ЗМІСТ

International Law

Анотація

This new edition of Cassese's International Law provides a stimulating and authoritative account of international law for undergraduates and postgraduates. It has been fully revised and updated to include all recent developments in the subject, and contains a new chapter on terrorism as well as extensive revision of the section on state responsibility.

Providing a comprehensive commentary on international law as a whole, it compares the traditional legal position with the developing and evolving law in a way that is sensitive to political and economic considerations, as well as including detailed yet accessible examinations of state responsibility and international criminal law.

The late Professor Cassese was a leading figure in the field, and this new edition takes full advantage of his extensive experience to provide a more personal approach to the subject than is typically found in the standard textbook, acting as good intellectual exercise for the stronger student.

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THE MAIN LEGAL FEATURES OF THE INTERNATIONAL COMMUNITY

1.1 INTRODUCTION

We all live within the framework of national legal orders. We therefore tend to assume that each legal system should be modelled on State law, or at least strongly resemble it. Accordingly, and almost unwittingly, we take the view that all legal systems should address themselves to individuals or groups of individuals, and in addition that they should include certain centralized institutions responsible for making law, adjudicating disputes, and enforcing legal norms.

However, the picture offered by the international community is completely different. This enquiry should therefore begin with a note of warning. The features of the world community are unique. Failure to grasp this crucial fact would inevitably entail a serious misinterpretation of the impact of law on this community.

1.2 THE NATURE OF INTERNATIONAL LEGAL SUBJECTS

The first salient feature of international law is that most of its rules aim at regulating the behaviour of States, not that of individuals. States are the principal actors on the international scene. They are legal entities, aggregates of human beings dominated by an apparatus that wields authority over them. Their general goals are quite distinct from the goals of each individual or group. Each State owns and controls a separate territory; and each is held together by political, economic, cultural (and frequently also ethnic or religious) links.

Within States individuals are the principal legal subjects, and such legal entities as public corporations, private associations, etc. are merely secondary subjects whose possible suppression would not result in the demise of the whole legal system. (However, the possible collapse of the governmental authorities may only be transitory; otherwise the whole State, as a distinct international entity, breaks down.) In the

international community the reverse holds true: States are the primary subjects, and individuals play a limited role (see **7.3** and **7.6**). The latter are as puny Davids confronted by overpowering Goliaths holding all the instruments of power.

Although the protagonists of international life are States as legal entities or corporate structures, of course they can only operate through individuals, who do not act on their own account but as State officials, as the tools of the structures to which they belong. Thus, for instance, if a treaty of extradition is concluded by France with China, this deal should not blind us to what actually happens, namely that the international instrument is brought into being by individuals and is subsequently implemented by individuals. The agreement is negotiated by diplomats belonging to the two States; their Ministers of Foreign Affairs sign the treaty; the instrument of ratification is formally approved and signed by the Heads of State, if necessary after authorization by parliamentary assemblies. Once the treaty has entered into force, it is implemented by the courts of each country (indeed, it is generally for the courts to grant or refuse extradition in each particular case) and, if required, also by officials of the respective Ministries of Justice.

Similarly, a State may consider that another country has committed an international transgression, and therefore decides to react by resorting to peaceful reprisals (today called countermeasures; see *infra* **15.3.1**) such as the expulsion of all the nationals of the State in question. This response is decided upon and carried out by individuals acting as State agents: the decision is normally taken, at the suggestion of the Foreign Minister, by the Minister for Home Affairs, after possible deliberation by the Cabinet; the actual expulsion is carried out by police officers or officials of other enforcement agencies.

Indeed, in international law more than in any other field, the phenomenon of the 'fictitious person', manifests itself in a conspicuous form: individuals engage in transactions or perform acts not in their personal capacity, that is to protect or further their own interests, but on behalf of collectivities or a multitude of individuals.

Why is it that the world community consists of sovereign and independent States, while human beings as such play a lesser role? We shall see in **Chapter 2** how the international community evolved and how, after the first modern States (England, France, Spain) came into being in the fifteenth century, the various communities in Europe and elsewhere gradually consolidated and 'hardened' into States. It may suffice now to stress that this powerful drive has been a constant and salient feature of the world community, so much so that most individuals now belong to one State or another: the world population of about six billion human beings is currently divided up amongst nearly two hundred States. In the Middle Ages it was usual to say that outside the Church no salvation could be found (*extra Ecclesiam nulla salus*)—at least, this was what the Church encouraged people to believe. Today it could be maintained with greater truthfulness that without the protection of a State human beings are likely to endure more suffering and hardship than what is likely to be their lot in the normal course of events—witness the plight of stateless persons, which has only lately been taken up by international institutions.

1.3 THE LACK OF A CENTRAL AUTHORITY, AND DECENTRALIZATION OF LEGAL 'FUNCTIONS'

National legal systems are highly developed. In addition to substantive rules, which enjoin citizens to behave in a certain way, sophisticated organizational rules have evolved. Special machinery exists concerned with the 'life' of the legal order. These developments resulted from the emergence within the State community of a group of individuals who succeeded in wielding effective power: they considered it convenient to create a special structure aimed at institutionalizing that power and crystallizing the relationships between the ruling group and their fellow members. In devising the institutional apparatus, a common pattern evolved in all modern States. First, the use of force by members of the community was forbidden, except for emergency situations such as self-defence (the right to use force to impede unlawful violence which would otherwise be unavoidable); States monopolized lawful coercion. Second, the central organs acting on behalf of the whole community were responsible for the three main functions typical of any legal system (law making, law determination, and law enforcement). Accordingly, first the monarch and subsequently an assembly (generally called a parliament) held the power to create and modify law, courts ascertained breaches of law and special bodies of professionals (police officers) were the law enforcers. It should be added that these were functions proper and not simple powers. For all these bodies had to exercise their powers in the interest of the whole community and not in their own interest; they were vested with a power but also a legal duty to make the law, to establish whether legal rules had been breached and to enforce them, if necessary.

By contrast, in the international community no State or group of States has managed to hold the lasting power required to impose its will on the whole world community. Power is fragmented and dispersed. True, political and military alliances have occasionally been set up or a strong convergence of interests between two or more members of the community has evolved. However, these have not hardened into a permanent power structure. The relations between the States comprising the international community remain largely *horizontal*. No *vertical* structure has as yet crystallized, as is instead the rule within the domestic systems of States.

This situation is all the more striking and unsatisfactory today. At present, as everybody knows, most components of national structures and of the international community (individuals, groups, associations, State-like entities, multinational corporations, transnational organizations, multinational financial structures, media networks, etc.) are so closely intertwined across national borders that they make up the phenomenon usually called 'globalization'. It has now become true that the fluttering of the wings of a butterfly in New York may trigger off a typhoon in Asia. However, global governance capable of settling all the problems that globalization may entail does not match this factual situation. Relative anarchy still prevails at the level of central management.

The major consequence of the *horizontal* structure of the international community is that organizational rules are at a very embryonic stage. There are no rules setting up special machinery for discharging the three functions referred to above, nor for entrusting them to any particular body or member of the international community. All three 'functions' are decentralized. (Clearly, in relation to the international community, one cannot speak of functions proper: when making law, settling disputes, or enforcing the law, States do not act in the interest and on behalf of the international community; they do not fulfil an obligation, but primarily pursue their own interests.) It is for each State, acting together with other States under the impulse of overriding economic, political, or other factors, to set new legal standards or to change them, either deliberately (as in the case of *treaties*, that is, contractual stipulations entered into by two or more States, and only binding upon the contracting parties; see *infra*, **Chapter 9**) or almost unwittingly (as in the case of *customary law*, that is, general rules evolved through a spontaneous process and binding upon all international legal subjects; see *infra*, **8.2**). It is for each of them to decide how to settle disputes or to impel compliance with law, that is whether to iron out disagreements peacefully or enforce the law unilaterally or collectively. Of particular significance is the fact that each State has the power of 'auto-interpretation' of legal rules, a power that necessarily follows from the absence of courts endowed with general and compulsory jurisdiction.

In addition, in traditional international law, that is, the law which came into being and governed international relations between the Peace of Westphalia of 1648 and the First World War (see **2.3**), resort to force was lawful both to enforce a right and to protect economic, political, or other interests. This State of affairs greatly favoured powerful States. As we shall see, some improvements, including the ban on the use of force by individual States, are to be found in the present international system (**2.5**; **3.4**).

1.4 COLLECTIVE RESPONSIBILITY

As in all primitive legal systems where groups play a much greater role than individuals, responsibility for violations of the rules governing the behaviour of States does not fall upon the transgressor (the individual state agent) but on the group to which he or she belongs (the State community). Here again we are confronted with a striking deviation from domestic legal systems.

Within the national legal orders which frame our daily lives, we are accustomed to the notion of individual responsibility: the one who commits a tort or any other breach of law shall suffer in consequence. One either must make good the damage or, in case of crime, is liable to a criminal penalty. Such is the rule. There are, however, exceptions. One is 'vicarious responsibility', which comes into play when the law provides that someone bears responsibility for actions performed by another person

with whom the former has special ties (for example, a parent is legally responsible for damage caused by his or her children); sometimes a whole group is held responsible for the acts performed by one of its representatives on behalf of the group (as in the civil liability of corporations for torts).

In the international legal system the exception becomes the rule. A State official may break international law: for instance, a military commander orders his pilots to intrude upon the airspace of a neighbouring State, or a court disregards an international treaty granting certain rights to foreigners, or a police officer infringes diplomatic immunities by arresting a diplomat or maltreating him. In these and similar cases the wronged State is allowed to 'take revenge' against the whole community to which that State official belongs, even though the community has neither carried out nor ordered the infraction. For instance, the State which has become the victim of the international transgression can claim the payment of a sum of money (to be drawn from the State treasury), or will resort to countermeasures (traditionally called reprisals) damaging individuals other than the actual authors of the offence (for example, the expulsion of foreigners, the suspension of a commercial treaty, and so on).

Hence, collective responsibility means both that the whole State community is liable for any breach of international law committed by any State official and that the whole State community may suffer from the consequences of the wrongful act (on this matter see **Chapter 13**).

The incident of Corfu of 1923 is instructive in this regard. On 27 August 1923 the Italian members of the International Commission charged by the Conference of Ambassadors (a body consisting of diplomats from France, the UK, Italy, and Japan and responsible for the implementation of the peace treaties) to delimit the Graeco-Albanian frontier were killed at Zepi, near the town of Janina, on Greek territory, at the hands of unknown terrorists. Two days later Italy requested Greece to formally apologize, hold a solemn religious ceremony, pay honour to the Italian flag and military honours to the dead, conduct a most serious inquiry within five days, inflict the death penalty on all culprits, and pay an indemnity of 50 million Italian lire payable within five days. The next day the Greek Government responded that it regarded as unjust the Italian charges that Greece was responsible for the assassination of the Italians; it also dismissed the requests concerning a criminal inquiry, the imposition of death penalty, and the payment of compensation. At the same time Greece submitted the matter to the Council of the League of Nations, with a view to an amicable settlement of the matter. Nevertheless, the next day upon the orders of the Italian dictator, Mussolini, Italian ships bombarded Corfu, causing numerous casualities among civilians (16 people were killed and more than three times that number wounded); Italian troops occupied the island, to force Greece to comply with the Italian requests. In the event, following the initial report by an international commission of inquiry it had set up, the Conference of Ambassadors found that Greece had been negligent in pursuing the perpetrators of the crime; on 27 September Italian troops evacuated Corfu and Italy was awarded in compensation 50 million lire (which Greece had previously deposited as security in the Swiss National Bank, on the understanding that the PCIJ would determine the amount of the indemnity due; a determination that, however, never took place). Thus, even assuming that Greece was responsible (a matter that was never fully clarified), Greek civilians and the Greek Treasury bore the brunt of the consequences of the

assassination perpetrated by some bandits at Zepi (for the relevant documents see 3 RD1 (1924), 339 et seq.).

For more recent and similarly instructive instances of collective responsibility, one may mention the reaction, in 1982, to the unlawful invasion by Argentina of the Falklands (Malvinas). The (then ten) members of the European Community adopted economic countermeasures (essentially the suspension of imports of textiles and meat from Argentina) and the USA followed suit, by among other things suspending 'new export-import credits and guarantees' (see *infra*, **15.5**); the parties adversely affected by such 'sanctions' were individuals and corporations, that is persons and entities other than the Argentine leadership that had decided the invasion. Another illustration of collective responsibility can be seen in the US air strikes on Tripoli and Benghazi on 14 April 1986 as a response to the bombing in Berlin, organized by Libyan agents on 5 April, of the *La Belle* disco, where two US soldiers and a Turkish woman were killed and more than 200 persons were wounded (see *infra*, **18.1.2**). According to Libya 41 persons died and 226 were wounded as a result of those air strikes (in 2001 the Berlin District Court ruled that the Libyan secret service was behind the bombing of the Berlin disco, and the ruling was confirmed in 2004 by the German Supreme Court in *Yasser Mohamed C. and others*). Yet another instance can be found in the economic sanctions adopted in 1992 by States against Libya, at the request of the UN SC (SC res. 748–1992) and as a reaction to the terrorist act at Lockerbie; these measures included the blocking of air communications with Libya (see *infra*, **15.51** and **22.4.2**); they clearly affected all Libyans as well as interests of Libyan corporations, in addition to Libyan State officials.

This form of responsibility is typical of primitive and rudimentary legal systems.[1]

Indeed, the law governing the international community is typical of primitive societies, with the aggravating circumstance—rightly emphasized by Hoffmann[2]—that unlike primitive communities (which are highly integrated, with all the ensuing benefits), the world community is largely based on the non-integration of its subjects, from the viewpoint of their social interrelations.

Later on we shall see that two new trends have significantly altered the traditional picture. First, next to traditional State accountability for 'ordinary' breaches of international rules, a new class of State responsibility has emerged for gross violations of fundamental rules enshrining essential values (so-called '*aggravated*' *responsibility*: see *infra*, **13.5–6**). Second, while previously the only category of individuals criminally liable under international law was that of pirates, since the end of the nineteenth century *individual responsibility* has gradually evolved. It was considered that serious offences committed by State officials in exceptional circumstances, for example war crimes, should entail the personal liability of their authors in addition to the possible

[1] Kelsen was one of the first authors to draw attention to this phenomenon. He pointed out that:

'[Co]llective responsibility exists in case of blood revenge which is directed not only against the murderer but also against all the members of his family. Collective responsibility is established in the Ten Commandments where Yahweh threatens to punish the children and the childrens' children for the sins of their fathers' (*Principles*, 9).

[2] S. Hoffmann, 'International Law and the Control of Force', in K. Deutsch and S. Hoffmann, eds., *The Relevance of International Law* (Garden City, NY: Anchor Books, 1971), at 36.

international responsibility of the State to which they belonged. The category of war crimes gradually expanded after the Second World War and further categories were added: those of crimes against peace (chiefly aggression) and of crimes against humanity (chiefly genocide) (see *infra*, **Chapter 21**). However, despite these momentous advances, collective responsibility still remains the rule.

1.5 THE NEED FOR MOST INTERNATIONAL RULES TO BE TRANSLATED INTO NATIONAL LEGISLATION

As we shall see *infra* (**Chapter 12**), international rules to be applied by States within their own legal systems generally need to be incorporated into national law. This is because the international community is composed of sovereign States, each eager to control the individuals subject to its jurisdiction and consequently to decide on the extent to which they may hold rights and obligations. Hence, when international rules need to be applied within a State, or by a State official, in most cases they must be turned into municipal law.

Thus, for instance, for an international rule forbidding the use of certain categories of weapon (such as chemical or bacteriological weapons) to take effect, the Minister of Defence and the military commanders of a given State must be under a national obligation to comply with the rule, become cognizant of the scope of the rule, and take all the necessary measures to implement it. A provision such as Article 29 of the Vienna Convention of 1961 on diplomatic relations ('The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity') obliges the enforcement agencies of a State to refrain from arresting or detaining foreign diplomats, and to take all necessary measures to prevent undue attacks on them. Similarly, Article 34 of the same Convention ('A diplomatic agent shall be exempt from all dues, taxes, personal or real, national, regional or municipal' except for certain categories of taxes enumerated in the same provision) requires the tax authorities of the 'receiving State' (that is the State where he performs his diplomatic activity) to take the requisite regulatory or administrative steps to exempt foreign diplomats from all the dues and taxes to which they may not be subjected.

It is therefore apparent that most international rules cannot work without the constant help, co-operation, and support of national legal systems. Exaggerating somewhat (on account of his strictly dualistic approach), the German publicist H. Triepel observed in 1923 that international law is like a field marshal who can only give orders to generals. It is solely through the generals that his orders can reach the troops. If the generals do not transmit them to the soldiers in the field, he will lose the battle (HR (1923) at 106).

1.6 THE RANGE OF STATES' FREEDOM OF ACTION

To illustrate yet another typical feature of the international community it is useful to refer once again, by way of comparison, to domestic legal systems.

In most national orders individuals—the primary legal subjects—enjoy great freedom in their private transactions. They can variously enter into agreements with other persons, or refrain from so doing, or they can set up companies, create associations, and so on. Their broad contractual freedom is not unfettered, however, in that central authorities usually place legal restraints upon them. Thus, for instance, one cannot make private transactions which are contrary to public order and morals (such as a contract whereby one party undertakes to hand over to another a next of kin, for purposes of prostitution); if such a transaction is made, it is null and void. It should be noted that national public orders include norms prohibiting physical persons from disposing of their body or their freedom. Thus, a contract whereby one party undertakes to mutilate his body or to deliver to another party one of his limbs is normally contrary to public order and consequently null and void. The same consideration applies to a contract whereby one party undertakes to commit suicide or to submit permanently to a position akin to slavery in relation to another party. Every domestic system contains a core of values that members of the community cannot disregard, not even when they engage in private transactions *inter se*. In the case of any such disregard, the response of the central authorities is to make the private undertaking devoid of legal effect. *A fortiori*, individuals are not allowed to depart from certain basic values, which are held in such high esteem as to be embodied in rules governing criminal behaviour. If two or more persons enter into an agreement for the setting up of a criminal association, not only will their agreement be null and void, they will also incur penal responsibility and are punishable accordingly. A third set of restrictions on individual freedom derives from all the norms of public law concerning the functioning of State institutions: thus, for instance, in a State where political elections take place by law once every four years, citizens are not free to vote whenever they would like to do so. Limitations also derive from constitutional rules restraining the exercise of certain rights and liberties (as in the case of freedom of thought or association), and from labour laws (which often restrict freedom of contract in labour relations with regard to working time and working conditions, normally with a view to protecting the weaker party).

By contrast, subjects of the international community enjoy wide-ranging freedom of action. In traditional international law their freedom was in fact untrammelled; in modern international law some legal restrictions have been established.

Under traditional law States enjoyed great latitude as regards their internal set-up. The world community could not 'poke its nose' into how a State organized its political system. All States were free to establish an authoritarian power structure, or to uphold democratic principles; they could create a parliament or do without any representative assembly whatsoever; they could have a monarch or a democratically

elected Head of State. This was the private business of each country. In addition, international law was not interested in requesting States to give their internal legal order a specific content. With a few exceptions (for instance, international customary rules on the treatment of foreigners or on immunities to be granted to foreign diplomats), States were completely free to decide upon the tenor and scope of their national legislation. Again, general international law was not involved in the matter.

States also enjoyed complete freedom as regards the conduct of their foreign policy. It was up to them to decide whether or not to enter into international agreements; they also were free to choose their partners and the contents of agreements. They could shape their international relations as they pleased; they could recognize a new State or withhold recognition; they were free to enter into alliance with one or more States or refrain from doing so. The legal order even authorized States to use as much force as they wished and on any grounds they chose. States could engage in a war or resort to forcible measures short of war (see **15.1.1–5**) either on the grounds that one of their legal rights had been violated, or because they considered it politically and economically expedient forcibly to attack another State (for example, in order to occupy and annex part, or the whole, of its territory, or to set up a government subservient to their commands, etc.). Law was so 'generous' as also to allow States to intervene in the domestic and international affairs of other members of the world community, either by political pressure or by threatening the use of force, for the purpose of inducing the 'victim' of the intervention to change its policy (see **15.1.2–3**). Furthermore, even when they undertook to submit their legal disputes to arbitration, States usually excluded from the obligation to submit to arbitration, all the disputes affecting their 'vital interests', and each State retained the right to decide whether a specific case fell within that category. Freedom in the economic field was even greater.

Lack of legal restraints even allowed States to agree with other States that one of them must extinguish itself: they could conclude an agreement whereby one of them was incorporated into the other; or they could merge; or else one of them could agree to cede a portion of its territory to another State. No imperative rule prohibited self-mutilation or self-destruction.

I have, of course, been speaking of legal freedom. Power politics, the constant need for a balance of power, economic and social considerations, the geographical situation of States, prestige and traditions, as well as other factors—all these conspired to reduce that freedom. Nevertheless, the legal order adopted a *laissez-faire* attitude, thereby leaving an enormous field of action to individual States.

It is not difficult to understand why international law developed in this way. No State or group of States proved capable of wielding permanent control over the world community so as to impose a set of basic standards of behaviour calculated to govern the action of members. Hence, it was necessary to fall back on a negative regulation, leaving all members free to act as they liked, provided they did not grossly and consistently trespass on the freedom of other members. Clearly, this approach could not but favour the Great Powers. In practice, international law was modelled in such a way as to legitimize, 'codify', and protect their interests.

The unrestricted freedom of States has been subjected to increasing qualification since the First World War. Three factors account for new developments in this area.

First of all, there is the ever-expanding scope of the network of international treaties. Most States are now party to a very large number of treaties impinging upon their domestic legal systems. Consequently, at present most members of the world community are bound to obey a number of obligations that greatly restrict their latitude, as regards both their own internal system and their freedom in the international sphere. Many States have assumed obligations in the field of commercial, political, and judicial co-operation, in the realm of human rights, and so on. Similarly, as far as international action is concerned, many are parties to international organizations, to treaties of alliance, etc. True, all these undertakings derive from treaties; in theory, States can therefore get rid of them if they wish to do so. However, in practice, it is difficult for them to release themselves from all their various commitments: political, economic, diplomatic, military, and psychological factors stand in the way.

A second important reason is the increasing number of legal restrictions on the right to use force. The Covenant of the League of Nations in 1919 placed considerable restraints on a number of States. These restraints curtailed these States' power to wage war. The Paris Pact promoted by the USA and France, reinforced and extended them to a larger (and, in some respects, different) group of States in 1928. They became radical and sweeping in 1945, when the UN Charter required members to refrain from using or threatening the use of any sort of military force, with or without the label of 'war'. The ban on the use of force has now turned into a principle encompassing the whole international community, although the resulting limitation on State freedom is unfortunately beset with loopholes, which chiefly affect the enforcement mechanisms (see **3.4**; **15.2**; **16.3.2** and **Chapter 17**).

Third, in the 1960s a customary rule evolved in the international community to the effect that certain general norms have greater legal force than other rules, in that States cannot derogate from them through international agreements. This set of peremptory norms was called *jus cogens* (see **11.2–9**). It follows that States are now duty-bound to refrain from entering into agreements providing for one of the activities prohibited by peremptory norms; if they nevertheless do so, their agreements may turn out to be null and void.

However, as we shall see (**17.7**), despite these major advances, in reality and at least in some respects, the condition of the present international community is not far removed from that of classical international law.

1.7 THE OVERRIDING ROLE OF EFFECTIVENESS

International law is a realistic legal system. It takes account of existing power relationships and endeavours to translate them into legal rules. It is largely based on the principle of effectiveness, that is to say, it provides that only those claims and

situations which are effective can produce legal consequences. A situation is effective if it is solidly implanted in real life. Thus, for instance, if a new State emerges from secession, it will be able to claim international status only after it is apparent that it undisputedly controls a specific territory and the human community living there. Control over the State community must be real and durable. The same consideration holds true for insurgents. If civil strife breaks out within a State, the rebels cannot claim international rights and duties unless they exercise effective authority over a part of the territory concerned. Similarly, in the case of the military occupation of a foreign territory, the occupying Power cannot claim all the rights and privileges deriving from the international law of warfare, until the territory is actually placed under that Power's authority and it is in a position to assert itself.

The principle of effectiveness permeates the whole body of rules making up international law. Under traditional law one of its corollaries has for long been that legal fictions had no place on the international scene. New situations were not recognized as legally valid unless they could be seen to rest on a firm and protracted display of authority. No new situation could claim international legitimacy so long as the 'new men' failed to demonstrate that they had firmly supplanted the former authority. Force was the principal source of legitimation.

One may well wonder why force has played such an overriding role in the world community, giving the international legal system a 'conservative' slant. The answer probably lies in the fact that power has always been diffused and a superior authority capable of legitimizing new situations has not emerged, nor have States evolved a core of legally binding principles serving this purpose (because they are too divided to be able to do so). In consequence, legal rules must of necessity rely upon force as the sole standard by which new facts and events are to be legally appraised.

The foregoing observations essentially apply to the *traditional* setting of the international community. Since the First World War a number of States have attempted to make 'legality' prevail over sheer force or authority. The main impetus came from the Stimson doctrine of 1932 (see **17.2.2**). This doctrine suggested withholding legitimation from certain situations which, although effective, offended values that were increasingly regarded as fundamental.

1.8 TRADITIONAL INDIVIDUALISTIC TRENDS AND EMERGING COMMUNITY OBLIGATIONS AND RIGHTS

1.8.1 RECIPROCITY AS THE BASIS OF INTERNATIONAL RIGHTS AND OBLIGATIONS

The international community has long been characterized by a horizontal structure and the lack of strong political, ideological, and economic links between its members.

(The Christian principles prevailing in the 'old' community were not allowed to override national interests.) These features have thus resulted in the tendency for every State to be self-seeking. Self-interest has held sway.

This phenomenon is also apparent in the way substantive rules govern the behaviour of States. International rules, even though they address themselves to all States (in the case of customs) or group of States (in the case of multilateral treaties), confer rights or impose obligations on *pairs of States* only. As a result, each State has a right or an obligation in relation to one other State only. Such rules can also be termed 'synallagmatic' in that they impose reciprocal obligations. For instance, in the case of customary rules, they may confer on each member of the international community rights *erga omnes*, that is towards all other States. However, in their concrete application, they boil down to standards applying to pairs of States. Conspicuous instances are the rule on sovereignty (each State can claim from all other States full respect for its territorial integrity and political independence), and that on the free use of the high seas (each State is entitled to enjoy freedom of navigation, fishing, and overflight, as well as freedom to lay submarine cables and pipelines in all parts of the sea which are not under the jurisdiction of a coastal State). It should, however, be noted that as soon as one of these norms is violated, the ensuing legal relationship links only the aggrieved State and the offending party. In other words, the *erga omnes* character of the substantive rights is not accompanied by a procedural right of enforcement belonging to all the members of the international community. Once a State has infringed the sovereignty of another State, it is for the victim to claim reparation; no other State can intervene on the victim's behalf or on behalf of the whole international community to claim cessation of the wrong or reparation. The same holds true for the rules on diplomatic immunities; although they are general in character and address themselves to all States, in fact they split into a number of binary rules, each regulating a pair of States. Thus, for instance, the rule that 'A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State' (codified in the 1961 Vienna Convention on Diplomatic Relations, Art. 31.1) entails that in the relations between, say, the UK and Indonesia, either State has the right to claim from the other that its diplomatic agents be immune from the criminal jurisdiction of the other State. The same applies to all other pairs of States members of the international community.

The same holds true for international treaties, in particular multilateral treaties. For instance, a treaty on international trade providing for the establishment of a certain customs duty on a particular good confers on each contracting party the right to demand of all the other contracting parties fulfilment of that obligation; as soon as a contracting party breaches that obligation with regard to goods imported from another contracting party, the latter is entitled to claim reparation for that breach. In practice, this multilateral treaty can be broken down into a set of substantially similar bilateral treaties, each regulating the relationships between a particular pair of States. It is as if each contracting party were bound by as many bilateral treaties as there are other contracting parties.

Plainly, we are far from the system obtaining in all national legal systems. There,

in cases of serious breaches (for example criminal offences), a representative of the entire community (the Public Prosecutor or a similar institution) can initiate legal proceedings irrespective of the attitude or action of the injured party. The system prevailing in international law has a number of serious drawbacks, among them the fact that the reaction to a wrong ultimately depends on whether the victim is stronger than or at least as strong as the culpable State. In the final analysis, respect for law is made dependent on power.

Probably one of the few exceptions to this network of legal rights and obligations was constituted by the general rule on piracy (on this notion, still applicable today, see *infra*, **7.6.1** and **21.1**). This rule authorized every State to seize and capture pirates on the high seas, whatever their nationality and whether or not they had attacked one of its ships or threatened to do so. Thus, this rule (which imposed on all individuals of the world the obligation to refrain from piracy) granted a right to all States unconnected to actual damage. However, when exercising this right, States did not act on behalf of the world community, for the protection of a community value; rather they acted merely to safeguard a *joint interest*. As a British court put it in 1817 in *Le Louis, Forest*, pirates are 'enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately, and thereby creating an [sic] universal terror and alarm' (at 705). Hence, the right to capture piratical vessels 'has existed upon the ground of repelling injury, and as a measure of self-defence' (at 704). This proposition clearly spells out that the right to capture pirates rested on the joint interest of all States to fight a common danger (and consequent damage), be it real or potential.

The same seems to hold true for the rights of riparian States with regard to navigable international rivers. Under customary law developed since 1815, every riparian State has a right to free navigation and to equality of treatment. Consequently, if one of those States performs an act preventing another State's free navigation, it simultaneously infringes upon the right of any other riparian State, whether or not it actually causes damage to it (with the consequence that, at least in principle, any other riparian State can demand cessation of the wrongful act). This is because, as the PCIJ put it in 1929 in *Territorial Jurisdiction of the International Commission of the River Oder*,

> 'the community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others' (at 27).

1.8.2 COMMUNITY OBLIGATIONS AND COMMUNITY RIGHTS

In the *present* international community traditional rules based on reciprocity still constitute the bulk of international law. Nevertheless, one can also find new rules with a different content and import. A number of treaties, many of which came into being after the First World War and more particularly in the aftermath of the Second World War, provide for obligations that are incumbent upon each State towards all other contracting parties and which are in no way reciprocal.

This category of rules has evolved from the emergence of *new values* that the international community has come to regard as being worthy of special protection. Thus, after the First World War, as a result of the ideological and political pressure of socialist doctrines, and also because, following the catastrophe of war, it came to be believed that the condition of workers was growing worse, the lot of workers was regarded as deserving greater international concern. Consequently, the International Labour Organization (ILO) was set up and international conventions for the protection of workers began being drafted and adopted, their implementation being under the scrutiny of the ILO (see, however, **7.6.2(c)** and **14.8.2**). Similarly, after the Second World War, as a reaction to the mass murder by the Nazis of ethnic and religious groups (chiefly Jews, as well as Gypsies) and the total disregard for the basic human rights of thousands of individuals both in Germany and elsewhere, the Allies decided to create better safeguards against genocide and other egregious violations of human rights. By the same token, the Nazi aggression against a number of European States and the attack by Japan on the USA prompted the UN to enact a sweeping ban on all forms of aggression. As stated above, all these new values resulted in numerous international treaties as well as a few international customary rules (see **Chapters 3** and **19**).

Community obligations possess the following unique features: (i) they are obligations protecting fundamental values (such as peace, human rights, self-determination of peoples, protection of the environment); (ii) they are obligations *erga omnes*, that is towards all the member States of the international community (or, in the case of multilateral treaties, all the other contracting States); (iii) they are attended by a correlative *right* that belongs to any State (or to every other *contracting* State, in the case of obligations provided for in multilateral treaties); (iv) this right may be exercised by any other (contracting) State, whether or not it has been materially or morally injured by the violation; (v) the right is exercised *on behalf of the whole international community* (or the community of the contracting States) to *safeguard fundamental values* of this community (for example, when a State makes a remonstrance to, or forcefully protests against, another State on account of atrocities committed by the latter against its own nationals, and demands the immediate cessation of those atrocities, it is not motivated by the desire to safeguard its own interests or to prevent any possible future damage; its sole (or primary) purpose is to vindicate humanitarian values on behalf of the whole international community). These rights can therefore be termed 'community rights'.

In a way, this body of values makes up what the Spanish international lawyer Francisco de Vitoria (1483–1546), a follower of modern natural law theory, termed *bonum commune totius orbis*, that is, the common good for the whole world—in other words, the assets and values that are shared by the whole of mankind and to which the particular interests and demands of individual States should yield. As we shall see, this is yet another confirmation that the emergence in modern times of the notions of community obligations and rights (and of the cognate concept of *jus cogens*, see *infra*, **11.2–3**) translates into positive law ideas and constructs propounded by the advocates of natural law between the sixteenth and the eighteenth century.

How can the 'community rights' we are discussing be exercised? Customary rules do not provide for any particular mechanism. It follows that it is possible to resort to

traditional means of redress (diplomatic steps, diplomatic pressure, peaceful countermeasures; see **15.3** and **15.5**). As for treaties, some simply proclaim a right, without specifying the means by which it can be put into effect. The means of redress just mentioned can also be used in such cases. By contrast, a number of other treaties set up special procedures or special machinery for facilitating the task of the claimant State. We shall return to this point later on (see **13.5** and **13.6** as well as **Chapter 14**).[3]

Nevertheless, the significance of the recent emergence of 'community obligations', though considerable, should not be over-emphasized.[4] For one thing, the treaties or customary rules laying down these obligations are still relatively rare. For another, even those rules are seldom put into effect. A typical feature of the international community, namely the huge gap between the normative level and implementation, is more conspicuous in this area than anywhere else. Although States have the opportunity of acting in the interest of the whole international community, or of all the other contracting parties, they usually prefer to avoid meddling in other States' internal affairs. They end up by exercising their 'community rights' only when their own economic, military, or political interests are at stake. In the final analysis, most procedures based on State-to-State complaints have ended in failure, or, at least, have not been exploited fully (see **13.5** and **13.7**).

1.8.3 ARTICLE 1 COMMON TO THE FOUR 1949 GENEVA CONVENTIONS AS INDICATIVE OF CURRENT MERITS AND FLAWS OF COMMUNITY RIGHTS AND OBLIGATIONS

A telling illustration of the current flaws of community rights and obligations can be seen in Article 1 common to the four Geneva Conventions of 1949 (protecting such 'war victims' as civilians, the wounded and the sick, prisoners of war, etc.), as well as Article 1.1 of the 1977 First Additional Protocol updating the 1949 Convention with respect to international armed conflicts, on which it is therefore worth dwelling at some length.

These provisions stipulate that each contracting State undertakes to respect the Conventions (and Protocol) 'in all circumstances', and by the same token assumes the

[3] In a Resolution adopted in 1989 the *Institut de Droit International* (in 63-II *Annuaire* (1990), 338–40) authoritatively restating and spelling out existing customary law, pointed out that the obligation to ensure observance of fundamental human rights as 'a direct expression of the dignity of the human person' is *erga omnes*; in case of breaches of human rights any other State is empowered to react by means of 'diplomatic representations as well as purely verbal expressions of concern or disapproval', whereas if the breaches are large scale or systematic, other States are entitled to take diplomatic, economic, and other peaceful measures towards the responsible State. Furthermore, as Judge E. Lauterpacht implicitly held in his Separate Opinion in *Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, (ICJ Reports 1993, §§113–115) under Article I of the 1948 Genocide Convention each contracting party is authorized (although perhaps not obliged) to react to any acts of genocide by any other contracting State. Customary law restates and broadens these obligations and rights in the area of genocide.

[4] On the various instances of current international protection of 'community interests' see the important considerations by B. Simma, 'From Bilateralism to Community Interest in International Law', 250 HR (1994-VI), esp. at 256 ff.

obligation 'to ensure respect' for these instruments 'in all circumstances'. Common Article 1 is not a substantive legal provision, that is, a provision that lays down a specific obligation (such as, for instance, Article 12.1 of the First Convention, whereby 'Members of the armed forces and other persons mentioned in the following Article, who are wounded and sick, shall be respected and protected in all circumstances'). In other words, common Article 1 does not provide for a specific conduct with regard to a specific matter. It is not a *primary* rule, that is (in Hart's terminology)[5] a rule that requires legal subjects to do or abstain from certain actions. Instead, that Article lays down a general obligation relating to *how* all the specific obligations laid down in the Conventions must be fulfilled by each specific contracting State both as regards its own compliance with those obligations and compliance by other contracting States. Article 1 is thus an adjective provision; it sets a *secondary* rule, concerning the modalities of fulfilment of obligations contained in primary rules.[6]

[5] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), at 78–9.

[6] It is necessary to dispose of an interpretative argument relating to common Article 1, which has recently been advanced. It has been argued (F. Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: from Tiny Seed to Ripening Fruit', in 2 *Yearbook of International Humanitarian Law* (1999), 3–38) that those who worked out the Conventions did not attach great importance to the undertaking, laid down in common Article 1, to 'ensure respect' for the Conventions. That phrase would either involve the obligation of States parties to ensure respect by their own armies and other state officials, or simply amount to a pleonastic and redundant affirmation of the obligation to comply with the Conventions, or would merely lay down a moral obligation. To rebut this interpretation it is sufficient to note that the views of the drafters of a treaty are of minor importance, pursuant to the customary rule codified in the Vienna Convention on the Law of Treaties (Article 32). Also in national law the principle that what matters is what the law provides, not what the lawmakers intended to do, prevails (as early as the late nineteenth century the leading legal scholar K. Binding (in *Handbuch des Strafrechts*, I (Leipzig: Duncker und Humblot, 1885) at 456), emphasized that what counts in the interpretation of a law is not 'what the lawmakers willed' but rather 'what the law wills'). What matters is the fact that the interpretation that the authors of ICCR Commentary, under the general editorship of J. S. Pictet first propounded (*Commentaire des Conventions de Genève de 1949*, vol. I (Geneva: ICRC, 1952), at 25–8) was taken up both by the UN Tehran Conference on Human Rights in 1968 Resolution XXIII, §9 of the Preamble ('States Parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict') and then by the UN General Assembly in Res. 2444 (XXIII) of 19 December 1968 (the UN Secretary-General was asked to take steps in consultation with the ICRC, to study 'steps which could be taken to secure the better application' of humanitarian law). Two distinguished scholars (L. Condorelli and L. Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances" ', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva and The Hague: ICRC–M. Nijhoff, 1984), at 17–35; and L. Condorelli and L. Boisson de Chazournes, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', in *International Review of the Red Cross* (2000) no. 837, at 67–87) subsequently elaborated upon and gave a theoretical underpinning to this interpretation. In 1986 the International Court of Justice in *Nicaragua (merits)* authoritatively upheld it (at §220). The approach adopted by the two authors has been adhered to by H. P. Gasser, 'Ensuring Respect for the Geneva Conventions and Protocols: the Role of Third States and the United Nations', in H. Fox and M. M. Meyer, eds., *Armed Conflict and the New Law*, vol. II (London: British Institute of International and Comparative Law, 1993), at 15–49 and recently restated by the ICJ in *Legal Consequences of the Construction of a Wall* (at §§158–9).

This, in short, is the construction that is today universally accepted by both States and the ICRC.

How does Article 1 operate with regard to the other, primary rules? It provides, first, that each contracting State is bound to abide by all the provisions of the Conventions regardless of any misbehaviour of another State party. In other words, it provides that those other (primary) provisions are not subject to the principle of reciprocity; hence, a contracting party may not disregard a provision if another State party breaches that provision to the detriment of the former State. Disregard of a Convention provision by way of countermeasure is not allowed. Second, Article 1 provides that each State party is bound to ensure respect for the Conventions by any other contracting State. It follows that (a) the obligation incumbent upon each contracting State to comply with the Conventions' provisions operates towards all the other contracting States. It is an obligation *erga omnes contractantes* (towards all the other contracting States). It also follows that (b) any State party has a *legal claim* to compliance with the Conventions by any other State party. Any contracting State, faced with violations of the Conventions by a belligerent (or, more generally, a party to an armed conflict) may take action and demand cessation of the breach. Thus, we are faced here with community obligations and community rights proper.

Let us now concentrate on this second feature of the legal mechanism instituted by Article 1. It should be clear from the above that back in 1949 the Geneva Conventions set up an innovative legal system that departed from the traditional principles governing international relations essentially geared to self-interest (reciprocity, bilateralism) and enshrined the principle of community protection of universal values. Each State party to the Conventions, even if it was not involved in or directly affected by an armed conflict, was granted a *legal entitlement* to demand observance of Convention provisions, in that they enshrine respect for fundamental humanitarian values. The *common interest* in compliance with humanitarian treaty rules was thus recognized and translated into a legal mechanism.

In 1949 States stopped however *halfway*. They did not specify how contracting parties could exercise that legal entitlement *at the interstate level*; they did not spell out through which international means or according to what interstate modalities that legal entitlement could operate. They only mentioned the system of Protecting Powers (see *infra*, **20.6.5(b)(4)**), which, however: (i) has not as its primary duty that of ensuring compliance with the law; (ii) is confined to those third States that each of the belligerents accepts (or proposes and the other belligerent accepts); and in addition (iii) has been scantily applied, on a number of grounds. Furthermore, (iv) the Conventions envisage only general tasks for the International Committee of the Red Cross (ICRC).[7]

Thus, by and large common Article 1 left in the hands of *each contracting State* faced with serious infringements of the Conventions by other States, the decision whether or not to undertake action and, in the affirmative, what form such action

[7] A common provision (Article 9/9/9/10) stipulates that the ICRC may, subject to the consent of the parties to an international conflict, undertake humanitarian tasks for the protection of war victims.

should take. However, the Conventions pointed to the possible reaction to serious violations of the Conventions, at the *national* level. The Conventions specified that the courts of each contracting party were endowed with universal jurisdiction over 'grave breaches' of the Conventions (i.e. very serious violations specified in those Conventions), wherever and by whomever perpetrated, on condition that the suspect or accused be present on the territory of the prosecuting contracting State (see **21.4**).

It is thus clear that the Conventions set up a universally oriented, or community-oriented mechanism, but did not coherently take the further step of envisaging the establishment of centralized machinery capable of activating and vindicating the community interest. Absent any such machinery, everything was left to each individual contracting State, both at the interstate level (relating to action to be taken as between States) and at the national (that is judicial) level. From community interest one was taken back to bilateralism, to individual action based on national self-interest.

State practice since 1950, when the Conventions entered into force, shows that in the event self-interest and unilateralism prevailed. At the *interstate level*, few States took action, and always at the bilateral level: they sent diplomatic notes, or undertook diplomatic demarches, *vis-à-vis* belligerents grossly violating the Conventions.[8] As these actions were never made public, one cannot gauge their importance and establish whether they had any follow-up. At the *national judicial level*, courts have not acted at least until 1994, when, prodded by the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) they started instituting proceedings against alleged authors of crimes in the former Yugoslavia. The ICRC occasionally took steps. When it did so, it normally published appeals to the belligerents concerned as well as to all State parties,[9] or issued press releases.[10] Again, it is difficult to appraise whether such action was consequential. It is thus clear that in most cases the action of States and the ICRC was not co-ordinated. In particular, it would seem that the ICRC tends not to act as the representative and spokesman of the community of States parties to the Geneva Conventions.

This assessment ought, however, to be qualified to some extent. *A few* international procedures exists which can be set in motion not by States but either at the request

[8] See H. P. Gasser, 'Ensuring Respect', *supra* n. 5, at 31 ('Although no clear evidence is available, we have reason to believe that governments actually do act in support of better respect for humanitarian law by States parties to an armed conflict, confidentially and on a bilateral level'). It should be noted that when he wrote these words Mr Gasser was the Legal Adviser of the ICRC.

[9] For instance, it issued appeals to all States in 1979 concerning the war in Rhodesia (ICRC *Annual Report* 1979, at 13); the war between Iran and Iraq (ICRC *Annual Report* 1983, at 56; 1984, at 60; 1989, at 85); the armed conflict in the former Yugoslavia (see the statements and press releases issued in 1991–5 and collected in CICR, *Ex-Yougoslavie, Déclarations du Comité International de la Croix-Rouge, 1994* (doc. DP (1994) 49; CICR, *Ex-Yougoslavie, Communiqués de presse et communications à la presse du CICR, 1995* (doc. DP (1994) 51); the NATO attack against the Federal Republic of Yugoslavia (Serbia and Montenegro) in 1999 (in ICRC, 2000, no. 837, at 258–62); the war in Iraq in 2003–4 (ICRC *Press release* no. 04/26 of 8 April 2004).

[10] See, for instance, the press releases no. 1479 of 15 December 1983 (on the Iran–Iraq war), no. 1481 of 7 March 1984 (on the same war), no. 1489, of 7 June 1984 (on the same war) no. 1574, of 1 June 1988 (on the use of antipersonnel mines and other prohibited weapons), of 9 April 2003 on POWs in the hands of the Iraqi authorities, of 11 April 2003 (no. 03/28) on the protection of civilians in the war in Iraq.

of the aggrieved individuals or *ex officio*, that is by the international body responsible for supervising compliance with the treaty concerned (see **14.8.2**). Thus, in such cases fulfilment of community obligations is sought by entities other than the various contracting States. Although these procedures are few in number, their significant operation eventually compensates for the lack of consideration still shown in the international community to ideals of a common good.

1.9 COEXISTENCE OF THE OLD AND NEW PATTERNS

Every legal system undergoes constant change, for law must steadily adjust itself to new realities. This sometimes results in old and new institutions living together: even in the case of revolutions, it is difficult to cast aside all the existing legal structures overnight. However, as a rule, fresh pieces of the legal fabric supplant outmoded ones so as to eliminate the most glaring inconsistencies.

In the international community two different patterns in law, one traditional, the other modern, live side by side. Taking up the distinction drawn by a distinguished British political scientist, M. Wight,[11] and developed by another outstanding British scholar, H. Bull,[12] we could call the traditional model '*Grotian*' and the new one '*Kantian*'. Under the former model the international community is based on a 'statist' vision of international relations; it is characterized by co-operation and regulated intercourse among sovereign States, each pursuing its own interests. In contrast, the more modern '*Kantian*' paradigm is based on a universalist or cosmopolitan outlook, 'which sees at work in international politics a potential community of mankind' and lays stress on the element of 'trans-national solidarity' (*jus cosmopoliticum*).

The new legal institutions, which have developed within the setting of the international community approximately since the First World War (and with greater intensity since 1945), have not uprooted or supplanted the old framework, the 'Grotian' strand. Rather, they appear to have been superimposed on it (even though their main purpose is to mitigate the most striking defects of the old system).

[11] See M. Wight, 'Western Values in International Relations', in H. Butterfield and M. Wight, eds., *Diplomatic Investigations* (London: Allen and Unwin, 1967); M. Wight, G. Wight, and B. Porter, eds., *International Theory—The Three Traditions* (Leicester and London: Leicester University Press, 1991), in particular at 137 ff.

Wight distinguishes between the Machiavellian, Grotian, and Kantian traditions.

[12] H. Bull, *The Anarchical Society: A Study of Order in World Politics* (London and Basingstoke: Macmillan, 1977), at 24–7; id., 'The Importance of Grotius in the Study of International Relations', in H. Bull, B. Kingsbury, and A. Roberts, eds., *Hugo Grotius and International Relations* (Oxford: Oxford University Press, 1990), esp. at 71–93.

Bull distinguishes between the Hobbesian or realist tradition, the Kantian or universalist tradition, and the Grotian or internationalist tradition.

R. Falk has taken up these notions and discussed them in many articles (see, in particular, 'A New Paradigm for International Legal Studies: Prospects and Proposals', in R. Falk, F. Kratochwil, and S. H. Mendlovitz, eds., *International Law: A Comparative Perspective* (Boulder, Col., and London: Westview, 1985), 651–702. See also R. Jackson, *The Global Governance—Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), 378–85.