

CONTENTS

INTRODUCTION BY THE EDITOR	xxvi
NOTES ON CONTRIBUTORS	xxviii
ABBREVIATIONS	xxxiii
TABLE OF INTERNATIONAL INSTRUMENTS	xxxix
TABLE OF INTERNATIONAL CASES	xlvi
TABLE OF STATUTES BY COUNTRY	xlix
TABLE OF DOMESTIC CASE LAW BY COUNTRY	1

INTRODUCTION: INTERNATIONAL LAW IN PRACTICE

REFLECTIONS FROM THE INTERNATIONAL COURT <i>HE Judge Rosalyn Higgins, DBE, QC</i>	3
THE PINOCHET CASE—SOME PERSONAL REFLECTIONS <i>The Rt Hon The Lord Millett</i>	7
THE PERSPECTIVE OF INTERNATIONAL LAW FROM THE BAR <i>Ian Brownlie, CBE, QC</i>	11
REFLECTIONS FROM THE PRACTICE OF INTERNATIONAL LITIGATION <i>Campbell McLachlan</i>	15
A PERSONAL PERSPECTIVE ON INTERNATIONAL LAW <i>Ralph Zacklin, Assistant Secretary-General United Nations</i>	21
THE PERSPECTIVE OF A FOREIGN MINISTRY LEGAL ADVISER <i>Michael Wood</i>	25

PART I THE HISTORY AND THEORY OF INTERNATIONAL LAW

1 A SHORT HISTORY OF INTERNATIONAL LAW <i>Stephen C Neff</i>	31
Summary	31
I Introduction	31
II Ancient Worlds	32
III The Middle Ages: The Natural Law Era	34
IV The Classical Age (1600–1815)	37

V	The Nineteenth Century (1815–1919)	41
A	The Positivist Tradition	41
B	Natural-law Remnants	46
C	The Historicist (or ‘Romantic’) Tradition	47
VI	The Twentieth and Twenty-first Centuries (1919–)	50
A	The Inter-war Period	50
B	After 1945	52
VII	Conclusion	56
	References	56
	Further Reading	58
2	SOME COMMON HERESIES ABOUT INTERNATIONAL LAW: SUNDRY THEORETICAL PERSPECTIVES	59
	<i>Iain Scobbie</i>	
	Summary	59
I	Introduction: Theory Matters	60
II	What is a ‘Theory’ and What is it For?	61
III	The Legal Structure of the Cold War: Liberal Democracy <i>Versus</i> Marxist-Leninism	67
A	The New Haven School	68
B	Soviet Theory	72
C	New Haven and Soviet Approaches Compared	76
IV	New Order For a New World?	78
V	And in the End	82
	References	83
	Further Reading	86
3	WHAT IS INTERNATIONAL LAW FOR?	89
	<i>Martti Koskenniemi</i>	
	Summary	89
I	The Paradox of Objectives	89
II	Converging Interests?	91
III	The Significance of Statehood	94
IV	Into Pragmatism?	97
V	A Tradition of Anti-Formalism	100
VI	Instrumentalism, Formalism, and the Production of an International Political Community	103

VII Beyond Instrumentalism and Formalism	105
VIII Between Hegemony and Fragmentation: A Mini-history	108
IX Legal Formalism and International Justice	110
References	112

PART II THE STRUCTURE OF INTERNATIONAL OBLIGATION

4 THE SOURCES OF INTERNATIONAL LAW	117
<i>Hugh Thirlway</i>	
Summary	117
I Introduction: What are Sources of Law?	117
II The Enumeration of the Traditional Sources of International Law: Article 38 of the Statute of the International Court of Justice	120
A Treaties and Conventions in Force	121
B Custom	124
C The General Principles of Law	130
D Subsidiary Sources: Judicial Decisions and Teachings	132
III The Relationship Between the Sources of International Law	134
A Relationship Between Treaty and Custom	134
B The Hierarchy of Sources	136
IV Is the Enumeration of Article 38 Exhaustive? Possible New or Additional Sources	138
A How Can New Sources Come into Existence?	138
B Some Additional Sources or Quasi-Sources That Have Been Suggested	139
V Conclusion	142
References	143
Further Reading	143
5 INTERNATIONAL LAW AND 'RELATIVE NORMATIVITY'	145
<i>Dinah Shelton</i>	
Summary	145
I Introduction: The Concept of Relative Normativity	145
II The Assertion of Peremptory Norms	150
III Hierarchy Among Conflicting Norms and Procedures	159
A Hierarchy Within a Single Treaty	160

B	Hierarchy Among Treaties Governing the Same Topic	163
C	Hierarchy Among Regimes	164
IV	'Soft Law'	166
V	Conclusion	171
	References	171
	Further Reading	172
6	THE PRACTICAL WORKING OF THE LAW OF TREATIES	173
	<i>Malgosia Fitzmaurice</i>	
	Summary	173
I	Introduction	173
II	Basic Concepts and Structures	174
A	What is a Treaty?	174
B	The Vienna Conventions	175
III	The Anatomy of a Treaty	177
A	The Making of Treaties	177
B	Authority to Conclude Treaties	177
C	Expression of Consent to be Bound	178
D	Invalidity of Treaties	180
E	Amendment and Modification	181
F	Termination and Suspension of the Operation of Treaties	182
IV	The Scope of Legal Obligations	183
A	The Principle <i>Pacta Sunt Servanda</i>	183
B	Treaties and Third States	184
V	General Principles of Interpretation	185
A	General Issues	185
B	Practice	186
C	<i>Travaux Préparatoires</i>	188
D	The Object and Purpose of a Treaty	189
E	The Principle of Effectiveness	189
F	Plurilingual Treaties	190
VI	Reservations to Treaties	191
A	The Genocide Convention Case	191
B	The Regime of the 1969 Vienna Convention	192
C	The Problem of Reservations to Human Rights Treaties	194
D	Interpretative Declarations	195

VII Problems Concerning the Grounds for Termination	196
A Material Breach	196
B Supervening Impossibility of Performance	198
C Fundamental Change of Circumstances	198
VIII Conclusion	200
References	200
Further Reading	201

PART III THE SUBJECTS OF THE INTERNATIONAL LEGAL ORDER

7 STATES AND RECOGNITION IN INTERNATIONAL LAW	205
<i>Colin Warbrick</i>	
Summary	205
I States	206
A Introduction	206
B History	210
C Self-determination	213
D Personality—What it means to be a Legal Person	217
E Statehood as Personality—What it takes to be a State	220
F The Rights and Duties of States—What it means to be a State	231
G The 'Juridical' State	232
H Conclusion	236
II Recognition	236
A Introduction	236
B The <i>Tinoco</i> Arbitration	238
C Legal Nature, Legal Consequences of the Recognition Decision	238
D Recognizing, Not Recognizing, Non-recognition	241
E Recognition of Governments	242
F International and Domestic Legal Consequences	247
G The Declaratory/Constitutive Debate	248
H International Organizations—Membership and Credentials	250
I Practice—the Soviet Union and Yugoslavia After 1989	254
J Constituting States—State-building	259
III Conclusion	261
References	262
Further Reading	266

8	INTERNATIONAL ORGANIZATIONS	269
	<i>Dapo Akande</i>	
	Summary	269
I	Introduction	269
	A History and Role of International Organizations	270
	B Definition, Distinctions, and Differences	270
	C Is there a Common Law of International Organizations?	271
II	Legal Personality	272
	A Personality in International Law	270
	B Objective Legal Personality and Relations with Non-member States	275
	C Personality in Domestic Law	276
III	Interpretation of Constituent Instruments	278
	A Who is Empowered to Interpret?	278
	B What are the Relevant Principles of Interpretation to be Applied?	280
IV	Powers of International Organizations	282
	A Implied Powers	282
	B Decision-making Powers	283
	C <i>Ultra Vires</i> Decisions of International Organizations	285
V	Privileges and Immunities	286
	A Sources of Privileges and Immunities	286
	B Scope of Privileges and Immunities	287
VI	The United Nations System	291
	A The Structure of the United Nations	291
	B Principal Organs of the United Nations	293
VII	Conclusion	295
	References	296
	Further Reading	297
9	THE INDIVIDUAL AND THE INTERNATIONAL LEGAL SYSTEM	299
	<i>Robert McCorquodale</i>	
	Summary	299
I	Introduction	299
	A The Individual	300
	B Individuals in the International Legal System	300

II	International Rights and Responsibilities	304
A	Individual Rights	304
B	Individual Responsibility	306
III	International Claims	307
A	Bringing International Claims	307
B	International Human Rights Law	309
C	International Economic Law	311
D	Immunities	314
IV	Creation, Development, and Enforcement of International Law	314
A	Right of Self-Determination	315
B	Indigenous Peoples	316
C	Non-governmental Organizations	317
D	Jurists	320
V	Conclusions	321
	References	322
	Further Reading	325

PART IV THE SCOPE OF SOVEREIGNTY

10	JURISDICTION	329
	<i>Vaughan Lowe</i>	
	Summary	329
I	Introduction	329
A	The Meaning of 'Jurisdiction'	329
B	The Significance of the Principles of Jurisdiction	330
C	The Doctrinal Analysis of Jurisdiction	331
II	Prescriptive Jurisdiction	333
A	The Territorial Principle	336
B	The National Principle	339
C	The Protective Principle	342
D	The Universal Principle	343
E	Treaty-Based Extensions of Jurisdiction	343
F	Controversial Bases of Prescriptive Jurisdiction	345
G	Inadequacies of the Traditional Approach	347
III	The Fundamental Principle Governing Enforcement Jurisdiction	351

IV Conclusion	353
References	354
Further Reading	354
11 INTERNATIONAL LAW AND RESTRAINTS ON THE EXERCISE OF JURISDICTION BY NATIONAL COURTS OF STATES	357
<i>Hazel Fox</i>	
Summary	357
I Introduction	357
II State Immunity	359
A Origins of the Plea of State Immunity	359
B Development of the Common Law Relating to State Immunity	359
C Development in Civil Courts and the USA	361
D Present Day Sources of the International Law of State Immunity	362
E The Elements Constituting the Plea of State Immunity	363
F Definition of the Foreign State for the Purpose of State Immunity	366
G Exceptions to Adjudication Jurisdiction	366
H Immunity from Execution	371
III The Other Two Avoidance Techniques	376
A Act of State	376
B Non-justiciability	377
IV The Three Avoidance Techniques Compared	378
V The Arguments For and Against the Use of Avoidance Techniques	380
VI Challenges to Immunity and Judicial Restraint	381
VII Conclusion	383
References	384
Further Reading	384
12 IMMUNITIES ENJOYED BY OFFICIALS OF STATES AND INTERNATIONAL ORGANIZATIONS	387
<i>Chanaka Wickremasinghe</i>	
Summary	387
I Introduction	388
II Diplomatic Relations	391
A The Scheme of the Vienna Convention on Diplomatic Relations	392
B Jurisdictional Immunities	395

C	Remedies in Cases of Abuse	396
III	Consular Relations	397
IV	Heads of State, Heads of Government, and Ministers for Foreign Affairs	398
A	Heads of State	398
B	Heads of Government and Ministers for Foreign Affairs	400
V	Special Missions	401
VI	The Immunities of Other State Officials	403
VII	Officials of International Organizations	404
VIII	The Scope of Immunities—Immunity and Impunity Distinguished	406
IX	Conclusions	411
	References	411
	Further Reading	413
13	THE RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL LAW	415
	<i>Eileen Denza</i>	
	Summary	415
I	Introduction	415
II	The Approach of International Courts and Tribunals	416
A	Where National Law Causes Breach of International Law	417
B	International Law Looks Mainly to the Result	419
III	The Approach of National Parliaments and National Courts	420
IV	The Spectrum of Constitutional Rules	422
A	The Netherlands	422
B	Germany	423
C	France	424
D	Russia	424
E	The United States	425
F	The United Kingdom	426
V	Some Problems Which Arise in National Courts	428
A	Does a Rule of Customary International Law Prevail Over Conflicting National Law?	428
B	What is the Meaning of an International Law Rule in the Context of Domestic Law?	429
C	Is the International Rule Directly Applicable and Directly Effective?	430
D	Does a Treaty Prevail Over Inconsistent National Law?	432

E	Can a Treaty Prevail Over a National Constitutional Norm?	434
F	Should the Executive Direct or Guide the National Court?	434
G	Should a National Court Apply a Foreign Law which Conflicts with International Law?	436
H	Are there Questions of International Law which National Courts should Decline to Answer?	437
VI	Conclusion: Elements of a Happy Relationship	439
	References	440
	Further Reading	441

PART V RESPONSIBILITY

14	THE NATURE AND FORMS OF INTERNATIONAL RESPONSIBILITY	445
	<i>James Crawford and Simon Olleson</i>	
	Summary	445
I	The Scope of International Responsibility: Introduction and Overview	446
II	State Responsibility: Issues of Classification and Characterization	449
	A Responsibility under International or National Law?	449
	B The Typology of State Responsibility	450
III	The Elements of State Responsibility	453
	A Attribution of Conduct to the State	454
	B Breach of an International Obligation of the State	458
	C Circumstances Precluding Wrongfulness: Defences or Excuses for Breaches of International Law	462
IV	The Content of International Responsibility	465
V	Invocation of Responsibility: Responses by the Injured State and Other States	468
VI	Conclusion: Further Development of the Law of International Responsibility?	470
	References	471
	Further Reading	471
15	ISSUES OF ADMISSIBILITY AND THE LAW ON INTERNATIONAL RESPONSIBILITY	473
	<i>Phoebe Okowa</i>	
	Summary	473
I	Introduction	474

II	Legal Interest as a Pre-requisite to Admissibility of Claims	474
A	Rationale of International Law Rules on <i>Locus Standi</i>	475
B	Modalities of Establishing of Legal Interest	476
III	The Bases of Diplomatic Protection	477
A	Nationality as the Basis of Legal Interest in Indirect Claims	477
B	Establishing Nationality for Purposes of Diplomatic Protection	479
C	The Nationality of Corporations	483
D	Applying the Nationality Rule	485
IV	Admissibility in Cases Concerning Obligations Owed to a Plurality of States	488
A	Introduction	488
B	Treaty Instruments Protecting Collective Interests	490
C	Litigation in the Public Interest and the Enforcement of <i>Erga Omnes</i> Obligations	490
V	Admissibility of Claims and the Rule on Exhaustion of Local Remedies	493
A	Introduction	493
B	The Content of the Rule	494
C	The Application of the Rule in the Context of Mixed Claims	495
D	Nature of the Rule	497
E	Which View Represents the Law?	498
F	The Exclusion of the Local Remedies Rule	499
VI	Conclusion	500
	References	501
	Further Reading	502

PART VI RESPONDING TO BREACHES OF INTERNATIONAL OBLIGATIONS

16	COUNTERMEASURES AND SANCTIONS	505
	<i>ND White and A Abass</i>	
	Summary	505
I	Introduction: Self-help in International Law	505
II	Countermeasures	508
A	Definition of Countermeasures	508
B	Reprisals and Retorsion	510
C	Limitations upon Countermeasures and other Non-forcible Measures taken by States	512

D	Countermeasures and Third States	514
III	Economic Coercion	518
IV	Sanctions	522
A	Definition of Sanctions	522
B	Limitations upon Sanctions	524
V	Conclusion	526
	References	527
	Further Reading	528
17	THE MEANS OF DISPUTE SETTLEMENT	528
	<i>John Merrills</i>	
	Summary	529
I	Introduction	529
II	Diplomatic Methods	531
A	Negotiation	531
B	Mediation	533
C	Inquiry	535
D	Conciliation	537
III	Legal Methods	539
A	Arbitration	539
B	The International Court of Justice	541
C	Other Courts and Tribunals	543
D	The Place of Legal Methods	544
IV	International Organizations and Dispute Settlement	547
A	Regional Organizations	547
B	The United Nations	548
C	The Charter System in Practice	550
D	The Value and Limitations of Organizations	552
V	Conclusion	553
	References	554
	Further Reading	557
18	THE INTERNATIONAL COURT OF JUSTICE	559
	<i>Hugh Thirlway</i>	
	Summary	559
I	Introduction	559
II	History	560

III	Structure and Composition	562
IV	Procedure	564
V	The Court's Jurisdiction	566
A	Jurisdiction: Structural Limitations	566
B	Jurisdiction in Particular Cases	568
C	Jurisdiction and its Exercise	571
D	Verification of Jurisdiction and Admissibility: Preliminary Objections	572
VI	Other Incidental Proceedings	574
A	Requests for the Indication of Provisional Measures	574
B	Parties: Joinder of Cases; Intervention by Third States	576
C	Interpretation and Revision of Judgments	579
VII	Effect of the Decisions of the Court	579
VIII	Advisory Proceedings	582
IX	The Court Past and Present: An Assessment	585
	Further Reading	587
19	THE USE OF FORCE AND THE INTERNATIONAL LEGAL ORDER	589
	<i>Christine Gray</i>	
	Summary	589
I	Introduction	589
A	The UN Charter Scheme	590
II	The Prohibition of the Use of Force in Article 2(4) UN Charter	591
A	The Use of Force in 'International Relations'	592
B	The Meaning of 'Threat or Use of Force'	592
C	The Use of Force 'Against the Territorial Integrity and Political Independence of Any State, or in Any Other Manner Inconsistent with the Purposes of the United Nations'	593
D	Humanitarian Intervention	595
III	Intervention, Civil Wars, and Invitation	598
IV	Self-defence	599
A	The Scope of Self-defence: Necessity and Proportionality	600
B	Anticipatory or Pre-emptive Self-defence	601
C	The Meaning of 'Armed Attack'	602
D	The Use of Force in Protection of Nationals	602
E	Self-defence Against Terrorism	603
F	Collective Self-defence	605

G	The Role of the Security Council	606
V	The Use of Force Under Chapter VII UN Charter	608
A	Measures Under Article 41	608
B	The Use of Force Under Chapter VII UN Charter	608
C	Implied Authorization of Force?	610
VI	UN Peacekeeping	610
A	The Inception of Peacekeeping	610
B	Peacekeeping After the End of the Cold War	611
C	The Transformation of Peacekeeping: Yugoslavia and Somalia 1991–95	612
D	Peacekeeping in Africa	613
E	Peacekeeping After the Brahimi Report	614
VII	Regional Action Under Chapter VIII UN Charter	614
A	A Greater Role for Regional Organizations	615
B	Controversy as to the Interpretation of Chapter VIII	615
C	The OECS Intervention in Grenada (1983)	616
D	Regional Peacekeeping After the Cold War	616
VIII	Conclusion	618
	References	618
	Further Reading	619

PART VII THE APPLICATION OF INTERNATIONAL LAW

20	THE LAW OF THE SEA	623
	<i>Malcolm D Evans</i>	
	Summary	623
I	Introduction	623
II	Constructing Baselines	626
A	Introduction: The Normal Rule	626
B	Straight Baselines	626
C	Bays	627
D	Archipelagoes	628
III	The Internal Waters, Territorial Sea, and Contiguous Zone	629
A	Introduction	629
B	Jurisdiction of the Coastal State	630
C	Navigation in the Territorial Sea	632

IV	The High Seas	637
A	The Freedoms of the Seas	637
B	The Exceptions to Flag State Jurisdiction	638
C	Conclusion	641
V	Resource Jurisdiction	642
A	The Continental Shelf	642
B	The Exclusive Fishing Zone	644
C	The Exclusive Economic Zone	644
D	The Deep Sea Bed	646
VI	Delimitation of Maritime Zones between Opposite or Adjacent States	647
A	Equidistance or Equitable Principles?	648
B	Factors Affecting Delimitation	649
VII	Fisheries	650
A	The Basic Scheme of Regulation	650
B	Managing Fisheries	651
VIII	Conclusion	654
	References	654
	Further Reading	657
21	INTERNATIONAL ENVIRONMENTAL LAW	657
	<i>Catherine Redgwell</i>	
	Summary	657
I	Introduction: What is International Environmental Law?	657
II	Defining 'The Environment'	659
III	The Development of International Environmental Law	659
IV	Key Environmental Actors	662
V	Sources of International Environmental Law	663
A	Customary International Law	664
B	Treaty Law	664
VI	Enforcement of International Environmental Law	665
VII	Substantive International Environmental Law	667
A	Protection of the Marine Environment	667
B	Protection of the Atmosphere	670
C	Nuclear Risks	674
D	Other Hazardous Substances and Activities	674

E	Conservation of Nature	677
F	Conservation of Marine Living Resources	683
VIII	Conclusion	685
	References	685
	Further Reading	687
22	INTERNATIONAL ECONOMIC LAW	689
	<i>Gerhard Loibl</i>	
	Summary	689
I	Introduction	689
II	International Finance Law	691
A	The International Monetary Fund (IMF)	691
B	The World Bank Group	695
C	Regional Development Banks	699
D	Concluding Remarks	699
III	International Trade Law	700
A	The General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO)	700
B	The World Trade Organization	700
C	International Commodity Agreements	708
IV	International Investment Law	710
A	Introduction	710
B	Definition of Investment	711
C	Bilateral Investment Treaties	712
D	Is there a Need for a Multilateral Investment Agreement?	714
E	Investment Insurance Schemes at the National Level	714
F	The Multilateral Investment Guarantee Agency (MIGA)	714
G	Investment Dispute Settlement Mechanisms	716
V	Regional Economic Integration Arrangements	717
VI	Concluding Remarks	717
	References	718
	Further Reading	720
23	INTERNATIONAL CRIMINAL LAW	721
	<i>Antonio Cassese</i>	
	Summary	721

I	Introduction: The Notion of International Criminal Law	721
II	General Features of International Criminal Law	722
A	Recent Origins	722
B	The Relationship With International Human Rights and National Criminal Law	723
C	The Relationship With Public International Law	724
III	The Establishment of International Criminal Tribunals	726
A	Post-Cold War 'New World Order' and the Development of Ad Hoc Tribunals (1993–94)	726
B	The International Criminal Court	730
C	The Establishment of so-called Internationalized or Mixed Criminal Courts or Tribunals	734
IV	Individual Criminal Responsibility in International Law	735
V	Categories of International Crimes	738
A	War Crimes	739
B	Crimes Against Humanity	740
C	Genocide	742
D	Other International Crimes (Aggression, Torture, Terrorism)	744
VI	Conclusion	754
	References	755
	Further Reading	756
24	INTERNATIONAL PROTECTION OF HUMAN RIGHTS	757
	<i>Henry J Steiner</i>	
	Summary	757
I	Introduction	757
II	The Kinds of Protection Provided by International Organizations	759
A	Why Create International Organizations?	759
B	IGOs and NGOs	762
C	Interaction among Institutions and Systems in Exerting Pressure on Delinquent States	770
III	Characteristics of International Human Rights Relevant to the Nature of Protection	772
A	Human Rights Violations Generally Occur within and Affect only People Within a Single State	773
B	Human Rights Violations Often have a Systemic Character and Reflect Deep Aspects of a State's Political Structure	774

C	The Reach of Human Rights Duties within States: Non-State (Private) Actors	776
D	The Progressive Realization of Civil and Political Rights	777
E	The State's Duty to Promote and Transform: Cultural Obstacles	780
IV	Conclusion: Perspectives and Voices	784
	References	786
	Further Reading	786
25	THE LAW OF WAR (INTERNATIONAL HUMANITARIAN LAW) <i>Christopher Greenwood</i>	789
	Summary	789
I	Introduction	789
II	When Does the Law of War Apply?	791
III	Who Is Entitled to Take Part in Hostilities?	794
IV	What Is a Lawful Target and How May it Be Attacked?	797
V	What Are the Limitations on the Weapons with Which States May Conduct Hostilities?	802
A	Nuclear Weapons	806
VI	What Protection Does the Law Afford the Victims of Hostilities?	809
A	Prisoners of War	809
B	The Wounded and Sick	811
C	Civilians	812
VII	How Much If Any of this Law Applies in Civil War?	814
VIII	How Can the Law Be Enforced?	817
	References	822
	Further Reading	823
	<i>Index</i>	825