Handbook of International Law

Second Edition

ANTHONY AUST

Obligations *erga omnes*

In *Barcelona Traction* (Second Phase), the International Court of Justice pointed out that certain obligations of a State are owed to all States, or *erga omnes* (to all the world). These include *jus cogens* and important human rights.[40] Certain treaties have been held to create a status or regime valid *erga omnes*.[41] Examples include those providing for neutralisation or demilitarisation of a certain territory or area, such as Svalbard or outer space; for freedom of navigation in international waterways, such as the Suez Canal; or for a regime respecting a special area, such as Antarctica.[42]

Jus cogens

Jus cogens (or a peremptory or absolute rule of general international law) is, in the words of Article 53 of the Vienna Convention on the Law of Treaties 1969:

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The concept was once controversial.[43] Now it is more its scope and applicability that is unclear.[44] There is no agreement on the criteria for identifying which principles of general international law have a peremptory character: everything depends on the particular nature of the subject matter. Perhaps the only generally accepted examples of *jus cogens* are the prohibitions on the use of force (as laid down in the UN Charter)[45] and on aggression, genocide, slavery, racial discrimination, torture and crimes against humanity.[46] This is so even where such acts are prohibited by treaties from which parties can withdraw.[47] Despite what may be said or written, it is wrong to assume that many important provisions of human rights treaties, such as due process, are *jus cogens*, or, for that matter, even rules of customary international law.[48] Whether self-determination is a *jus cogens* is open to question given that the principle may be very difficult to apply in practice: see the tricky debate about Kosovo.[49]

[40] See *Legal Consequences* (n. 20 above), paras. 154–9.
[41] See M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford, 1997, pp. 24–7; and p. 327 below.
[42] See pp. 327 et seq. below for details about the regime.
[43] See I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, Manchester, 1984, pp. 203–41.
[44] For an in-depth discussion of *jus cogens*, see Sinclair (see above note), pp. 203–26. See also p. 376, nn. 2–4, below for references to them, and Crawford's useful book (n. 46 below).
[45] See p. 204 below.
[46] See the ILC Commentary on Art. 26 of its draft Articles on State Responsibility (go to www.un.org/law/ilc/) or see Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge 2002, pp. 187–8.
[47] See p. 93 below. [48] See p. 228 below. [49] See pp. 17, 21 and 362 n. 4 below.

'Soft law'

There is no agreement about what is 'soft law', or indeed if it really exists.[50] Generally, it is used to describe international instruments that their makers recognise are *not* treaties, but have as their purpose the promotion of 'norms' (see above) which are believed to be good and therefore should have general or universal application. This is particularly so if such instruments employ imperative terms such as 'shall.' Such non-treaty instruments are typically called Guidelines, Principles, Declarations, Codes of Practice, Recommendations or Programmes. They are frequently to be found in the economic, social and environmental fields. The Rio Declaration on Environment and Development 1992 is one.[51] Because the subject matter is usually not yet well developed, or there is a lack of consensus on the content, it cannot be embodied in a treaty. But that soft law instrument, the Universal Declaration of Human Rights 1948, has been the source for many universal and regional human rights treaties. Many 'soft law' instruments can be regarded as MOUs in the sense that there is no intention that they should be legally binding,[52] although some of their provisions may later be incorporated into treaties or come to be regarded as representing customary international law.[53]

Comity

In their international relations, States also observe certain rules of comity.[54] These are not legally binding, but rules of politeness, convenience and goodwill, such as the reciprocal provision of free, but often very limited, on-street parking for diplomats.[55] Later, some *may* become binding rules. Domestic courts may also rely upon comity as a reason for not accepting jurisdiction in a case, but this may be either because they are applying a rule of conflict of laws or acting with restraint in exercising their jurisdiction.[56]

Domestic law

The law that applies within a State is described variously as 'national', 'internal' or 'municipal' law, although most international lawyers now seem to favour the term 'domestic law'. So, it will be used in this book, even though it is sometimes confused with family law.

[50] See Boyle, in Evans (ed.) *International* Law, 2nd edn, Oxford, 2006, pp. 145–58; B, B & R, *International Law and the Environment*, 3rd edn, Oxford, 2009, pp. 34–7.
[51] ILM (1992) 876; B & B Docs. 9; and see p. 306 below.
[52] See pp. 51 and 53 below as to the meaning of MOUs.
[53] See Boyle and Chinkin, *International Law-making Processes*, Oxford, 2007; Aust MTLP, pp. 53–7.
[54] See Oppenheim, pp. 50–1; Brownlie, p. 28.
[55] See *Parking Privileges for Diplomats* (1971) 70 ILR 396; and Denza, *Diplomatic Law*, 3rd edn, Oxford, 2008, pp. 200–4.
[56] See p. 146 below.

For international lawyers, the most important aspect of domestic law is its relationship (interface) with international law.[57] Most judgments on issues of international law are made by domestic courts, and, by this means, much of international law has been developed and will continue to do so.[58] Although international law exists on the international plane, much of it is now intended to reach deep into the internal legal order of States and so operate in domestic law. This is most obvious with treaties, many of which have to be implemented in domestic law to be effective. International law does not allow a State to invoke its domestic law to justify its failure to perform a treaty,[59] but this applies equally to the rest of international law.[60] The way in which domestic courts deal with an issue of international law is therefore important. (The place of treaties in domestic law is explained at pp. 74–80 below.)

How customary international law is applied by domestic courts is entirely dependent on the constitution and law of each State. Most treat customary international law as part of domestic law and unlike foreign law (which in common law systems has usually to be proved by expert evidence) is therefore a matter for legal argument. The chief difference of approach is between those constitutions that provide that customary international law is supreme law (e.g. Germany), and those where it is not. In the latter case, if there is a conflict between customary international law and (1) the constitution: the constitution prevails (e.g. the United States), *or* (2) legislation: the legislation prevails (e.g. in the United Kingdom and most Commonwealth States). The latter rule reflects the pure form of dualism.[61]

Subjects and objects of, and actors in, international law

By 'subjects', is not meant topics, but those persons or entities to which international law applies. It obviously applies to States and international organisations.[62] But can international law apply also to natural persons (individuals) and legal persons, such as corporations established under domestic law? Such persons are not creations of international law, and are not regarded by most authorities as subjects of international law, that is, to whom international rights (and obligations) attach *directly*.[63] Instead, such persons are generally seen as 'objects' of international law.

Although international law increasingly gives rights to, and imposes obligations on (natural or legal) persons, the notion that they therefore enjoy rights and obligations under international law can lead to misunderstandings. Such

[57] See generally Oppenheim, pp. 52–86; E. Denza, in M. Evans (ed.), *International Law*, Oxford, 2006, pp. 423–44.
[58] See the consolidated index to the over 135 (and counting) volumes of *International Law Reports*, published by Cambridge University Press.
[59] Article 27 of the VCLT (see p. 75 below). [60] Oppenheim, pp. 82–6.
[61] See further in respect of treaties, at pp. 76–8 below. [62] Oppenheim, p. 16.
[63] For a thought-provoking view, see Higgins, pp. 16 and 39–55.

rights and obligations can be enforced by, or against, persons only through action by States. Persons only can enjoy rights under international law if States have agreed to this. For example, a person with a claim against a foreign State cannot take that claim to an international court or tribunal without intervention by the person's State. Either the State has to act on behalf of the person,[64] or there must be some mechanism established by the States concerned (usually by treaty) under which the person can bring the claim directly before an international tribunal.[65] Likewise, if under international criminal law or the law of armed conflict natural persons are liable to be prosecuted in domestic or international courts for serious breaches, that can be done only when States have agreed on the necessary international means to do just that,[66] and this will need some action by the States in their own law. The position is the same for human rights in international law. In short, international rights and obligations still exist on the international plane, being granted by States.[67]

National liberation movements

With the development of the law relating to non-self-governing territories and the principle of self-determination, certain movements – now usually referred to as national liberation movements (NLMs) – may be in the process of acquiring the status of a subject of international law,[68] although, with the notable exception of Palestine, most of the peoples represented by NLMs have now obtained statehood for their territories. This process was helped by permanent observer status in the UN being accorded to NLMs that were recognised by the Organization of African Unity (now the African Union) or the League of Arab States, so, in practice, excluding secessionist movements.

NGOs

Even if (like Amnesty or Greenpeace) they operate internationally, non-governmental organisations (NGOs) are bodies established under domestic law. Although they have proliferated enormously since the end of the Second World War, and been very active, and sometimes influential, on the international scene, they are not subjects of international law.[69] Unless they provide humanitarian relief, they are essentially providers of information, lobbyists or pressure groups, and so all NGOs may be regarded as non-State actors. For students who think life in an NGO may suit them, they should know that a lot of their time will be taken up in competing with other NGOs which are in the same

[64] See p. 167 below.
[65] For example, under bilateral investment treaties, see p. 345 below, although enforcement of an award may need to be done in domestic law.
[66] See pp. 245 et seq. below.
[67] See also pp. 235 et seq. below on the relationship between international and domestic law.
[68] See Oppenheim, pp. 162–4; Shaw, pp. 245–8; Brownlie, p. 62. [69] Oppenheim, p. 21.