributable to Ukraine. [12]

The ensuing dispute is one over the assessment of the facts invoked, rather than about the existence of the ban on the use of force or the obligation to prevent and punish genocide. So far, the UN General Assembly has firmly rejected these arguments and condemned, by a large majority, the Russian attack. [13]

The legitimacy of the Russian conduct is currently under scrutiny in different international fora. With regard to the latter aspect of the dispute on the alleged genocide carried out by Ukrainian authorities against ethnic Russians, Ukraine has sued Russia before the ICJ under the 1948 *Genocide Convention* invoking the abuse of the Convention by Russia. [14] While the latter has not taken part in the proceeding, at the time of printing of the present book, 43 states have made a joint statement declaring their intention to intervene in the proceedings before the ICJ under Article 63 of the *ICJ Statute*, which provides for intervention in the proceedings by third parties

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Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security (…).'

[12] See the English translation of Putin's declaration of war on Ukraine on the webpage of *The Spectator* (24 February 2022). See also M Milanović, 'What is Russia's Legal Justification for Using Force against Ukraine?' in *EJIL:Talk!* (24 February 2022).

[13] UN General Assembly, Res ES-11/1 of 2 March 2022. 141 states voted in favour of the resolution, while only 5 (Belarus, Eritrea, North Korea, Syria and obviously Russia) voted against. More interestingly, 35 states abstained from voting, including China, India and Iran.

[14] So far, the ICJ has issued an order of provisional measures see *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v Russian Federation) (Provisional Measures) (Order) [2022] urging Russia to immediately suspend the military operations and to refrain from any action which might aggravate or extend the dispute before the Court.

who deem to have an interest in the interpretation of rules applicable to the dispute between applicant and defendant. [15]

Ukraine has also filed a lawsuit against Russia before the ECtHR and requested interim measures in relation to 'massive human rights violations being committed by the Russian troops in the course of the military aggression.' [16] The ECtHR has promptly upheld the Ukrainian request and urged Russia to refrain from military attacks against civilians and civilian objects and to ensure the safety of the medical establishments and personnel within the territory under siege. [17] The case, involving, among others, alleged violations of the right to life, prohibition of torture, slavery and forced labour is currently pending before the ECtHR. [18] In the meantime, Russia has been expulsed from the CoE, under whose auspices the ECtHR works, and, as a consequence, the Committee of Ministers of the Organisation has decided that it will cease to be a party to the ECHR from September 2022. [19]

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[15] The statement is available on the webpage of the UK Government (<www.gov.uk>). See also B McGarry, 'Mass Intervention? The Joint Statement of 41 States on Ukraine v. Russia' in *EJIL:Talk!* (30 May 2022).

[16] 'The European Court Grants Urgent Measures In Application Concerning Russian Military Operations On Ukrainian Territory' (1 March 2022).

[17] *Ibidem*. The ECtHR had already issued a number of interim measures in connection with the then ongoing 2014 conflict in the Donetsk and Lugansk regions, see *Case of Ukraine and the Netherlands v Russia*, App Nos 8019/16, 43800/14 and 28525/20. The ECtHR has also ascertained its jurisdiction to assess the numerous alleged violations of the ECHR carried out by Russian authorities in occupied Crimea, See *Case of Ukraine v Russia (re Crimea)* [GC], Apps Nos 20958/14 and 38334/18, Decision (14 January 2021). Another dispute established under Annex VII to the UNCLOS concerning the 2018 detention of Ukrainian naval vessels and servicemen at the hand of Russian authorities has been recently ruled to be admissible by the PCA, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v the Russian Federation) (Preliminary Objections) (Award) [2022] Case No 2019-28.

[18] *Case of Ukraine v Russia (X)*, App No 1055/22.

[19] Res CM/Res(2022)3 of 23 March 2022.

In passing, we can also add here that the legitimacy, under international law, of the armed operation in Ukraine has been challenged not only at the level of state responsibility, but also at that of individual (criminal) responsibility. [20] In fact, as of August 2022, 43 states parties to the *Rome Statute* have referred, pursuant to Articles 13(a) and 14(1) thereof, the situation in Ukraine to the Prosecutor of the ICC for the alleged commission of international crimes falling within the jurisdiction of the Court. [21]

The second scenery concerning the attitude of the wrongdoing state is the one in which a state may decide to breach a rule of international law with the view to trying to change it. This attitude was epitomised by the 1945 *Truman Proclamation* on the extension of the national exclusive jurisdiction over and under the seabed of the continental shelf adjacent to the US coasts. In fact, the geological configuration of the continental platform – which is often rich of natural gas and oil – may extend hundreds of miles from the shore. Therefore, such Proclamation, being contained in an Executive Order having legislative and executive nature, [22] represented a conduct in patent contrast with the international freedom of the high seas in force under the law of the sea at the time.

Such departure from the law was first met with the absence of significant protests – properly defined in law as acquiescence – and later even with the emulation by numerous coastal states from different regions of the world. Accordingly, in that particular instance, conduct in breach of the law has promoted the formation of new customary law, which was soon codified by the 1958 *Convention on the Continental Shelf*.

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[20] See Chapter 7, Section 6.

[21] The referral is available at *Situation in Ukraine* (ICC-01/22) (<www.icc-cpi.int/ukraine>).

[22] Executive Order No 9633 of 28 September 1945.

6. Can we speak of a Constitution of the international society of states? A brief history

As put by renowned international French lawyer Georges Scelle, at the beginning of the last century:

> 'There is a constitution and constitutional rules insofar as one is confronted with the making of normative rules aimed at meeting the essential needs of social relations and at providing, even though in a rudimentary fashion, the means for the enforcement of such fundamental rules.' [23]

This passage complements the old tag *ubi societas, ibi ius* with the corollary assumption that ***ubi ius, ibi constitutio***. Namely, if there is a set of rules governing the relations among the actors of a given society, there must be some basic rules, generally recognised, that govern both the structural distribution of power between them and the procedures by which legal rules are brought about. In international law one would be at pains to find one comprehensive constitutional instrument. Over the last seventy years, the ***UN Charter*** can rightly be said to have been an important component of the constitutional principles of contemporary international law. However, the former cannot be considered to be exhaustively representative of the latter, if only for the fact that the founding principles of contemporary international law date back to a much earlier period than 1945, namely, to the 17th century in an unwritten form, like most international rules prior to the codifications of the 20th century. The unwritten character of the founding rules of interna-

[23] English translation by the author. The original text goes as follows: '[I]l y a constitution et normes constitutionnelles toutes les fois qu'il y a élaboration de règles normatives destinées à traduire les nécessités essentielles des rapports sociaux et à fournir, fut-ce de façon rudimentaire, les moyens de mise en œuvre de ces règles fondamentales,' G Scelle, 'Le droit constitutionnel international' in J Duquesne (ed), *Melanges R. Carré de Malberg* (Sirey 1933), 505.

tional law would not be a sufficient argument to deny the existence of an international constitution. It is sufficient to consider the example of the uncodified UK Constitution made up of a variety of written and unwritten sources of law.

The question of the existence, or not, of a constitution of international law is not regarded here as a theoretical statement, even though there is indeed an intensive ongoing theoretical debate on the subject.[24] Whilst international law is regarded here as a matter of social fact, looking for its constitution means looking for its basic constituent features. In any legal system, the constitutional ones are the rules and principles that are most directly connected with the underlying social and political process that produces them. Accordingly, the identification of such rules also serves the purpose of identifying the basic features of the organisation of power in a given society at any given point in time of history. This is particularly true given the 'living' nature of constitutions.

In empirical terms, as they emerge from history – hence, aside from the most formalistic and theoretical Kelsenian international law constructions[25] – it appears that the basic principle underlying the structure of the international society is that of the sovereign **equality of states**.

This *Grundnorm* of international law, since its inception in the mid-17th century, implies its low level of institutionalisation. It accounts for the **lack of a centralised power** with regard to law-

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[24] On this topic, see J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (OUP 2009), K Zemanek, 'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011), 398ff and J Vidmar, 'Norm Conflict and Hierarchy in International Law: Towards a Vertical International Legal System?' in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012), 18ff.

[25] See H Kelsen, *Principles of International Law* (re-edited, 2nd edn, The Lawbook Exchange 2003).