CHAPTER 7
SUBJECTS AND ACTORS

VILJAM ENGSTRÖM, ALEX GREEN, RAGHAVI VISWANATH, GRAŻYNA BARANOWSKA, TAMSIN PHILLIPA PAIGE, JENS T. THEILEN, JULIANA SANTOS DE CARVALHO, VERENA KAHL, HE CHI, SUÉ GONZÁLEZ HAUCK, ANNE PETERS, AND RAFFAELA KUNZ

INTRODUCTION

VILJAM ENGSTRÖM

BOX 7.1 Required Knowledge and Learning Objectives

Required knowledge: History of International Law, Sources of International Law

Learning objectives: Understanding the interrelations between the concepts of legal subject and legal personality; the evolution of the concepts of legal subject and legal personality; and the expansion and pluralisation of acknowledged actors in international law.

BOX 7.2 Interactive Exercises

Access *interactive exercises for this chapter*[1] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 7.1 QR code referring to interactive exercises.

1 https://openrewi.org/en-projects-project-public-international-law-subjects-and-actors-in-international-law/

DOI: 10.4324/9781003451327-9

A. INTRODUCTION

Any legal system defines who can possess rights and obligations in it. This is also the case for international law. This chapter identifies States as the paramount subjects of international law, with international organisations possessing legal personality alongside States. Our conception of the sphere of actors that can have a regulatory function at the international level has broadened beyond these two subjects to include for example individuals, non-governmental organisations, corporations, animals, and cities. This chapter introduces the challenge that this poses to the conventional conception of subjects of international law.

B. SUBJECTS OF INTERNATIONAL LAW

I. STATES AND INTERNATIONAL ORGANISATIONS AS PRIMARY SUBJECTS

The main subjects of international law are States[2] and international organisations.[3] States are commonly considered the original subjects of international law. Out of States and international organisations, States are undoubtedly the main subjects, which follows from the central role of State consent for the creation of international law. States can be considered the main source of international law also because one characterising feature of international organisations is that they consist of States as their constituents. A particular feature of the international legal system is that it lacks a central legislator (compared to domestic law). For this reason, international legal persons are also commonly considered to possess the capacity to create international law. In other words, the capacity to have rights/obligations under international law is a defining feature of being an international legal person.

The notion of a legal person as such can be traced back to the publications of Gottfried Wilhelm von Leibniz in the late 17th century, whereas Emer de Vattel's Le Droit des Gens (1758) is considered to have expanded the moral personality of the State to also cover the international dimension.[4] In practice, 'legal subject' and 'legal person' are commonly used as synonyms. However, they need not be identical. To be a subject can be characterised as possessing an academic label, whereas personality is a status conferred by the legal system.[5] There are also diverging views as to whether the capacity to create international legal obligations should be a necessary attribute for legal personality to begin with.[6]

---

2 On States, see Green, § 7.1, in this textbook.

3 In this context meaning 'intergovernmental organisations'. On international organisations, see Baranowska, Engström, and Paige, § 7.3, in this textbook.

4 Catherine Brölmann and Janne Nijman, 'Legal Personality as a Fundamental Concept of International Law' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law – Contributions to Disciplinary Thought* (Edward Elgar 2017).

5 Jan Klabbers, 'The Concept of Legal Personality' (2005) 11 Ius Gentium 35.

6 Roland Portmann, *Legal Personality in International Law* (CUP 2010).

The international legal personality of international organisations was confirmed by the ICJ in 1949 in the *Reparation for Injuries* case.[7] However, the Court made clear that the 'legal personality and rights and duties [of international organisations] are [not] the same as those of a State'.[8] No automatic set of rights or legal powers can be derived from the possession of personality as such. Instead, the nature and extent of rights of organisations depend on 'the needs of the community'.[9] Some common powers that organisations do possess are, however, the capacity to conclude treaties, to acquire and dispose of property, and to institute legal proceedings.[10]

This does not mean that the legal personality of organisations is categorically 'lesser' in the sense that the rights and obligations of organisations could never be more extensive than those of States. The paradigm example is the monopoly on authorisation of use of force possessed by the United Nations.[11]

II. CLASSICAL SUBJECTS 'IN THE GREYZONE'

In addition to States and international organisations, some actors are commonly identified at the fringes of legal subjectivity. Among such actors are for example national liberation movements, which may have a role as a de facto government, have the capacity to conclude international agreements, and possess rights and obligations under international humanitarian law. The Holy See is also considered to possess international legal personality, being a party to multiple treaties, having concluded diplomatic relations, and governing a defined territory, all of which can be considered elements of statehood.[12] Also governments in exile, as well as self-governing territories, may exercise functions that indicate the possession of limited legal personality.[13] Actors of international law can, in other words, enjoy legal personality to various degrees.

C. THE EXPANDING SPHERE OF ACTORS OF INTERNATIONAL LAW

I. THE ERODING DISTINCTION BETWEEN SUBJECTS AND OBJECTS

The concept of international legal personality has always been subject to debate. Today, as more and more actors have the capacity to possess rights and duties in international law, the question arises whether this also affects (or should affect) the conventional

---

7 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

8 Ibid 178.

9 Ibid 179.

10 See for example IMF Articles of Agreement (adopted 22 July 1944, entered into force 27 December 1945) 2 UNTS 39, articles IX(2) and VII(2).

11 Robert Kolb, *An Introduction to the Law of the United Nations* (Hart 2010). On the UN, see Baranowska, Engström, and Paige, § 7.3, in this textbook.

12 On criteria for statehood, see Green, § 7.1, in this textbook.

13 See e.g. James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 123–125.

divide between subjects and 7,2 objects of international law. The position of the individual is a classical debate in this respect, with Georges Scelle already in the early 20th century positioning individuals as international legal subjects.[14] Along with the proliferation of international human rights, humanitarian, and criminal law, the status of the individual in international law has been increasingly elevated.[15] Another actor the position of which is in change is that of animals.[16] Animals are considered rights holders,[17] and several countries have in their civil codes gone beyond treating animals as mere 'things'.[18] This has also generated calls for acknowledging at least a limited legal personality of animals.[19]

II. THE PLURALISATION OF ACTORS OF INTERNATIONAL LAW

In addition to being legal subjects and possessing international legal personality, States and international organisations are undoubtedly also 'actors' of, and 'participants' in, the international legal system. Rosalyn Higgins in 1994, building on the ideas of the so-called New Haven School, preferred to approach international law as a dynamic process of decision-making that through 'interaction of demands by various actors, and State practice in relation thereto . . . leads to the generation of norms and the expectation of compliance in relation to them'.[20] In this 'actor conception', the importance of the notion of legal personality as a threshold for the creation of international law is reduced.[21] A realisation of the limits of the conventional subjects doctrine goes hand in hand with globalisation and the consequent surge in the institutionalisation of international cooperation.[22] A State-centred image of international law is considered overly narrow both in respect of the actors that it acknowledges as well as the instruments and acts that it considers relevant.

A 'regulatory' or 'governance' layer is steadily thickening, developed through institutional regimes, atop the constitutional and legislative layer.[23] This emergence of new political arenas and actors is sometimes addressed as the 'post-national condition', taking hold of the fact that the pluralisation of actors and the corresponding

14 Georges Scelle, *Précis de Droit des Gens, Principes et Systématique* (1932) Vol I, introduction, le milieu intersocial.

15 On individuals, see Theilen, § 7.4, in this textbook.

16 On animals, see Peters, § 7.8, in this textbook.

17 Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (OUP 2005).

18 Birgitta Wahlberg, 'Animal Law in General and Animal Rights in Particular' (2021) 67 Scandinavian Studies in Law 13.

19 David Favre, 'Living Property: A New Status for Animals within the Legal System' (2010) 93 Marquette Law Review 1021.

20 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994).

21 Roland Portmann, *Legal Personality in International Law* (CUP 2010).

22 Richard Collins, 'Mapping the Terrain of Institutional Lawmaking: Form and Function in International Law' in Elaine Fahey (ed), *The Actors of Postnational Rule-Making* (Routledge 2016); Janne E Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press 2004).

23 Richard Collins, *The Institutional Problem in Modern International Law* (Hart 2016) 235; Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011).

proliferation of new forms of regulatory acts also suggests that the role of the nation State is under change.[24]

This development does not solely take place outside of the realm of States and international organisations. A phenomenon known as 'agencification' concerns the establishment of international bodies that are not based on international agreements but on decisions of international organisations. This includes, for example, subsidiary bodies established by the UN General Assembly (e.g. UNEP and UNDP), but also bodies established jointly by organisations (e.g. the WFP or the Codex Alimentarius Commission).[25] Also in the European Union agencies (e.g. the Maritime Safety Agency and the European Fisheries Control Agency) have become new sources of authority.[26] Agencies in the EU have separate legal personality,[27] whereas the situation among agencies in international law in general is more varied.

Whereas agencies display an institutional relationship to the founding organisation(s), a pluralisation of actors in international law also goes further than that practice. Under labels such as 'post-national rule-making',[28] 'global administrative law',[29] 'exercise of public authority',[30] and 'informal international lawmaking',[31] interest has been turned to less formalised forms of international collaboration. These approaches bring into focus actors such as the G20, the ISO, and ICANN, and explore the performance of their tasks, their role in global governance, the regulatory impact of their activities, and the potential status of their acts as sources of international law.[32] As part of this, also domestic authorities become of interest,[33] including cities,[34] which can bear rights and obligations and play a role in implementing international law.[35]

---

24 Damian Chalmers, 'Post-Nationalism and the Quest for Constitutional Substitutes' (2000) 27 Journal of Law and Society 178.

25 Edoardo Chiti and Ramses A Wessel, 'The Emergence of International Agencies in the Global Administrative Space' in Richard Collins and Nigel D White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011).

26 Elspeth Guild and others, *Implementation of the EU Charter of Fundamental Rights and Its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office* (2011), Report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs; Deirdre Curtin, *Executive Power of the European Union: Law Practices, and the Living Constitution* (OUP 2009).

27 European Parliamentary Research Service, EU Agencies, Common Approach and Parliamentary Scrutiny (2018).

28 Elaine Fahey (ed), *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (Routledge 2016).

29 Benedict Kingsbury, 'The Concept of Law in Global Administrative Law' (2009) 20 European Journal of International Law 23, 20–23.

30 Armin von Bogdandy and others, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010).

31 Joost Pauwelyn, Ramses Wessel, and Jan Wouters, *Informal International Lawmaking* (OUP 2012).

32 On soft law and sources beyond article 38 ICJ statute, see Kunz, Lima, and Castelar Campos, § 6.4, in this textbook.

33 See e.g. Lorenzo Casini, 'Domestic Public Authorities within Global Networks: Institutional and Procedural Design, Accountability, and Review' in Pauwelyn and others (n 31).

34 Helmut Aust and Janne E Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar 2021).

35 Yishai Blank, 'International Legal Personality/Subjectivity of Cities' in Aust and Nijman (n 34).

There are merits and demerits with this development at large, as well as in respect of particular actors (discussed more in detail in the subsequent chapters). This broadening of the scope of international law to include a varied range of actors also raises question marks concerning the conventional squaring of the notions of 'subject of international law' and 'international legal personality'.[36] At any rate it seems clear that the conventional doctrine of international legal personality can be inadequate or even an obstacle to discussing other actors than States or international organisations from a legal perspective.[37]

BOX 7.3 Advanced: Regulatory Pluralism

There are many ways in which a regulatory function or effect may arise of acts which in themselves do not create formal legal obligations. Acknowledging such an effect builds on a conception of legally binding rules as only one aspect of the international regulatory framework. 'Regulation' in this sense refers to all rules, standards, or principles that govern conduct by public and/or private actors.[38] This development has by no means been incidental but is rather the result of an active push. For example, the preamble of the Rio Declaration sets 'the goal of establishing new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people', and Agenda 21 states that these global partnerships are intended to be inclusive of all thinkable non-State actors. In a regional setting, for example the EU's approach to its macro-regions (such as the Mediterranean and the Baltic Sea), explicitly builds upon using existing funds, institutions, and legislation 'more strategically and imaginatively'.[39]

D. CONCLUSION

This chapter has positioned States and international organisations as the conventional legal subjects of international law. Out of these two, States are the legal subjects par excellence, as State consent is needed for the creation of international legal obligations, including the establishment of organisations. An increasingly expanding set of actors, however, are acknowledged as performing a regulatory function in the international legal system. This development reveals the evolutionary nature of the subject/object

36 Gerd Droesse, *Membership in International Organizations: Paradigms of Membership Structures, Legal Implications of Membership and the Concept of International Organization* (TMC Asser 2020).

37 Nijman (n 22).

38 Nupur Chowdhury and Ramses A Wessel, 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?' (2012) 18 ELJ 335, 337–338, and Joost Pauwelyn, 'Informal International Law-Making: Framing the Concept and Research Questions' in Pauwelyn and others (n 31) 13.

39 Commission, 'Report concerning the added value of macro-regional strategies' COM (2013) 468 final, 2.

dichotomy for capturing a regulatory function and effect. The following sub-chapters will further expand on the status and function in international law of a set of actors not traditionally thought of as international legal subjects.

BOX 7.4 Further Readings

Further Readings

- F Johns (ed), *International Legal Personality* (Ashgate 2010)
- E Fahey (ed), *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (Routledge 2016)
- Special Issue: *Legal Personality* (2005) 11 Ius Gentium
- Special Issue: *The Exercise of Public Authority by International Institutions* (2008) 9(11) GLJ
- RA Wessel, 'Decisions of International Institutions: Explaining the Informality Turn in International Institutional Law' (Conference Paper 2014)

§ § §

§ 7.1 STATES

ALEX GREEN

BOX 7.1.1 Required Knowledge and Learning Objectives

Required knowledge: Sources of International Law; Subjects and Actors in International Law; Founding Myths

Learning objectives: Understanding the history, nature, and contemporary context of Statehood; the law of State creation; the principles of State continuity and extinction; the status of contemporary States; and the typical legal consequences of Statehood.

A. INTRODUCTION

As quipped by Thomas Baty, international law, 'it is universally agreed . . . has something to do with States'.[40] Although States are no longer the *only* subjects of international law (if indeed they ever were), they remain some of the most important and powerful. Moreover, in the absence of a global government, States constitute some of the most important institutional actors within the international legal order in terms of law creation, interpretation, application, and enforcement. To quote James Crawford, the laws of 'Statehood are of a special character, in that their application conditions the application of most other international law rules'.[41] Given the importance and complexity of these laws, conceptual clarity is essential.

To that end, we must distinguish three sets of questions about States. The first set is *existential*, concerning the conditions necessary for new States to arise (creation), endure (continuity), and become destroyed (extinction).

Questions surrounding the existence of States are some of the most politically charged within international law. This controversy can be found not only in relation to the various national and regional independence movements that are, at the time of writing, active around the world,[42] but also, for example, within the unique challenges posed by the global climate crisis and its implications for the survival of many States at risk from rising sea levels.[43]

---

40 Thomas Baty, *The Canons of International Law* (J. Murray 1930) 1.

41 James Crawford, *The Creation of States in International Law* (OUP 2006) 45.

42 Anne Bayefski (ed), *Self-Determination in International Law: Quebec and Lessons Learned* (Kluwer Law International 2000); Julie Dahlitz (ed), *Secession and International Law: Conflict Avoidance – Regional Appraisals* (Asser 2003); Marcelo Kohen (ed), *Secession: International Law Perspectives* (CUP 2006).

43 Carolin König, *Small Island States & International Law: The Challenge of Rising Seas* (Routledge 2023).

The second set covers the *essence* of statehood, or to put this another way, the *concept of statehood* itself. These are by far the most challenging to answer, encompassing political philosophy and sociology as well as international law, and implicate issues of justice, equality, and sovereignty. The third set concerns questions of *entitlement*, encompassing the 'juridical consequences' of statehood, in terms of the characteristic rights and powers that States possess.

One might also add a further set of questions, pertaining to the characteristic *obligations* that States hold. However, given the extent to which this implicates the law of international responsibility,[44] this chapter will focus exclusively upon *existential, essential*, and *entitlement*-based questions. Before proceeding, however, brief consideration must be given to the emergence of contemporary statehood, such that these three sets of questions can be placed in their proper historical context.

B. THE NATURE AND HISTORY OF MODERN STATEHOOD

The traditional story about the dawn of modern States is that they first emerged from the 1648 Peace Settlements of Münster and Osnabrück, collectively known as the 'Peace of Westphalia'.[45] According to Leo Gross, these settlements 'undoubtedly promoted the laicization of international law by divorcing it from any particular religious background, and the extension of its scope so as to include, on a footing of equality, republican and monarchical States'.[46] This story is so inaccurate as to be effectively mythological.[47] Not only is the 'Westphalian myth' problematically Eurocentric, but States of some kind or another have existed within Europe itself since ancient times.[48]

Westphalia is nonetheless instructive, albeit because it tells us more about the attitudes of those propagating the story than it does about historical reality.[49] Particularly illuminating are historical attempts to draw retroactive lines of conceptual continuity from the early United Nations (UN) period,[50] back through the 'nation-States' of the late 19th and early 20th centuries,[51] to some mythologised point at which 'States [were recognised as] units in an international society with mutual rights and obligations'.[52] This ideological move is best understood as an attempt to legitimate the principle of

---

44 On international responsibility, see Arévalo-Ramírez, § 9, in this textbook.

45 Gerard Mangone, *A Short History of International Organization* (McGraw-Hill 1954) 100.

46 Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 AJIL 20, 26.

47 On international law's founding myths, see González Hauck, § 1, in this textbook.

48 See generally Christian Reus-Smith, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton UP 1999).

49 Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 Int'l Org. 251, 264–266.

50 On the UN, see Baranowska, Engström, and Paige, § 7.3.D., in this textbook.

51 On the 19th century, see González Hauck, § 1, in this textbook.

52 Percy H Winfield, *The Foundations and the Future of International Law* (CUP 1942) 18.

sovereign equality that predominates within international legal doctrine today (see below). It is perhaps ironic that such legitimising narratives not only risk a naturalistic fallacy (because history alone *justifies* nothing) but are also unnecessary, since the normative merits of sovereign equality can be assessed on their own terms.[53]

Beyond Westphalia, two more recent legal-historical developments merit attention. First, there is the conceptual decoupling of *statehood* from *nationhood*. Second, there is the transition from viewing the (non-)existence of statehood as an issue of *social fact* to one of *legal status*. Taking the first, the link between statehood and identifiable nations was pushed most vociferously during the inter-war period.[54] That connection has survived, at least to some extent, within particular branches of contemporary political philosophy and is most neatly captured by David Miller's claim that '"nation" must refer to a community of people with an *aspiration* to be politically self-determining, and "State" must refer to the set of political institutions that they may aspire to possess for themselves'.[55] Whatever the merits of this definition for philosophical purposes, it is legally inaccurate. There are many plurinational and multinational States, whose existence and normative value cannot be reduced to their supervenience upon one nation.[56]

Taking the second point, it was once typical to regard Statehood as a 'pre-legal' sociological fact, rather than a matter of legal status. Lassa Oppenheim famously opined that '[t]he formation of a new State is . . . a matter of fact, not law',[57] his words being echoed, for example, by Abba Eban on behalf of the State of Israel.[58] In a similar vein, Hersch Lauterpacht argued that, although States lack legal personality until they are recognised by other members of the international community, they have an existence prior to recognition, which, whilst not entirely 'pre-legal' in character, corresponds to the existence of factually effective governance over a discrete portion of the globe.[59] More recent scholarship departs from such views, with James Crawford most clearly expressing what is now the more-or-less orthodox position that

> [a] state is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.[60]

This view is wholly supported by the analysis that follows.

---

53 Steven Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (OUP 2015) 212, 219; Alex Green, 'A Political Theory of State Equality' (2023) 14(2) TLT 178, 179.

54 This general position was most famously articulated by Woodrow Wilson, then President of the United States, in a speech to Congress on 8 January 1918, in which he disclosed his 'Fourteen Points'.

55 David Miller, *On Nationality* (OUP 1995) 19.

56 Roger Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America' (2018) 31(4) LJIL 773.

57 Lassa Oppenheim, *International Law* (Vol 1, 1st edn, Longmans, Green 1905) 264; (Vol 1, 9th edn, Longman 1992) 677.

58 UNSC Verbatim Record (27 July 1948) UN DOC S/PV/339, 29–30.

59 Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 6, 26–30.

60 Crawford (n 41) 5.

C. EXISTENTIAL QUESTIONS: CREATION, CONTINUITY, AND EXTINCTION

I. CREATION

1. The Law of Recognition

Whether an entity is recognised as a State or not is of supreme practical importance. Although it is conceivable that non-recognised entities might nonetheless possess statehood, an absence of recognition typically means that the entity in question will not be treated as a State by those members of the international community that refuse to recognise it as such. If non-recognition is total, many of the benefits consequent upon statehood (see below) will not in practice be available to that entity. Moreover, since international law lacks any centralised authority for determining its State subjects, the international community of States must fulfil this function collectively through practices of *mutual* recognition. Given these points, questions of foreign recognition can often be highly controversial: for example, the State of Israel, amongst others, famously refuses to recognise the State of Palestine, largely in an attempt to ensure its (alleged) non-existence.

a) Recognition of Governments and Recognition of States

The law of recognition can be split into those principles that govern the recognition of *States* and those that, instead, concern the recognition of *governments*. Strictly speaking, the latter does not form part of the law of statehood. Where one State has recognised another, it will be legally estopped from acting on the basis that the recognised entity is *not* a State, at least until it can be demonstrated that recognition has been effectively withdrawn.[61] Changes in government, including under belligerent occupation (see below), do not ordinarily alter this position. Moreover, the very concept of 'governments-in-exile', and the effective representation of States before international organisations,[62] assumes a schism between the two. The distinction between the recognition of States and the (non-)recognition of particular governments is therefore of considerable importance. The essence of that distinction is between States as abstract legal entities, understood in the terms canvassed below, and governments as (1) the political institutions in place within those entities and/or (2) the collection of individuals who administer those institutions.[63] For example, although very few States have established formal diplomatic relations with the current Taliban government of Afghanistan, there is little doubt that Afghanistan itself remains a State under international law.

---

61 Jean Charpentier, *Le Reconnaissance Internationale et L'Evolution du Droit des Gens* (Pedone 1956) 217–225.

62 On international organisations, see Baranowska, Engström, and Paige, § 7.3, in this textbook.

63 To this extent, the distinction here differs from the most common distinction between 'States' and 'governments' within political philosophy, which is that between governance institutions, on the one hand, and governing individuals or groups, on the other. See, for example Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004) 281.

b) The 'Great Debate'

Another fundamental distinction that needs to be drawn concerns the 'great debate' that surrounds the question of whether recognition is *declaratory* or whether it *constitutes* Statehood, in the sense of imbuing erstwhile non-State entities with that status.[64]

This disagreement holds between those who believe recognition to be merely declarative of already existing statehood, and those who believe recognition instead constitutes (or 'creates') that status. The debate, at its most fundamental level, concerns the nature of statehood itself. According to the most extreme version of the declaratory view, recognition is a purely political act that signifies little more than a willingness to engage in full diplomatic relations.[65] On the most uncompromising version of the constitutive view, statehood itself exists only relatively speaking, which is to say only *between* entities that recognise the statehood of each other.[66] Both views are, according to general consensus, mistaken. Contemporary proponents of the declaratory view typically hold that, although statehood is not legally contingent upon receiving foreign recognition, recognition is nonetheless probative because existing States bear primary legal responsibility for identifying new States as a matter of customary international law.[67] Conversely, contemporary proponents of the constitutive view often hold that although widespread recognition is not always *necessary* for State creation, it can be *sufficient*, with recognition itself representing just one means through which statehood can be conferred.[68]

In light of this moderation, it may seem odd that the 'great debate' is still presented in such terms. One explanation may be the insistence in some quarters that 'the declaratory view is generally more consistent with the practice of States',[69] as well as the less controversial claim that '[a]mong writers the declaratory doctrine, with differences in emphasis, predominates'.[70] Logically speaking, there is no necessary dichotomy, at least not between more moderate variants of both views. It is entirely consistent to hold, for example, that foreign recognition has *both* probative value *and* constitutive effect in relation to State creation. Moreover, there is no logical obstacle to Statehood arising *without* widespread foreign recognition in some cases and nonetheless arising (at least partly) *because of* recognition in others.

The better view is that widespread foreign recognition can indeed have constitutive effect but that it is insufficient for statehood to arise.[71] Recognition *bolsters* nascent

64 Crawford (n 41) 26.

65 See, for instance, Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 89–90.

66 Robert Redslob, 'La reconnaissance de l'état comme sujet de droit international' (1934) 13(2) Revue de Droit International 429, 430–431.

67 Crawford (n 41) 27.

68 See for example Jure Vidmar, *Democratic Statehood in International Law: The Emergence of States in Post-Cold War Practice* (Hart 2013) 238.

69 Ratner (n 53) 186.

70 Crawford (n 41) 25.

71 Alex Green, *Statehood as Political Community: International Law and the Emergence of New States* (CUP 2024) chapter 4.

statehood: where one or more antecedents of Statehood are in doubt, widespread recognition can act as a legal counterweight, 'pulling' towards the conclusion that a new State has emerged.[72]

c) The Collective Duty of Non-recognition

The importance of recognition is such that there are circumstances under which it should not be extended. Within political philosophy, a lively debate persists over precisely when, normatively speaking, nascent entities should not be recognised as possessing statehood.[73] Insofar as international law is concerned, established States will have a duty *not* to recognise nascent entities when their emergence is attended by serious international illegalities. These are, namely, violations of the norms underlying the procedural principles canvassed below: self-determination, territorial integrity, and the prohibition on the threat or use of force. In practice, violation of the second norm (territorial integrity) is typically attended by violation of the first (self-determination) or third (the prohibition on force). Nonetheless, all three contribute towards the normative foundations of collective non-recognition in justificatory terms.

BOX 7.1.2 Example: Independence of Southern Rhodesia

Southern Rhodesia declared independence from the United Kingdom on 11 November 1965 under the moniker 'Rhodesia'. Controlled by a white minority, and unopposed militarily by the United Kingdom, it was condemned by the UN Security Council (UNSC) and the UN General Assembly (UNGA) for its racial segregation and widespread ethnic discrimination. (See UNSC resolutions 217 (1965), 253 (1968), and 277 (1970); and UNGA resolutions 2022 (XX), 5 November 1965 and 2024 (XX), 11 November 1965.) Crucially, despite swiftly gaining 'effective' government in the sense described below, international refusal to recognise either entity was essentially total. Southern Rhodesia no longer exists, following the 1979 Lancaster House Agreement and the resulting independence of the Republic of Zimbabwe on 18 April 1980.

2. The Antecedents of Statehood

Accepting the above, particular conditions must be fulfilled before any plausible claim can be made that a new State has emerged. These conditions are best understood as the factual 'antecedents' of statehood and constitute, in effect, a collection of paradigmatic

72 This explains, for instance, the emergence of Bosnia and Herzegovina, which is generally accepted to have emerged in the absence of effective governmental control, and also the more-or-less uncontroversial statehood of the Principality of Monaco, which for some considerable time lacked important indicators of political independence. See Alex Green, 'Successful Secession and the Value of International Recognition' in Jure Vidmar, Sarah McGibbon, and Lea Raible (eds), *Research Handbook on Secession* (Edward Elgar 2023).

73 See, for example, the arguments and references within Buchanan (n 63) 266–288.

properties that new States must possess.[74] These antecedents are often treated as providing a *definition* of statehood.[75]

While the historical roots are within customary international law,[76] the antecedents are most famously referenced within article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.[77] These 'Montevideo criteria' were once considered dispositive; however, this is no longer the case.[78] Making adjustments for contemporary practice and scholarship, a more accurate list of factual antecedents reads as follows: (1) a permanent population; (2) a more or less defined territory; (3) an effective government; and (4) relative political independence.[79]

Although all four antecedents are important for State creation, they do not operate as a set of strictly necessary conditions. In some cases, one or more antecedents may be present to a lesser extent than usual and, nonetheless, State creation may still occur. The most commonplace circumstances are where statehood is widely recognised despite the absence of effective governance. In such circumstances, that recognition arguably has a partly constitutive role. A holistic judgment in relation to any given case is thus necessary.

a) A Permanent Population

This antecedent requires there to be a more or less identifiable body of people who are habitually resident upon the territory of the nascent State. Various justifications for this have been posed, however most agree that (1) States are concerned with governance and (2) governance requires an identifiable group of 'the governed'.[80] In contemporary law, there are no limitations upon the size of this group. Tuvalu and the Republic of Nauru, which have populations of under 1 million, are no less States than the Republic of India and the People's Republic of China, which have populations well in excess of 1 billion. Historically, this point was not so clear. As recently as the early 20th century, some smaller States, such as the Grand Duchy of Luxembourg and the Principality of Liechtenstein, were considered by several larger entities to be of dubious international status, largely on the basis of their relative size.[81] Moreover, although numerous 'micro-States' have now joined the UN, they were once excluded from the League of

74 Green (n 71) chapter 3.

75 For example: Matthew Craven, 'Statehood, Self-Determination, and Recognition' in Malcolm D Evens (ed), *International Law* (4th edn, OUP 2014) 216–226.

76 *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 A.D. 11, 15.

77 Montevideo Convention on the Rights and Duties of States, adopted at Montevideo (26 December 1933, entered into force 26 December 1934).

78 Thomas Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law 403.

79 The fourth Montevideo criterion, the 'capacity to enter into relations with other States', is best viewed as either an element of effective government and political independence or as a legal consequence of Statehood, rather than an antecedent of that status.

80 Green (n 71) chapter 3.

81 Craven (n 75) 218.

Nations on the basis of their size.[82] A survey of more contemporary practice, however, shows conclusively that in 'modern' international law size does not matter.[83]

One other important point to note is that the presence or absence of a permanent population for the purposes of State creation does *not* require exclusive ties of *nationality* between that population and the nascent entity. Nationality is determined in relation to the domestic laws of established States, or else by treaty.[84] It follows from this that an entity must possess statehood, or at least an analogous international status,[85] *before* nationality can arise in relation to it. To avoid any transitional issues arising from State creation by secession or devolution (see below), the position in contemporary international law appears to be that, absent any contrary agreement, nationality of a new State automatically arises in relation to the people habitually resident upon its territory.[86]

b) A More or Less Defined Territory

States are territorial entities, traditionally delineated with reference to their inhabitable land but with consequent entitlements to any internal waters, territorial sea, and to the airspace above this 'horizontal' territory. This means that some more or less determinate land-based territorial unit must be identifiable in relation to which a nascent State can be said to exist. This point has been put somewhat more extremely by some, such as Philip Jessup, who commented in his capacity as representative of the United States 'that one cannot contemplate a State as a kind of disembodied spirit'.[87]

However, that territory does not have to be either contiguous or of any particular size. The Republic of Indonesia, which comprises around 17,500 separate islands,[88] is no less a State than the Republic of Kenya or the Republic of Bulgaria, whilst even very small territorial units can be subject to plausible statehood claims.[89] Furthermore, the existence of disputes over the status or extent of the territory in question will not prevent statehood from arising.[90] One illustrative example is that of the State of Israel,

---

82 Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 EJIL 599, 607.

83 Crawford (n 41) 52.

84 *Nottebohm Case (second phase) (Liechtenstein v. Guatemala)* (Merits) [1955] ICJ Rep 4 [23].

85 One clear example of this is the Republic of China (Taiwan), which while not formally recognised as a State itself has functioning nationality laws that *are* recognised by a preponderance of other States.

86 Crawford (n 41) 53. See also *Acquisition of Polish Nationality* (Advisory Opinion) [1923] PCIJ Rep Series B No 7.

87 UNSC Verbatim Record (2 December 1948) UN DOC S/PV/383, 11.

88 Indonesia, 'Identification of Islands and Standardization of Their Names' 11th UN Conference of the Standardization of Geographical Names (New York 8–17 August 2017) (30 June 2017) UN DOC E/CONF.105/115/CRP.115.

89 Thomas Franck and Paul Hoffman, 'The Right of Self-Determination in Very Small Places' (1976) 8(3) New York University Journal of International Law and Politics 331, 383–384. See also Jorri Duurmsa, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (CUP 1996) 117.

90 See, for example: *Monastery of Saint-Naoum* (Advisory Opinion) [1924] PCIJ Rep Series B No 9 and *Question of Jaworzina* (Advisory Opinion) [1923] PCIJ Series B No 8, both of which assume this point; and *North Sea Continental Shelf* (Merits) [1969] ICJ Rep 3, 32 and *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* (Merits) [1994] ICJ Rep 6, 22, which both confirm the point, at least in relation to disputed boundaries.

which was admitted to the UN on 11 May 1949 notwithstanding ongoing disputes as to *both* the extent of its territorial limits *and* the soundness of its claim to hold any territory at all in a lawful manner.[91]

c) An Effective Government

According to several orthodox views, the requirement of effective government is central to State creation.[92] Indeed, Crawford goes so far as to suggest that the territorial antecedent itself is little more than a specification of the fact that 'effective government' means 'effective governmental control over a more or less defined territory'.[93] Whether or not this is true, it is clear that effectiveness holds considerable sway over the emergence of statehood in the ordinary course of events. In the case of the Republic of Finland, which seceded from the Russian Empire in 1917, the prevalence of 'revolution and anarchy' was held to have prevented the new State from arising until May 1918.[94] Such cases have often been argued to be paradigmatic.[95]

Two questions nonetheless persist in relation to the effectiveness antecedent. The first is what precisely makes a government 'effective': what are the conditions (or 'desiderata') of effectiveness and how, as a result, does the law of statehood conceptualise governance? Call this the 'purposive' question. The second concerns the *extent to which* government must be effective, no matter what 'effectiveness' may mean in purposive terms. Call this the 'variability' question. Both questions have more or less orthodox answers, which are characterised by Crawford in the following terms:

> to be a State, an entity must possess a government or a system of government in general control of its territory, to the exclusion of other entities . . . [and] international law lays down no specific requirements as to the nature and extent of this control, except that it include some degree of maintenance of law and order and the establishment of basic institutions.[96]

What does seem clear is that, purposively speaking, 'effective' government does not imply democracy, nor does it require a demonstrable capacity to achieve the full and speedy protection of basic human rights.[97] In terms of variability, it seems that at least in some circumstances, such as those where statehood goes effectively unopposed, the requirement that government establish 'some degree of maintenance of law and order' might be extremely thin. For example, when the Kingdom of Belgium was forced to grant independence in 1960 to what is now the Democratic Republic of Congo (DRC), the latter swiftly suffered several secession movements within its territory, an

---

91 UNGA Res 273 (III) (11 May 1949); UNSC Res 70 (4 March 1949) UN DOC S/RES/1280.

92 Crawford (n 41) 55.

93 Ibid 52, 56.

94 *Aaland Islands Case* (1920) L.N.O.J. Spec. Supp. No. 3 [8]-[9].

95 See generally: Thomas Baty, 'Can an Anarchy Be a State?' (1934) 28(3) AJIL 444.

96 Crawford (n 41) 56.

97 Vidmar (n 68) 39, 65, 241–242.

upsurge in endemic violence, and a continued Belgian military presence.[98] Nonetheless, the DRC was quickly recognised to be an independent State.[99]

d) Relative Political Independence

Nascent States must demonstrate an absence of foreign *domination*,[100] which is distinguishable from both the absence of foreign political *influence* and the absence of *dependence* upon foreign infrastructure. For example, no serious doubt pertains as to the independence of the Principality of Liechtenstein, notwithstanding the fact that (out of logistical necessity) it makes use of Austrian prisons rather than maintaining its own. Such cases can be usefully contrasted with the erstwhile foreign policy of Great Britain, which historically claimed an entitlement to bind its Dominions, for instance, to the 1924 Treaty of Lausanne without their permission. Such asymmetric authority claims constitute foreign – in this case, colonial – domination par excellence.[101]

Non-domination can be assessed both formally and de facto. Formally, independence will be in doubt where another State makes a legally plausible authority claim over the territory in question, whether that claim of right concerns the internal affairs or the foreign relations of the affected entity.[102] In de facto terms, the question is whether there exists substantial external control over the governmental functions or territory of the nascent entity by some other State. For example, the purported creation of the State of Manchuria (Manchukuo) by the erstwhile Empire of Japan in 1932 was generally denied recognition on the basis that Manchukuo was, in fact, a 'puppet' State lacking de facto independence.[103] As this also demonstrates, in circumstances where formal independence is apparent but de facto independence is lacking, the latter should be considered the more probative.

3. Procedural Principles

Plausible claims to statehood may nonetheless fail if the nascent entity violates one of three procedural principles, which, in combination with the cumulative effects of recognition, mediate the process of State creation. Before canvassing the principles, it must be stressed once more that they are not generally considered to be absolute disqualifiers for the creation of new States.[104] In each case, holistic judgment is required. However, it is highly likely that a failure to satisfy even one procedural principle will result in statehood *not* accruing. Moreover, violation of one of these three is characteristically sufficient to trigger the duty of collective non-recognition.

---

98 Thomas Kanza, *Conflict in the Congo: The Rise and Fall of Lumumba* (Penguin Books 1972) 78, 109, 192; UNGA Res 1599 (XV) (15 April 1961).

99 UNSC Res 142 (7 July 1960) UN DOC S/RES/142; UNGA Res 1480 (XV) (20 September 1960).

100 Green (n 71) chapter 3.

101 Crawford (n 41) 71–72.

102 Ibid.

103 *Sino-Japanese Dispute – Advisory Committee of the Special Assembly, Resolution of 24 February 1933*: LNOJ Sp Supp no 101/1, 87.

104 Cf. Green (n 71) chapter 4.

a) 'Negative' Self-Determination

There is a strong legal presumption against State creation where this would result in the formal disenfranchisement or political subordination of large sections of a territory's extant population. This presumption is a function of collective self-determination as an underlying value of contemporary international law.[105] In addition to weighing against State creation in circumstances where this 'negative' requirement of self-determination is breached, the emergence of an entity in violation of this principle operates as a trigger for the duty of collective non-recognition. This can be seen most clearly in the alleged emergence of the Turkish Republic of Northern Cyprus, as well as in the unsuccessful attempts, by the apartheid government of South Africa, to create the Bantustans of Transkei,[106] Bophuthatswana,[107] Venda,[108] and Ciskei.[109]

BOX 7.1.3 Example: Northern Cyprus

Northern Cyprus emerged in 1974 under a Turkish Cypriot administration with military support from the Republic of Turkey (*Loizidou and Cyprus (intervening) v Turkey*, Merits, [1996] ECHR 70, paras 16–23). Its creation resulted in some 211,000 Greek Cypriots being displaced from the North, whilst those who remained faced severe restrictions upon their liberty, most notably in terms of freedom of movement (*Cyprus v Turkey*, Merits, App no 25781/94, (2002) ECHR 2001-IV, paras 28–48). These dispossessions and restrictions caused mass disenfranchisement, which resulted in collective non-recognition under the auspices of the UNSC (UNSC resolutions: 541, 18 November 1983; and 550, 3 May 1984). To date, only Turkey recognises the statehood of this entity.

b) The Presumption in Favour of Territorial Integrity

This presumption is a function of the entitlements that established States enjoy to (1) continue to possess territory to which they are legally entitled and (2) administer that territory free from the wrongful interference of other States.[110]

The importance of this principle reinforces the application of the other procedural principles. By virtue of the presumption that established States will remain whole, greater weight is placed upon any illegality occasioning State creation. This can be seen,

105 Crawford (n 41) 128–131. On self-determination, see Bak-McKenna, § 2.4, in this textbook.

106 Status of Transkei Act 100 of 1976.

107 Status of Bophuthatswana Act 89 of 1977.

108 Status of Venda Act 107 of 1979.

109 Status of Ciskei Act 110 of 1981.

110 See also UNGA 2625 (XXV) (24 October 1970) UN DOC A/RES/25/2625, principle 5; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, paras 191–193; Conference on Security and Co-operation in Europe. Final Act, Helsinki 1975, article IV.

for example, in the response of the international community to the Russian Federation's unlawful recognition of the so-called Donetsk People's Republic and Luhansk People's Republic in the Donbas region of Ukraine in 2022.[111]

Furthermore, it entails that international law grants no entitlement to secession (the creation of new States via *unilateral* departures from 'parent' entities).[112] The orthodox argument is that only erstwhile colonies possessed a *right* to independent statehood and that, following the decolonisation movement, no entities now exist to which such a right might apply.[113] Instead, following the International Court of Justice in its advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*,[114] this line of argument maintains that international law (1) generally *permits* secession but accords no entitlement to secede, but (2) will nonetheless hold secession unlawful when it is occasioned by violations of self-determination or the prohibition on the use of force.[115] This arrangement protects territorial integrity, according to some scholars, because the absence of a right to secession means that nascent entities must prove either that their independence was *granted* by their 'parent' State or that they exhibit the antecedents of Statehood to such an extent (and for such a length of time) that the practical reality of their Statehood cannot be cogently denied.[116]

As a result, grants of independence have considerable importance. Such grants characteristically occur through devolution (the creation of new States via the *consent* of parent entities).[117] Where this consent is provided, no issues of territorial integrity arise. In this respect, consent places new States in an analogous normative position to those arising from the *dissolution* of their predecessors. In both cases, the territorial integrity of the erstwhile sovereign no longer pertains.

c) The Prohibition on the Threat or Use of Force

This prohibition is enshrined in article 2(4) of the UN Charter.[118] Attempts to create States through the unlawful use of force will trigger duties of collective non-recognition. This is justified not only by the importance of ensuring that unlawful force does not benefit States that use it but also by the need to uphold the territorial integrity of affected State from the attacks of foreign belligerents. Evidence for this duty

---

111 See, for example: *Statement by Ambassador Martin Kimani, during the Security Council Urgent Meeting on the Situation in Ukraine*, 21 February 2022, para 2; *Prime Minister's statement on Ukraine (United Kingdom)*, 22 February 2022, HC Deb 22 February 2022, Vol 709, col 173; *Statement of Mélanie Joly, Minister of Foreign Affairs (Canada)*, 21 February 2022, Ottawa, Ontario, Global Affairs Canada, para 3.

112 *Reference re Secession of Quebec*, 1998 SCJ No 61 [155].

113 Crawford (n 41) 415.

114 [2010] ICJ Rep 403 [436]-[438].

115 Marko Milanovic, 'A Footnote on Secession' (*EJIL: Talk!*, 26 October 2017) <www.ejiltalk.org/a-footnote-on-secession/> accessed 28 February 2022.

116 Vidmar (n 68) 52–53.

117 Crawford (n 41) 330–373. Devolution, in this sense, should not be confused with any internal devolution of governmental power that stops short of granting independent statehood.

118 On the use of force, see Svicevic, § 13, in this textbook.

can be found, for example, in the international response to the Russian Federation's 2022 military invasion of Ukraine, which purported to be for the purpose of securing 'remedial' independence for the so-called Donetsk People's Republic and Luhansk People's Republic within the Donbas region.[119]

Some have suggested that unilateral foreign intervention might be permissible to secure regional secession in response to mass atrocities conducted by a parent State.[120] One example might be the People's Republic of Bangladesh (or East Pakistan as it was then known), which gained generally recognised independence despite unilateral military intervention by the Republic of India.[121] However, even those who argue in favour of a right to remedial secession typically stop short of arguing that India's unilateral intervention was lawful as a result.[122] A more credible view is that evidence of mass atrocities renders international countermeasures short of unilateral military intervention permissible. It is also possible that the international community may, at the same time, come under an 'imperfect' obligation to provide military support for independence under the auspices of the UNSC but that the lawfulness of military intervention would be contingent on an authorising resolution being adopted.[123]

II. CONTINUITY AND EXTINCTION

1. The Presumption of Continuity

States are, in general, far harder to destroy than they are to create. This is so because there exists, as a matter of customary international law, a strong but rebuttable presumption of State *continuity*, which serves to ensure relative geopolitical stability.[124] Nonetheless, States can and do become extinct. This happens when the antecedents of Statehood become absent to such an extent and for such a length of time that it no longer remains plausible to hold that an independent entity exists. However, the threshold for this occurring is, due to the presumption in favour of continuity, extremely high. An effective government, for example, may remain absent for

---

119 Decree of the President of the Russian Federation, 21 February 2022, No. 71, 'On the recognition of the Donetsk People's Republic'; Decree of the President of the Russian Federation, 21 February 2022, No. 72, 'On the recognition of the Luhansk People's Republic'.

120 Green (n 71) chapter 4; Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 ICLQ 857, 880.

121 Jean JA Salmon, 'Naissance et Reconnaissance du Bangladesh' in *Multitudo legum, ius unum: Melanges en honneur de Wilhelm Wengler* (Interrecht 1973) 478–480.

122 Green (n 71) chapter 4.

123 Following UNGA Res 337 (V) (3 November 1950), the General Assembly may make recommendations for the adoption of sanctions but cannot, by itself, authorise military action, see Rebecca Barber, 'What Can the UN General Assembly Do About Russian Aggression in Ukraine?' (*EJIL: Talk!*, 26 February 2022) <www.ejiltalk.org/what-can-the-un-general-assembly-do-about-russian-aggression-in-ukraine/> accessed 28 February 2020. See on humanitarian intervention Svicevic, § 13.E.II.2., in this textbook.

124 See the detailed, if somewhat historical, review of State practice provided by Krystyna Marek in her *Identity and Continuity of States in International Law* (Librairie E. Droz 1954) 15–126; and also Crawford (n 41) 671–673, 700–701, 715–717.

many years without the extinction of the State in question. In a similar vein, even considerable changes in territory, or the total loss of de facto independence due to belligerent obligation, will not ordinarily result in the extinction of the affected State.[125] It is indicative that only eight States became extinct in the period between 1945 and 2005, whilst within the same period 128 new States came into being.[126] One important example of extinction is the former Socialist Federal Republic of Yugoslavia, the dissolution of which resulted – following protracted conflict, complicated by considerable international intervention – in the emergence of what are now Bosnia and Herzegovina, the Republic of Croatia, Montenegro, the Republic of North Macedonia, the Republic of Serbia, and the Republic of Slovenia, as well as the partially recognised Republic of Kosovo.[127]

2. Extinction and Succession

If a State does become extinct, its space on the map will not remain empty for long. Should a new State arise within the territory of an extinct entity, we must then ask whether the newcomer will be a 'successor' to the former State.[128] Already existing States can also succeed others, either where an establish entity absorbs the territory of an extinct community, or where two or more established States merge to form a new entity.[129] More generally, succession to existing rights and obligations is possible following secession or devolution, as well as, historically speaking, decolonisation. The question arising is whether the new entity in fact succeeds to the obligations of the previous one. Unfortunately, the 'law of State succession' (such as it is) forms little more than an area of legal controversy concerning what happens when the statehood of one entity is displaced by that of another.[130] There is no 'overriding principle, or even a presumption, that a transmission or succession of legal rights and duties occurs in a given case'.[131]

In general, only the following propositions hold with any degree of certainty. First, where a successor State emerges but its predecessor State endures (e.g. within circumstances of decolonisation), succession to treaties is not possible, with the notable exception of boundary treaties, which govern the extent of the new entity's extant borders.[132] Second, successor States are not liable for their predecessor's international wrongdoing unless they have by conduct adopted the unlawful activity in question.[133] Third, membership of international organisations characteristically does not pass

125 Crawford (n 41) 673–678, 688–690.

126 Ibid 715–716.

127 For a detailed discussion of this process, see Vidmar (n 68) 66–111, 117–136, 176–184.

128 Daniel P O'Connell, *The Law of State Succession* (CUP 1956) 3–6.

129 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 423.

130 Arman Sarvarian, 'Codifying the Law of State Succession: A Futile Endeavour?' (2016) 27(3) EJIL 789.

131 Ibid.

132 Arnold McNair, *The Law of Treaties* (OUP 1961) 592, 600–601, 629, 655.

133 *Robert E Brown (United States v. Great Britain)* (1923) 6 R.I.A.A. 120; *Redward and Others (Great Britain) v. United States (Hawaiian Claims)* (1925) 6 R.I.A.A. 157; *Lighthouses Arbitration between France and Greece (France v Greece), Claims No 11 and 4* (1956) 23 I.L.R. 81. On State responsibility and attribution, see Arévalo-Ramírez, § 9, in this textbook.

to succeeding States, although special accommodation can be made and the matter ultimately rests with the constitution or charter of the relevant organisation.[134] Succession to treaty obligations is now partially governed by the 1978 Vienna Convention on Succession of States in respect of Treaties, although only 23 States have both signed and ratified that Convention. As such, it is typically necessary to proceed by examining discrete customary principles and treaty arrangements that may or may not govern particular State successions. To take one example, the 1919 Treaty of St Germain-en-Laye covered the inheritance of public debts by the successor States to the Austro-Hungarian monarchy, while there is a generally accepted customary presumption, to take another example, that ownership of public property on the territory of a successor State is passed to that successor.[135]

Most importantly for present purposes, *succession* is both conceptually distinct from the *continuity* and *identity* of States and mutually exclusive with those two things. Where a State is identical with some prior entity, issues of succession do not arise. In cases of continuity and identity – and not in circumstances of succession – every single entitlement and obligation of a State can be *presumed* to endure through time. One example is Russia, considered to be identical with the former Soviet Union.

3. Continuity and the Climate Crisis

One particularly troubling possibility caused by the contemporary law of continuity and extinction is the existential threat posed to Small Island Developing States (SIDS) by the global climate crisis.[136] Several SIDS may well suffer *legal extinction* due to human-caused climate change.[137] On an 'austere view' of State continuity, the total loss of their territory, if physically irrecoverable, would result in a loss of statehood, rendering the erstwhile population of affected SIDS stateless.[138] Currently, several SIDS, including Vanuatu and Tuvalu, are taking steps to combat the austere view as part of an overall attempt to address the long-term harms they stand to suffer from the global climate crisis.[139]

---

134 See generally: Konrad Bühler, 'State Succession, Identity/Continuity and Membership in the United Nations' in Pierre Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (Brill Nijhoff 1997). On international organisations, see Baranowska, Engström, and Paige, § 7.3, in this textbook.

135 *Appeal from a Judgment of Hungaro-Czechoslovak Mixed Arbitral Tribunal (Czechoslovakia v. Hungary)*, 1933 P.C.I.J. (ser. A/B) No. 61 [237].

136 Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise (51st Pacific Islands Forum, 6 August 2021) <www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/> accessed 10 August 2023. On climate law, see Viveros-Uehara, § 17, in this textbook.

137 Kate Pucell, *Geographical Change and the Law of the Sea* (OUP 2019) 228–229; Carolin König, *Small Island States & International Law. The Challenge of Rising Seas* (Routledge 2023) chapter 3.

138 Alex Green, *'The Creation of States* as a Cardinal Point: James Crawford's Contribution to International Legal Scholarship' (2022) 40(1) AYBIL 68, 82–83.

139 'Vanuatu to Seek International Court Opinion on Climate Change Rights' (*The Guardian*, 26 September 2021) <www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights> accessed 21 February 2022.

D. QUESTIONS OF ESSENTIALITY: SOVEREIGNTY AND EQUALITY

I. THE BASIC QUESTION

Different academic disciplines may ask 'what States are' for different reasons, not all of which will be strictly relevant to international law. Within legal and political philosophy, for example, the essence of statehood is typically interrogated in relation to its purpose. In this way, Allen Buchanan characterises States as the units of human social and political organisation responsible for securing justice via the protection of fundamental human rights.[140] Purely legal accounts of statehood are typically articulated in two ways (although these sometimes overlap). They either reflect the antecedents of statehood, on the basis that statehood reduces to a particular kind of effective territorial governance, or they list 'the exclusive and general legal characteristics of States'.[141]

However, some have developed discrete understandings of statehood based on philosophically informed reconstructions of international legal doctrine.[142] These reconstructions are unique insofar as they each reinterpret the law of statehood in light of particular philosophical principles, whilst at the same time constructing the full account of those principles with reference to contemporary law.[143] Substantively, such work characterises statehood *as it exists within contemporary law* in terms of political community,[144] legitimate governance,[145] or republicanism.[146] Notwithstanding the insights offered by such approaches, I stick to more 'mainstream' doctrinal work in what follows.

II. SOVEREIGN STATEHOOD AS STATUS AND CAPACITY

Sovereignty can be an unhelpfully opaque legal concept, due to the controversial place it holds within domestic law, normative philosophy, and contemporary political rhetoric. Internationally, 'sovereignty' is often used as synonym for statehood itself ('a sovereign State'), as shorthand for the minimal degree of political independence necessary for statehood to arise or endure, or else to express the residual liberty that States possess when they are not otherwise legally bound.[147] Moreover, 'sovereignty' can

140 Buchanan (n 63) 98–105, 235–238, 247–249.

141 Crawford (n 41) 40–41.

142 Green (n 71); Fernando Tesón, *A Philosophy of International Law* (Westview Press 1997) 57–66; Mortimer Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (Palgrave Macmillan 2006) 33–37, 95–103.

143 They mirror, to this extent, the work of Ronald Dworkin (and others) within domestic/municipal jurisprudence, see Dworkin, *Law's Empire* (Hart 1986) 56–72, 87–88, 250–256.

144 Green (n 71).

145 Tesón (n 144).

146 Sellers (n 144).

147 Kamal Hossain, 'State Sovereignty and the United Nations Charter' (MS DPhil d 3227, Oxford 1964).

not only be used to articulate claims of territorial title ('sovereignty *over* territory') but also as a catch-all for the complete set of legal capacities and entitlements that States characteristically possess.[148]

Historic usage tended to link sovereignty to the existence of an identifiable sovereign.[149] In the words of Thomas Hobbes, such an entity 'consisteth the Essence of the Common-wealth'; which (to define it,) is

> One Person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.[150]

This historic insistence upon the right of sovereigns to act 'as [they] shall think expedient',[151] created within both philosophy and law 'a tendency to associate with [sovereignty] . . . the idea of a person above the law whose word is law for his inferiors or subjects'.[152]

An important contemporary implication of this is the common but mistaken belief that sovereign statehood entails *legally unlimited* authority.[153] This has caused some international lawyers to pose as a 'dilemma' the question, 'Can the existence of rules binding upon States be reconciled with the very notion of sovereignty?'[154] Much like the old theological paradox of whether an omnipotent God can create a stone that He is incapable of lifting,[155] this line of enquiry asks, for example, whether 'sovereign States' can 'truly' possess the capacity to bind themselves via treaty. If we say 'yes', then they can become legally bound, which undermines their 'unlimited' authority, whereas if we say 'no', then that authority is *also* undermined, since they cannot then have the authority to bind themselves.[156]

The answer to this 'dilemma' lies in rejecting the belief that sovereignty implies unlimited authority. Rather than being inconsistent with legal obligation, State authority is itself an aspect of international law and therefore must possess legally defined limits.[157] This holds because the sovereignty of any single State *because it*

148 Crawford (n 41) 32.

149 John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) Lecture VI. On international law's founding myths, see González Hauck, § 1, in this textbook.

150 Thomas Hobbes, *Leviathan or the Matter, Forme, and Power of a Common-Wealth Ecclesiastical and Civil* (Andrew Crooke 1651), chapter XVII ('The Definition of a Common-wealth').

151 Cf. David Dyzenheus, 'Hobbes and the Legitimacy of Law' (2001) 20(5) Law and Philosophy 461.

152 HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 221.

153 On one interpretation, this notion grounded the ruling of the Permanent Court in *The Lotus* (supra n 111).

154 Jan Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon Redux' (1999) 3 ARIEL 345, 348.

155 Thomas Aquinas, *Summa Theologica*, Book 1, Question 25, article 3.

156 Timothy Endicott, 'The Logic of Freedom and Power' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 246.

157 Ibid 246–252. On jurisdiction, see González Hauck and Milas, § 8, in this textbook.

is a State necessarily implies the equal sovereignty of all others. In a world where more than one State exists, freedom from obligation and wholly unlimited authority thus becomes illogical.[158] 'Sovereignty' thus means no more nor less than the full set of legal capacities ordinarily associated with statehood. To put this another way, to be sovereign for the purposes of international law means to have the *status* of an established State. In concrete terms, this has two implications. First, that the acquisition and maintenance of sovereignty turns on the law that governs the creation, continuation, and extinction of States, even though this law may then be supplemented by other principles such as human rights. Second, 'sovereignty as status and capacity' means that sovereignty implies the entitlements canvassed below in addition to the *obligations* necessary to secure those entitlements by all States on a formally equal basis.

III. SOVEREIGN EQUALITY IN AN UNEQUAL WORLD

Although States possess *formal* equality,[159] in almost all other respects they are staggeringly unequal.[160] For example, extensive scholarship exists on disparities of international power,[161] within which considerable attention is paid to the inequalities of global influence created by the existence of the so-called Great Powers.[162] States are also unequal, to take another example, in terms of their size (both geographically and demographically), their access to natural resources, and qualitatively, in terms of their democratic credentials and their compliance with international human rights standards.[163] Moreover, some have coastlines whilst some are landlocked, whilst others govern unique ecosystems, cultural sites, and indigenous communities.[164] In light of this, it is difficult to imagine a group of 'equals' with *less equality* than contemporary States. Fortunately for present purposes, to invoke equality is, conceptually speaking, to *preclude* total sameness. If two things are identical, in the

158 Henry Shue, 'Limiting Sovereignty' in Jennifer Welsh (ed), *Humanitarian Intervention and International Relations* (OUP 2004) 16.

159 See, for example: Charter of the United Nations (adopted 26 June 1945, San Francisco, entered into force 24 October 1945) 1 UNTS XVI, article 2; Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 EJIL 599, 600; *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* (Order of 3 March 2014) [2014] ICJ Rep 147, paras 26–28; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99, para 57; and *Arrest Warrant of 1 I April 2000 (Democratic Republic of the Congo v. Belgium)* (Merits) [2002] ICJ Rep 3 [62]-[71].

160 Philip Jessup, 'The Equality of States as Dogma and Reality' (1945) 60(4) PSQ 527, 528.

161 See, for example: Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 2009); James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Brill 2014); Jack Goldsmith and Eric Posner, *The Limits of International Law* (OUP 2007).

162 Gerry Simpson: 'The Great Powers, Sovereign Equality and the Making of the United Nations Charter' (2000) 21 Aust YBIL 133; *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2009); 'Great Powers and Outlaw States *Redux*' (2012) 43 NYIL 83.

163 Sean Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 ICLQ 545, 556; Gregory Fox and Bradley Roth, 'Democracy and International Law' (2001) 27 Review of International Studies 327, 337.

164 On indigenous peoples, see Viswanath, § 7.2, in this textbook.

sense that they are completely indiscernible, then they are not equal but entirely the same.[165] The formal equality of States should therefore be understood in terms of *normative* equality, which is to say an *equality of status*. To paraphrase the philosopher Thomas Nagel, States are formally equal in that they hold the same place within the 'normative community' of international law.[166] The content of that status is controversial, being connected to the philosophical as well as the legal essence of States;[167] however, its *implications* are reasonably clear and encompass the full incidents of sovereignty (canvassed above).[168]

E. QUESTIONS OF ENTITLEMENT: THE JURIDICAL CONSEQUENCES OF STATEHOOD

I. AUTONOMY AND SECURITY ENTITLEMENTS

The entitlements that protect the autonomy and security of States correspond to their right to continue to exist *as* States, which is to say as 'sovereign' members of the international community. For this reason, several of these entitlements correspond, in a more or less direct manner, to the existential conditions for the creation and continuation of Statehood, canvassed above.[169]

1. Territorial Integrity

As canvassed in the section 'The Presumption in Favour of Territorial Integrity', the principle of territorial integrity is a fundamental constituent of the United Nations Charter system, referenced in article 2(4) of that text and therefore very often linked to the prohibition on the threat and use of force within international relations. These elements support the proposition that States are legally protected from incursions into their territory by other States, both in existential terms and insofar as such incursions generate recoverable loss. Moreover, the operation of territorial integrity within the law of State creation is to present a normative hurdle that seceding entities must in some manner overcome. In this manner, established States are entitled not only to continue to exist within their extant territorial boundaries but also to do so free from military or paramilitary interference from other States.

---

165 Bertrand Russell, *An Inquiry into Meaning and Truth* (George Allen and Unwin 1972) 97–102.

166 Thomas Nagel, 'Personal Rights and Public Space' (1995) 24(2) Philosophy & Public Affairs 83, 85.

167 Green (n 71).

168 Focusing upon the consequences of sovereign equality, rather than upon the essence of statehood itself, is sufficient for present purposes but does risk a certain artificiality. Without deeper philosophical reflection, this view may amount only to the tautologous proposition that 'States are equal in view of their statehood', which is admittedly rather unhelpful.

169 Green (n 71) chapter 3.

2. Political Independence

The right to political independence, protected by the principle of non-intervention, mirrors the right to territorial integrity in that it not only concerns an established State's right to continue to exist but its right to freedom from foreign domination. It is also, to this extent, the corollary of independence as an antecedent of statehood, representing the right of States, once fully independent, to remain so. Although States are entitled to be free from the *domination* of foreign governments, they are not entitled to freedom from the political *influence* of other States. To take just one example, interference in governmental elections, be it covert or otherwise, constitutes a breach of the non-intervention principle (and a violation of political independence),[170] whereas exerting purely diplomatic influence upon domestic policy does not.

In practice, applying the non-intervention principle faces greatest practical difficulties when determining the practise line between foreign domination and mere influence. Although the threat or use of force, for example, represents a clear violation of that principle, the International Court of Justice (ICJ) in the *Nicaragua* case explicitly recognised the possibility that 'indirect' action supporting subversive activities within another State may violate that principle as well.[171]

This was affirmed in 2005, when the ICJ cited the principle of non-intervention when passing judgment against the Republic of Uganda for supporting rebel forces in the Democratic Republic of the Congo. The Court held that 'the principle of non-intervention prohibits a State "to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State"'.[172]

In each case, the relevant questions are first whether the alleged intervention was coercive or subversive in nature – thereby amounting to an attempt at foreign domination – and then whether any available defences are available, such as the implied consent of the complainant State. Given the commonplace conflation of independence with sovereignty,[173] it is necessary to remark upon several other things that do *not* frustrate political independence. First, the opposability of international obligations against a State in no way undermines its legal independence.[174] Second, membership within international organisations, including those with institutions capable of issuing binding directives upon their members, in no way abrogates the independence of States

---

170 Michael Schmitt and Liis Vihul (eds), *Tallin Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) 312 Rule 66; Michael Schmitt, 'Foreign Cyber Interference in Elections: An International Law Primer, Part I' (*EJIL: Talk!*, 16 October 2020) <www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-i/> accessed 28 February 2022.

171 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14.

172 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Merits) [2005] ICJ Rep 168.

173 Hossain (n 149).

174 Supra n 73 (at 131).

belonging to such organisations.[175] Notwithstanding the rhetoric surrounding 'Brexit', it is trite international law that membership of the European Union in no way affected the political independence of the United Kingdom.[176] Third, domestic constitutional arrangements, even those settled upon under direction from foreign powers, pose no necessary threat to political independence *unless* the arrangements in question establish unilateral claims of right or general authority over the domestic or foreign affairs of the affected State.[177] As above, the presence or absence of foreign domination, be it formal or de facto, is determinative of independence and not the existence of bilateral or even multilateral commitments amongst juridical equals.

3. Freedom to Choose Political, Social, Economic, and Cultural Systems

Contemporary statehood does not require particular forms of government and so does not depend, for example, upon the presence of democratic institutions, the provision of social security, or the separation of church and State.[178]

The general applicability of this principle is borne out, perhaps, by the fact that UN membership does not turn upon, for example, the presence of democratic institutions within the applicant entity.[179] The only nuance to be noted here is that other branches of international law, such as the international law of human rights, can and do regulate the *manner in which* governance is undertaken. Freedom to choose a political system, to this extent, excludes the freedom to choose one that violates fundamental human rights norms, at least to the extent that the State in question is party to the relevant international human rights law treaties.[180]

4. Permanent Sovereignty Over Natural Resources

Established States have exclusive rights to exploit any natural resources falling within their territory, which includes any onshore resources and any located within their territorial sea.[181] This general rule, which arguably sits 'downstream' from both territorial integrity and the freedom States enjoy to establish their own economic systems, is most clearly expressed within Principle 21 of the 1972 Stockholm Declaration,[182] which references a State's

175 Crawford (n 41) 70–71.

176 Ibid.

177 Green (n 71) chapter 3.

178 [1986] ICJ Rep 14 [263].

179 Whilst the United Nations Charter frequently uses the word 'State' in an idiosyncratic manner – and therefore sometimes may not entail much for the status of the 'State' it references – membership decisions pursuant to article 4(1) broadly reflect the notion that members must be States under international law, see Higgins (n 20) 11–57.

180 On human rights law, see Ciampi, § 21, in this textbook.

181 Ricardo Pereira, 'The Exploration and Exploitation of Energy Resources in International Law' in Karen E Makuch and Ricardo Pereira (eds), *Environmental and Energy Law* (Blackwell 2012) 199. On the law of the sea, see Dela Cruz and Paige, § 15, in this textbook.

182 'Report of the United Nations Conference on the Human Environment' (Stockholm 5–16 June 1972) UN Doc A/CONF.48/Rev.1.

> sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

This formulation was also adopted, in slightly modified form, within Principle 2 of the 1992 Rio Declaration.[183] As argued by Sundhya Pahuja, there is some concern that permanent sovereignty over natural resources, which was originally developed to safeguard postcolonial States against foreign economic exploitation immediately following decolonisation, has in fact led to the protection and elevation of the foreign investor as a subject of international law to the expense of domestic populations of those States.[184]

II. ENTITLEMENTS OF STANDING

If the entitlements listed above cover the rights of States to exercise the capacities ordinarily associated with the term 'sovereignty', then the entitlements now at issue protect their position as equal members of the international community. Such entitlements of standing might be conceived as rights to participate on certain terms within the international legal order,[185] and include, amongst other things, principles of sovereign immunity, the law of diplomatic and consular relations, and the immunity of States from the compulsory jurisdiction of international courts and tribunals. Since other chapters in this volume address these elements in greater detail than would be possible here, the remainder of this chapter will focus instead upon two further entitlements of standing.

1. Legal Personality

Legal personality is the capacity to exist within (legally enforceable) juridical relations: to hold certain rights, duties, powers, liabilities, and so on.[186] The precise relationship between statehood and legal personality has been subject to some controversy. According to Lassa Oppenheim, '[t]he equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their international personality'.[187] This order of derivation is highly misleading. Properly construed, legal personhood is a *consequence* of statehood and not its logical antecedent.

The fact that legal personality follows from statehood (and not the other way around) is best demonstrated by the direction of analysis adopted in the *Reparation*

183 'Report of the United Nations Conference on Environment and Development' (Rio de Janeiro 3–14 June 1992) UN Doc A/CONF.151/26 (Vol I).

184 Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) 95–171. On international investment law, see Hankings-Evans, § 23.1, in this textbook.

185 Ratner (n 53) 190–197.

186 See, for example: Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 77–100. On legal personality in international law, see Engström, § 7, in this textbook.

187 Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht ed, Vol I, 6th edn, Longman 1947) 238.

for Injuries advisory opinion, in which the International Court of Justice grounded the legal personality of the UN upon an enquiry into *nature and function* of that organisation.[188] Importantly, within the context of identifying whether or not the UN had personality sufficient to bring a claim for damage done to that organisation, the Court characterised the undoubted capacity of *States* to bring analogous claims as being facilitative of consensual dispute resolution 'between two political entities, equal in law, similar in form, and both the direct subjects of international law'.[189] The *essence* of States, in other words, as 'political entities' equally subject to international law is what grounds *their* legal personality (which, after all, consists in little more than the capacity to hold rights and duties such as those at issue in the opinion itself).[190]

2. The Powers to Create and Apply International Law

Whether or not States are the only entities capable of creating and applying international law, they remain crucially important institutions for law creation and application within the global legal order.[191]

Fortunately, none of this creates insuperable difficulties because the statehood of most entities within the international community is reasonably clear. The point, for present purposes, is that statehood itself imparts these important 'jurisgenerative' capacities,[192] meaning that important normative questions arise surrounding the authority and legitimacy of State-made international law.[193] According to some scholars, international law should differentiate between States when it comes to their impact upon international law-making and application. Suggestions include, for example, (1) that democratically legitimate States should have to consent to putative international norms before those norms become opposable against them, whilst non-democratic States should have no such option;[194] and (2) that States which fail routinely to observe fundamental human rights principles should have their jurisgenerative capacities suspended or curtailed.[195] Whatever the merits of these views in normative terms, they do not reflect contemporary international doctrine, which makes no such discriminations.

---

188 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178–180.

189 Ibid 177–178.

190 'Personality', to this extent, is distinct from 'personhood', which is arguably more substantive, see Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66(3) MLR 346.

191 On the State-centredness of law-making in international law, see Eggett, § 6, in this textbook.

192 This phrase is taken from: Robert M Cover, 'The Supreme Court, 1982 Term – Forward: *Nomos* and Narrative' (1983) 97 Harvard Law Review 4.

193 See generally: Carmen Pavel, *Law Beyond the State* (OUP 2021).

194 Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29(2) LJIL 289.

195 Patrick Capps, *Human Dignity and the Foundations of International Law* (Bloomsbury 2009) 264–268.

F. CONCLUSION

States are some of the most powerful actors within the international legal system. They are also, in a range of other ways, central to the functioning of that normative order. Nonetheless, the idea of Statehood remains both complex and contested. Questions persist surrounding the law that governs their creation, continuity, and extinction, as well as their fundamental nature and entitlements. This is, however, hardly surprising. Just as States remain some of the most powerful entities on Earth, so too do they remain some of the most complex. As a result, when approaching the State within international law, the careful student and practitioner is best advised to take these issues one at a time, rather than seeking a one-size-fits-all, ultimate view of what States truly are and how, according to the law that governs international relations, they should be treated.

BOX 7.1.4 Further Readings and Further Resources

Further Readings

- J Crawford, *The Creation of States in International Law* (OUP 2006).
- J Duurmsa, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (CUP 1996).
- A Green, *Statehood as Political Community: International Law and the Emergence of New States* (CUP 2024).
- C König, *Small Island States & International Law the Challenge of Rising Seas* (Routledge 2023).
- J Vidmar, *Democratic Statehood in International Law: The Emergence of States in Post-Cold War Practice* (Hart 2013).

Further Resources

- Başak Etkin and Kostia Gorobets, 'Episode 19: Alex Green on Natural Law, Statehood and International Law' (*Borderline Jurisprudence*, 7 April 2023) <https://podcasts.apple.com/gb/podcast/episode-19-alex-green-on-natural-law-statehood-and/id1561575704?i=1000607861316> accessed 8 August 2023.

§ § §

§ 7.2 INDIGENOUS PEOPLES

RAGHAVI VISWANATH

BOX 7.2.1 Required Knowledge and Learning Objectives

Required knowledge: Decolonisation; Sources of International Law; States

Learning objectives: Understanding how international law has come to comprehend indigeneity and indigenous peoples and the underlying logic; learning about the rights afforded to indigenous peoples and the ways in which this may be limiting; familiarising oneself with indigenous epistemologies and their growing relevance to legal research and law-making.

A. INTRODUCTION

International law, as Ntina Tzouvala notes, is constituted by argumentative patterns around the 'standard of civilization'. This oscillates between a 'logic of biology' invoking blatantly racist notions of a supposedly natural 'backwardness' of peoples deemed to be 'uncivilised' and a 'logic of improvement', invoking more subtle but equally racist notions of inferiority combined with the promise of conditional inclusion in the family of 'civilised nations'.[196] This discourse manifests violently in international law's engagement with indigenous peoples. As colonialism expanded in the 16th century, those whose lands were encroached were labelled 'indigenous', 'native', 'Indian', or 'tribal', each term constructed to convey their supposed lower degree of civilisation.[197]

The association of the term 'Indians' to indigenous communities in the Americas was a misattribution by Christopher Columbus in 1492, who erroneously thought he had reached India.[198] Columbus' encounter with the Arawaks was a telling example of the drastically different worldviews of the native Arawaks and the Europeans.[199] 'They believe very firmly', Columbus wrote, 'that I, with these ships and people, came from the sky'.[200] This assumption of intellectual and biological superiority bred dismissal of 'Native Americans' humanity. People like Vespucci and Winthrop dehumanised indigeneity to justify European invasion of indigenous lands.[201]

196 Ntina Tzouvala, *Capitalism as Civilisation* (CUP 2020).

197 Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005).

198 See González Hauck, § 1, in this textbook.

199 Peter Carroll, *The Free and the Unfree: A Progressive History of the United States* (Penguin 2001) 35–36.

200 'First Encounters in the Americas' (*Facing History*, 1 August 2017) <www.facinghistory.org/resource-library/first-encounters-americas> accessed 16 July 2023.

201 Ibid.

This civilisational discourse permeated the vestiges of international law and became the bedrock of modern international law. Early proponents of international law such as Vitoria infamously remarked that while 'Indians were capable of holding rights and dominion over land', they were 'unfit to found or administer a lawful state up to the standard required by human and civil claims'.[202] To Vitoria, sovereign status was contingent on conforming to Christian norms. Grotius, similarly, introduced the 'terra nullius' doctrine.[203] By the application of 'terra nullius', land was considered vacant if it was not occupied by Christians.[204] 'Vacant' land could be defined as 'discovered', and as a result sovereignty, title, and jurisdiction over such lands could be claimed. As criticism of the doctrine mounted after the world wars, the doctrine fell into disuse, but the afterlives of its biological logic remained. Case in point is the trusteeship model that was devised to justify the widespread colonialism from the late 18th century onwards and later codified in Chapter XII of the UN Charter.[205]

These narratives excluded indigenous peoples from recognition under State regimes. International law's State-centredness sidelined them as actors. Illustratively, no indigenous peoples were consulted during the making of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.[206] It was only as formal decolonisation processes started to succeed in the 1960s that indigenous peoples started gaining visibility, but even then, they remained trapped in State-created grammars of sovereignty and national borders.

This chapter traces the historical struggles of indigenous peoples to be recognised as actors in international law. It introduces readers to indigenous peoples' encounters with international law, and the ways in which international law has responded to indigenous demands for legal status and sovereignty. It also traces the continuities between historical discourses and contemporary logics. The discussion then zooms into specific debates surrounding the identification of indigenous peoples and the contestations relating to rights enjoyed by indigenous peoples. The final part focuses on indigenous resistance to material and epistemic gatekeeping in international law.

B. INDIGENOUS PEOPLES AND THE STATE

Until the 1900s, international law adhered tightly to a European grammar of statehood.[207] As the club of statehood begrudgingly opened to members outside of

202 Ronald Takaki, *A Different Mirror: A History of Multicultural America* (Back Bay Books 2008) 34.

203 On Grotius and Vitoria, see González Hauck, § 1, in this textbook.

204 'Challenging Terra Nullius' (*National Library of Australia*) <www.nla.gov.au/digital-classroom/senior-secondary/cook-and-pacific/cook-legend-and-legacy/challenging-terra> accessed 16 July 2023.

205 On the world wars and their aftermath in terms of colonial reorganisation, see González Hauck, § 1, in this textbook.

206 International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171; International Covenant on Economic, Social, and Cultural Rights 1966 (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3.

207 Ian Brownlie, *Principles of Public International Law* (4th edn, OUP 1990) 88–91 (discussing theories of recognition of statehood).

Europe,[208] international law's vocabulary evolved. In 1945, upon the setting up of the United Nations (UN), human rights, even in their rudimentary form, fiercely tugged at the statist form of international law.[209] However, it was not long before human rights were also fashioned by States as components of their prerogative. The early successes of decolonisation only effected a change in hands without disrupting these rubrics of statehood. As Kodjoe notes, the 'salt water thesis' ensured that decolonisation was not made available to enclaves of indigenous communities living within independent States.[210] The thesis posited that only colonies located across the 'salt-water' (or the ocean) could gain independence without disrupting the territorial integrity of existing nation-States, while independence for domestic non-self-governing territories had the potential to cause a severe disruption.[211] The first effort to codify indigenous peoples' rights, which was Convention No. 107 of 1957, adopted within the International Labour Organization (ILO), only paid lip service to the material ways in which indigenous peoples' demands militate against State sovereignty.[212] Convention 107 was adopted with a view to 'redress the isolation and marginalisation of indigenous peoples and to ensure that indigenous peoples benefited from development programmes'.[213] It follows Tzouvala's 'logic of improvement', which describes that certain actors were only seen as entitled to limited personhood, contingent on the Eurocentric and capitalist moulds of personhood. Rather than 'indigenous peoples', the Convention uses the term 'indigenous *populations*'. It thus employs a grammar of assimilation – cultural and legal – of indigenous identity within State units, and dresses this in the rhetoric of recognition of indigeneity.[214]

The tussle between indigeneity and statehood continued well until the 1990s. This was the period during which ILO's Convention No. 169 concerning Indigenous and Tribal peoples in Independent Countries was adopted in response to the 'developments in the situation of indigenous peoples', presumably related to the social capital acquired by the global indigenous peoples' movement in the 1970s.[215] The Convention was predicated on the need to consult indigenous peoples in development-related decisions. The Convention was more alive to the colonialist undertones of categories such as 'semi-tribal populations', unlike its predecessors.[216] Still, States expressed

208 On decolonisation, see González Hauck, § 1, in this textbook.

209 Helene Ruiz Fabri, 'Human Rights and State Sovereignty: Have the Boundaries Been Significantly Redrawn?' in P Alston and E MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 33.

210 Wentworth Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (Nellen 1977) 115, 119.

211 Audrey Jane Roy, *Sovereignty and Decolonization: Realizing Indigenous Self-Determination at the United Nations and in Canada* (thesis submitted to Cornell University 1998).

212 Indigenous and Tribal Populations Convention (adopted 26 June 1957, entered into force 2 June 1959), 328 UNTS 247.

213 Alexandra Xanthaki, 'The ILO Conventions' in Xanthaki (ed), *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (CUP 2007).

214 James Anaya, *Indigenous Peoples in International Law* (OUP 1996).

215 Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 28 ILM 1832.

216 International Labor conference (75th session), Replies received and Commentaries' in International Labor Conference, Partial Revision of the Indigenous and Tribal Peoples Convention, 1957 (No. 107), Report VI(2), Question 9, 16–17 (Geneva 1988).

much apprehension about the use of terms traditionally associated with independent statehood, such as 'territory' and self-determination. States like Canada and United States feared that self-determination would enable invocations of external secession, thereby threatening State sovereignty.[217]

Even as the delegation of statehood function to non-State actors increased in contemporary times, it only facilitated a change of hands from imperial offices to postcolonial authorities, as Usha Natarajan rightly notes.[218] Postcolonial States, supported by international organisations like the World Bank, implemented industrial projects to meet economic growth metrics, without considering marginalised communities.[219] The vocabulary of development finds legs both in the Global North(s) as in the Global South(s) and compounds to displace indigenous communities. This is best illustrated by the fact that 40% of indigenous communities are displaced by development projects in India alone.[220] The focus on development started to push indigenous demands of sovereignty to the fringes, making small of the deeply spiritual, cultural, social, and economic relationship that indigenous peoples share with land.[221]

Development was also framed as 'removed' from the indigenous worldview, which the State frames as an interest in the preservation of the 'primitive'. Marooma Murmu writes about how indigenous dance and music – which are indeed central to indigenous existence – give birth to urban romanticised stereotypes of indigenous peoples as the 'Other'.[222] This rhetoric of backwardness is repeatedly invoked to remove indigenous peoples from decision-making spaces.

C. IDENTIFYING INDIGENOUS PEOPLES

In the 1960s, as formal decolonisation efforts succeeded,[223] consciousness of indigenous peoples' special cultural identity and their relationship with land grew. International indigenous mobilisation became more systematic and visible. The capstone was the International Non-Governmental Organization Conference on Discrimination

---

217 David Meren, 'Safeguarding Settler Colonialism in Geneva: Canada, Indigenous Rights, and ILO Convention No. 107 on the Protection and Integration of Indigenous Peoples (1957)' (2021) 102(2) CHR 102, 106.

218 Usha Natarajan, 'Decolonization in Third and Fourth Worlds: Synergy, Solidarity and Sustainability Through International Law' in Sujith Xavier and others (eds), *Decolonizing Law: Indigenous, Third World and Settler Perspectives* (Routledge 2021).

219 Sutapa Chattopadhyay, 'Postcolonial Development State, Appropriation of Nature, and Social Transformation of the Ousted Adivasis in the Narmada Valley, India' (2014) 25(4) Capitalism, Nature, Socialism 65, 74.

220 Sriram Parasuraman, *The Development Dilemma: Displacement in India* (Palgrave Macmillan 1999).

221 Irene Watson, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (2009) 108(1) South Atlantic Quarterly 27, 29; Lucy Claridge, 'Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois' (2010) Minority Rights Group International <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-1009-Download-full-briefing-paper.pdf> accessed 16 July 2023.

222 Maroona Murmu, 'There Is No Caste Discrimination in West Bengal?' (*Radical Socialist*, 8 July 2019) <www.radicalsocialist.in/articles/national-situation/865-there-is-no-caste-discrimination-in-west-bengal> accessed 16 July 2023.

223 On decolonisation, see González Hauck, § 1, in this textbook.

against Indigenous Populations in the Americas in 1977,[224] where Western indigenous representatives discussed strategies to forge a transnational indigenous front and a set of sovereignty demands. From the late 1980s onwards, indigenous peoples won consultative status at several UN forums. This mobilisation started to bear fruit, with the UN starting to take steps to recognise indigeneity. The first of such steps was Special Rapporteur Martinez Cobo's report, which noted that indigenous populations were descendants of those who inhabited territories before settlers arrived. Such populations were known to have a distinct social, economic, and cultural identity– typically tied to their ancestral land.[225] Its focus, however, was on peoples disenfranchised by settler colonialism, understood as the occupation of territory and resources by foreign peoples and the displacement of indigenous legal orders.[226]

Scholars were quick to show that the Cobo conditions were misplaced for communities in Africa and Asia.[227] Since African colonies were fully occupied before colonisation, imperial force was exerted through what Kenyan scholar Ngugi wa Thiong'o calls the 'cultural bomb' that 'annihilate[s] a people's belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves', thus 'mak[ing] them want to identify with that which is furthest removed from themselves'.[228] This hybrid form of colonialism benefited the African elites, who led decolonisation movements and were able to successfully occupy the positions of authority previously held by imperialists. Because of this complicated model of colonialism, tracing indigeneity in Africa is far from easy. Most people can draw links with pre-colonial inhabitants.[229] The same is true of indigeneity in Asia, where everyone has an equal claim to being indigenous.[230]

In response, more reflexive definitions of indigeneity emerged. In 1989, ILO Convention No. 169 utilised the term 'peoples'.[231] Peoples was a nod to the autonomy of indigenous communities and their demands for political and legal sovereignty. The Convention also differentiated between tribal peoples and indigenous peoples, with the former being units that are socially and culturally distinct from the majority and

---

224 Ingrid Washinawatok, 'International Emergence: Twenty-One Years at the United Nations Symposium' (1998) 3 City University of New York Law Review 41.

225 UNCHR Thirty-sixth session, 'Final report submitted by Special Rapporteur Jose Martinez Cobo' (30 September 1983) E/CN.4/Sub.2/1983/21/Add.8; Chidi Oguamanam, 'Indigenous Peoples and International Law: The Making of a Regime' (2004) 30 Queen's Law Journal, 348, 352.

226 Adelaja O Odukoya, 'Settler and Non-Settler Colonialism in Africa' in Samuel Ojo Oloruntoba and Toyin Falola (eds), *The Palgrave Handbook of African Politics, Governance and Development* (Palgrave Macmillan 2018).

227 Kealeboga Bojosi and George Mukundi Wachira, 'Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and People's Rights' (2006) 6 African Human Rights Law Journal 382.

228 Ngugi Thiong'o, *Petals of Blood* (Penguin Books 1977).

229 Dorothy Hodgson, 'Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas' (2002) 104(4) American Anthropologist 1037, 1041.

230 Bhangya Bhukya and Sujatha Surepally, 'Unveiling the World of the Nomadic Tribes and Denotified Tribes: An Introduction' (2021) 56 Economic and Political Weekly 36.

231 Convention 169, article 2.

organised by customary rules of clanship and being.[232] The UN Working Group on Indigenous Populations adopted a different approach and, in 1993, chose not to define indigeneity because 'historically, indigenous peoples have suffered, from definitions imposed by others'.[233]

Nonetheless, indigeneity holds powerful social meaning. It has become 'a shared experience of loss of forests, alienation of land, displacements by development projects, and much more',[234] allowing for cross-border indigenous mobilisation.

D. RIGHTS OF INDIGENOUS PEOPLES

I. NATURE OF RIGHTS-HOLDERS

Efforts to garner international recognition of indigenous identity have predominantly employed the vocabulary of rights. However, formal recognition of indigenous peoples' rights was slow. ILO Convention No. 107 of 1957 recognised the economic, social, and cultural rights of indigenous peoples. Yet, these rights were contingent on the assimilation of indigenous peoples into the dominant population, and they were individual rights by design. Article 27 of the ICCPR[235] on cultural rights, for instance, has been widely criticised for exclusively recognising cultural rights of 'persons' belonging to minorities, instead of groups as a whole.[236] Moreover, the *travaux préparatoires* of the Covenants suggests that the term 'minorities' was understood in a restrictive sense as well-defined stable groups that enjoyed a distinct culture and were numerically disadvantaged.[237] The cultural rights protections granted to minorities were not intended to even mildly threaten majority regimes.[238] It has been suggested that indigenous peoples were deliberately kept removed from the drafting of the Covenants because States feared 'that this might cause political destabilization' and lend credibility to secession demands.[239] With time, there was gradual recognition of the collective dimension of indigenous peoples' rights, an important step being international jurisprudence acknowledging this dimension.[240]

---

232 Ibid.

233 UNCHR (Sub-Commission), 'Report by Erica-Irene Daes on the Protection of the heritage of indigenous peoples' (1997) E/C'N.4/Sub.2/1995/26.

234 Gladson Dungdung, 'The Pathalgari Movement for Adivasi Autonomy: A Revolution of India's Indigenous Peoples' (*IWGIA*, 11 March 2022) <www.iwgia.org/en/india/4613-the-pathalgari-movement-for-adivasi-autonomy-a-revolution-of-india%E2%80%99s-indigenous-peoples.html> accessed 16 July 2023.

235 International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

236 Rudiger Wolfrum, 'The Protection of Indigenous Peoples in International Law' (1999) 59 HJIL 371.

237 Commission of Human Rights (6th session), (1950) A/2929, paragraph 184; 8th session (1952), 9th session (1953).

238 UNGA, 'Report of the Third Committee' UNGAOR 16th session, UN Doc. A/5000 (1961), paragraph 123.

239 Rebecca Tsosie, 'Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit within Civil Society?' (2003) 5 University of Pennsylvania Journal of Constitutional Law 357, 376.

240 Lubicon Band in *Ominayak v. Canada* CCPR/C/38/D/167/1984 (1990), Ayyamas in *Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (2009), Sami of the Nordic countries in *Lansman v. Finland*, CCPR/

II. SELF-DETERMINATION

The recognition of self-determination has been tied to the recognition of 'peoples'.[241] In the specific context of indigenous peoples, the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) clarified that the right to self-determination does not include secession.[242] States like Australia, New Zealand, Canada, and the United States did not sign the Declaration, citing their discomfort with recognising the right to self-determination of indigenous peoples. Although these States have now reversed their position, their discomfort with self-determination has not dampened. Tribunals have continued to be uncomfortable with recognising indigenous peoples' right to external self-determination. The *Poma Poma v Peru* case before the Human Rights Committee is a case in point.[243] The Committee declared the case to be inadmissible, arguing that self-determination was not an individual right as required by the Optional Protocol. Similarly, in the other cases where self-determination has been invoked, the Committee has chosen instead to situate the facts within other rights.

III. RIGHTS OF NATURE

Recognition of indigeneity challenges the anthropocentric grammar of rights. In several indigenous cosmologies, humans are only custodians and symbiotic partners within nature. Inspired by these epistemologies, the Ecuadorian Constitution codified the rights of Pacha Mama, the Andean earth goddess as known in the Quichua and Aymara indigenous languages, in 2008.[244] The Constitution now commits to protecting the *sumak kawsay* (the 'good way of living'), which also reinforces the State's obligations towards restoration and preservation of the functions of nature.[245] States like Bolivia and Uganda have followed suit.[246] Importantly, the Bolivian Constitution does not entrench the rights *of nature*, but frames such rights as stewardship of humans towards nature and 'other living

C/52D/511/1992 (1994).; *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya*, Comm. No. 276/2003, Afr. Comm'n on Human & Peoples' Rights (2009). See also Elizabeth Ashamu, 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission' (2011) 55(2) Journal of African Law 300, 311.

241 On self-determination, see Bak McKenna, § 2.4, in this textbook.

242 Jackie Hartley, Paul Joffe, and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Purich 2010); and Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (Routledge 2018), notably chapter 2.

243 *Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (2009), 13.

244 Constitucion de 2008, República del Ecuador (ECD) <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 16 July 2023.

245 María Valeria Berros, 'The Constitution of the Republic of Ecuador: Pachamama Has Rights' (*Environment & Society Portal*, 2015) <www.environmentandsociety.org/arcadia/constitution-republic-ecuador-pachamama-has-rights> accessed 16 July 2023.

246 'Rights of Nature gain ground in Uganda's Legal System' (*Gaia Foundation*, 2019) <https://gaiafoundation.org/rights-of-nature-gain-ground-in-ugandas-legal-system/> accessed 16 July 2023.

things'.[247] Rights of nature are contained in another statute.[248] In India, rights of nature are recognised in a patchwork of judicial pronouncements.[249] In other States, rivers and national parks have been recognised as legal persons. Case in point is the Whanganui River in New Zealand,[250] and the legal status of the Sukhna River near India's northeast border with Nepal.[251] Such a reorientation is intended to better serve claims against polluting projects that threaten to damage ecologies. However, the retention of the language of rights – often alien to indigenous epistemologies – still allows balancing exercises in favour of extractivist projects and is furthermore sometimes used for 'whitewashing' purposes.[252]

IV. RIGHT TO FREE, PRIOR, AND INFORMED CONSENT

The right to free, prior, and informed consent is chiefly concerned with the quality of consent given by communities before development projects are implemented. Free denotes the lack of intimidation or coercion, prior refers to consent taken well in advance of a project, and informed refers to the range of facts offered (nature, size, impact, permissions of project) prior to obtaining consent.[253] The mode of obtaining consent must be aligned with the customary laws of indigenous peoples. Although typically consent is understood as an obligation of conduct, there are some regimes which stress 'obtaining' consent, turning it into an obligation of result.

V. INDIGENOUS RIGHT TO LAND

Historically, sovereignty was understood as a conceptual instrument to reclaim lands and natural resources. The right to land was initially situated within the rubric of property rights. However, property rights hinge on grammars of individuality, ownership, and saleability. For indigenous peoples, the relationship to land is one of spirituality, less one of ownership.[254]

---

247 Paola Villavicencio Calzadilla and Louis J Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) TEL 397, 402.

248 Law 071 of the Rights of Mother Earth, 21 December 2010 (BO) <http://181.224.152.72/~embajad5/wp-content/uploads/2017/12/rights-of-mother-earth.pdf> accessed 16 July 2023.

249 See the Madras High Court's decision covered here: Katie Surma, 'Indian Court Rules That Nature Has Legal Status on Par with Humans – and That Humans Are Required to Protect It' (*Inside Climate*, 4 May 2022) <https://insideclimatenews.org/news/04052022/india-rights-of-nature/> accessed 16 July 2023.

250 Whanganui River Deed of Settlement, 5 August 2014 <www.govt.nz/treaty-settlementdocuments/whanganui-iwi> accessed 16 July 2023. For a discussion, see Catherine I Magallanes, 'Reflecting on Cosmology and Environmental Protection: Maori Cultural Rights in Aotearoa New Zealand' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015), 274, 291.

251 *Sukhna Enclave Residents Welfare Association and Ors. v. State of Punjab and Ors*., CWP No.18253 of 2009 & other connected petitions, High Court of Punjab and Haryana.

252 Paola Villavicencio Calzadilla and Louis J Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) TEL 397.

253 OHCHR, 'Free, Prior and Informed Consent of Indigenous Peoples' (2015) <www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf> accessed 16 July 2023.

254 Alexandra Xanthaki, 'Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land' in Alexandra Xanthaki (ed), *Indigenous Rights and United Nations Standards* (CUP 2007), chapter 5.

Today, land is increasingly being read into cultural rights. In General Comment No. 23, the UN Human Rights Committee observed that 'culture manifests in various forms, including a particular way of life associated with the use of land resources'.[255] The draft general comment on the right to land also confirms this linkage.[256]

VI. FOURTH WORLD APPROACHES TO INTERNATIONAL LAW

The 'Fourth-World' movement (FWAIL)[257] was born out of the failure of TWAIL[258] to combat the predatory role that international law plays in perpetuating violence against indigenous peoples. Fourth World approaches question the basic assumptions underlying international law, including the idea of the State being an impartial guarantor, the dominance of the English and French languages as the vernacular of international law, or even the criteria based on which personhood is recognised. Fourth World approaches push for the recognition of non-anthropocentric personhoods – of land, of nature, of ancestors, and of ecosystems. Such approaches also expose the colonial motivations behind diminishing the personhood of indigenous peoples. At its root, this opposition stems from a basic difference in epistemology. That is, they highlight the fact that there are different ways of thinking about international law and all these different ways are equally credible and valid.

VII. FRAMEWORK OF RELATIONALITY

Indigenous epistemologies – while incredibly diverse – share certain tenets, the first of which is relationality. 'Relationality' has been coined in answer to the individual-focus of Western liberalism. It centres the relationships each knowledge producer shares with their kin and with nature.[259]

In fact, extractivism demands and sometimes even imposes relationships, eroding the reality of relationships and therefore also the principle of relationality.[260] In practical terms, relationality requires a serious introspection of one's positionality and privilege, and understanding how to surrender and *listen* to indigenous co-collaborators. From a position of doing, the researcher moves to a position of listening. Listening, not only in the biological sense, but as Cahill notes, listening in the affective sense.[261]

---

255 CCPR General Comment No. 23: article 27 (Rights of Minorities), (1994) CCPR/C/21/Rev.1/Add.5.

256 CESCR Draft General Comment No. 26: Land and Economic, Social and Cultural Rights, (2022) E/C.12/GC/26.

257 The term has been coined by George Manuel and Michael Posluns. See George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Minnesota Press 1974)

258 On TWAIL, see González Hauck, § 3.2, in this textbook.

259 Lauren Tynan, 'What Is Relationality? Indigenous Knowledges, Practices and Responsibilities with Kin' (2021) 28(4) Cultural Geographies 597, 602.

260 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books 2012); Eve Tuck and Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1(1) Decolonization: Indigeneity, Education & Society 1.

261 Caitlin Cahill, 'The Personal Is Political: Developing New Subjectivities Through Participatory Action Research' (2007) 14(3) Gender, Place & Culture 267, 272.

VIII. SACRED AND SECULAR

Spirituality is central in indigenous worldviews, informing rationality and meaning-making.[262] All relationships and all beings are endowed with spirituality – whether it is the land or one's knowledge. Spirituality, in Western legal discourse, is often romanticised and treated as less than scientific.[263] In their piece, Townsend and Townsend critique how indigenous elders' articulations of their spiritual relationships with territory and nature were not seen as relevant to more scientific assessments about territory apportionment and environmental rights for which an external expert was invited.[264]

IX. RECIPROCITY AS EPISTEMOLOGY

Several indigenous epistemologies rest on the notion of reciprocity. As Kovach notes,

> they say that we traditionally knew about portal, the doorway, how to get knowledge and that it was brought to the people by sharing, by community forums, by sitting in circles, by engaging in ceremony, by honouring your relationship to the spirit. When we do that, the spirit will reciprocate and we will be given what we are needed.[265]

Reciprocity applies to insiders and outsiders and those in-between. Indigenous cultures – unlike Western epistemologies – do not attach neutrality to people situated outside indigenous cultures. They see all worlds as being interconnected and each individual and community responsible for changes affecting peoples everywhere. Internal positions are equally problematised. As Linda Tuhiwai-Smith notes, insiders often take their familiarity for granted. However, indigenous epistemologies pin critical reflexivity on insiders, too.[266] These ideals are not only embedded in stories and myths, but also in songs, rituals, and dance.[267]

E. CONCLUSION

This chapter illuminates how international law was born out of and profited from the violent dispossession of indigenous peoples. It also examines the long-standing struggles

---

262 Ross Hoffman, 'Respecting Aboriginal Knowing in the Academy' (2013) 9(3) AlterNative: An International Journal of Indigenous Peoples 189.

263 Virginius Xaxa, 'Decolonising Tribal Studies in India' (*Raiot,* 2021) <https://raiot.in/decolonising-tribal-studies-in-india-prof-virginius-xaxa/> accessed 16 July 2023.

264 Dina Lupin Townsend and Leo Townsend, 'Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System' (2021) 35(2) Social Epistemology 147.

265 Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations and Contexts* (University of Toronto Press 2009), 41; Kathleen Absolon, *Kaandossiwin: How We Come to Know* (Fernwood 2011) 55.

266 Linda Smith, *Decolonizing Methodologies* (University of Otago Press 1999) 13.

267 Shay Welch, *The Phenomenology of a Performative Knowledge System: Dancing with Native American Epistemology* (Springer International 2019); Sowvendra Shekhar Hansda, *The Adivasi Will Not Dance: Stories* (Speaking Tiger 2017).

organised by indigenous peoples to gain personhood in international law. In so doing, it also highlights the incongruities within the global fraternity of indigenous peoples. The later parts of the chapter unpack the bundle of rights that indigenous peoples enjoy. This discussion also shows how certain rights such as the right to land often clash with indigenous ways of thinking, because they place emphasis on materiality and individuality over spirituality.

BOX 7.2.2 Further Readings

Further Readings

- C Oguamanam, 'Indigenous Peoples and International Law: The Making of a Regime', (2005) 30 QLJ 348
- S Lightfoot, 'The Declaration on the Rights of Indigenous Peoples' in Sheryl Lightfoot (ed), *Global Indigenous Politics* (Routledge 2016)
- K Absolon, *Kaandossiwin: How We Come to Know: Indigenous Re-Search Methodologies* (Fernwood 2022)
- SH Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Theytus 1998)
- J Anaya, *Indigenous Peoples Under International Law* (2nd edn, OUP 2004)

§ § §

§ 7.3 INTERNATIONAL ORGANISATIONS

GRAŻYNA BARANOWSKA, VILJAM ENGSTRÖM, AND TAMSIN PHILLIPA PAIGE

BOX 7.3.1 Required Knowledge and Learning Objectives

Required knowledge: Sources of International Law; Subjects and Actors in International Law; States

Learning objectives: Understanding the concept of international organisation; varieties of international organisations and their categorisation; organisations as actors in international law and as international legal persons; the autonomous nature of international organisations; concepts of legal personality and legal powers/competences; main features of the United Nations and its structure and function; the law of the United Nations and the fundamental principles of public international law in the UN Charter.

A. INTRODUCTION

It has been said that everything we do is today in one way or another dealt with by an international organisation. International organisations have become an established way of structuring inter-State relations, today outnumbering, in any definition, the number of States. This chapter identifies basic features of international organisations, highlights elements of their autonomy, and explains fundamental concepts relating to organisations. It also introduces the United Nations (UN) as the paramount organisation of the international legal system.

B. IDENTIFYING AN INTERNATIONAL ORGANISATION

I. DEFINING AN INTERNATIONAL ORGANISATION

While international organisations influence many aspects of our life – they regulate our food,[268] how we travel,[269] and who delivers our mail[270] – defining them appears challenging. The ILC's Draft articles on the responsibility of international organisations defines international organisations as established by a treaty or another instrument governed by international law and possessing international legal personality. The Draft

268 Food and Agriculture Organization of the United Nations <www.fao.org/home/en> accessed 18 June 2023.
269 World Tourism Organization <www.fao.org/home/en> accessed 18 June 2023.
270 Universal Postal Union <www.upu.int/en/Home/> accessed 18 June 2023.

articles further stipulate that such organisations may include other entities as members in addition to States.[271]

Several characteristics can be identified that – while not providing an exhaustive definition – provide a 'useful point of departure' for identifying international organisations. These include (1) being created by States, (2) being based on a treaty, and (3) consisting of at least one organ with a distinct will. All these characteristics are fluid and raise further discussion. For example, international organisations can be jointly created by States and international organisations; not all organisations are based on a treaty but, for example, a decision of the UN General Assembly (UNGA) or domestic parliaments.[272]

II. CATEGORISING INTERNATIONAL ORGANISATIONS

1. Intergovernmental – Supranational – Non-governmental

International organisations are traditionally understood to consist of States. As such, a defining feature of international organisations as actors in international law is that they are 'intergovernmental'. The notion 'intergovernmental' can also be used to indicate a distinction to other forms of organisations. As a point of departure, an intergovernmental organisation does not limit the sovereignty of States.[273] Although the constituent instrument of an intergovernmental organisation is a treaty, and as such may contain certain obligations for the member States (e.g. financial obligations), most organisations cannot adopt legally binding decisions. One exception is the UN, discussed below. However, the UN would still not qualify as a supranational organisation.

Supranational organisations differ from intergovernmental organisations in respect of their regulatory authority. The European Union is currently the only example of a truly supranational organisation, exercising a range of law-making, adjudicative, and enforcement powers.[274] As stated by the Court of Justice of the European Union, by becoming members, States have created an organisation of 'unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers'.[275] This 'limitation' means that EU legislative measures can have direct effect in the legal orders of EU member States.

A common way to distinguish between organisations is to scrutinise the body of law that governs the organisation's activities: only those entities are international organisations that are governed by international law. Consequently, organisations whose activities are

---

271 ILC, 'Responsibility of States for Internationally Wrongful Acts' (53rd session 23 April–1 June and 2 July–10 August 2001) UN Doc A/RES/56/83 Annex.

272 Jan Klabbers, *An Introduction to International Organizations Law* (CUP 2022) 6–12.

273 On sovereignty, see Green, § 7.1, in this textbook.

274 Peter L Lindseth, 'Supranational Organizations' in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016).

275 Case 6/64 *Flaminio Costa v E.N.E.L* [1964] ECR 585, 593.

governed by domestic law are considered non-governmental organisations.[276] By way of examples, the International Committee of the Red Cross is governed by Swiss law, and Amnesty International by British law. Membership in non-governmental organisations is also withheld for individuals. This does not mean that non-governmental organisations would not perform important tasks in the practice of international law. This reflects the trend of increasingly recognising an ever more diverse set of actors.[277] Moreover, organisations can transition from non-governmental to intergovernmental.

BOX 7.3.2 Example: Transition From Non-governmental to Intergovernmental

The International Commission on Missing Persons was initially established in Sarajevo in 1996 to help to account for missing persons during the Yugoslavian wars. The Commission gradually expanded its mandate and sphere of activities. Eventually, its status changed in 2014, when five States signed a treaty and conferred upon it the status of an intergovernmental organisation.[278]

2. Global/Open – Non-global/Closed

Another useful distinction can be made between global and non-global organisations. In global or open organisations all States are eligible to become members, such as the UN or the World Health Organization. To the contrary, non-global or closed organisations restrict their membership in one way or another. Examples include regional organisations such as the Organization of American States and the African Union, organisations based on a common background such as the Organisation of Islamic Cooperation or Organisation Internationale de la Francophonie, or organisations where membership is restricted to a particular function, such as the Organization of the Petroleum Exporting Countries or the North Atlantic Treaty Organization.

BOX 7.3.3 Example: Membership in Closed Organisations

The restricted membership of closed organisations need not be carved in stone. For example, Armenia, Azerbaijan, and Georgia were initially found ineligible to partake in the Council of Europe as they were considered geographically part of Asia. Nevertheless, they were eventually admitted at the turn of the century.[279]

---

276 Klabbers (n 275) 7. On NGOs, see He Chi, § 7.6, in this textbook.

277 On the pluralisation of actors, see Engström, § 7, in this textbook.

278 Agreement on the status and functions of the International Commission on Missing Persons (adopted 15 December 2014, entered into force 14 May 2015) article 1(1) stating: 'The International Commission on Missing Persons is hereby established as an international organisation'.

279 Henry G Schermers and Niels Blokker, *International Institutional Law* (Brill/Nijhoff 2018) 57–59.

3. Political – Technical

While most international organisations are established to perform a specific function, the limited scope and nature of the tasks of some organisations make them appear as dealing with predominantly technical issues. For example, the Universal Postal Union regulates global postal services. Instead of diplomats, States usually delegate experts to meetings of such organisations. By contrast, 'political' organisations may discuss any matter of global governance, and State delegations usually consist of diplomats and politicians, the paradigm example being the UNGA (further discussed below). At the same time, the distinction between political and technical organisations can be difficult to uphold.[280]

BOX 7.3.4 Example: Technical Versus Political Organisations

Seemingly technical questions can turn out to be intensely political. The Universal Postal Union's tasks may be thought of as rather technical. However, in 2019 the United States threatened to withdraw from the Union claiming that China is taking advantage of its developing country status within the organisation.[281]

C. INTERNATIONAL ORGANISATIONS AS AUTONOMOUS ACTORS

I. LEGAL PERSONALITY

Although international organisations have been created by treaty already since the late 19th century, it was only with the creation of the League of Nations and the International Labour Organization that the issue of legal personality of organisations came to be discussed.[282] International organisations are established legal subjects of international law.[283] This was confirmed by the ICJ in the Reparation for Injuries Advisory Opinion in 1949.[284]

The legal personality of organisations has two dimensions: personality in domestic law and in international law. The constituent treaties of international organisations commonly contain a provision granting the organisation legal personality under the

280 Schermers and Blokker (n 282) 62–63.

281 'Trump Pulls US Out of UN Postal Scheme on China Price Concerns' (*The Guardian*, 17 October 2018) <www.theguardian.com/us-news/2018/oct/17/trump-universal-postal-union-withdraw-foreign-postal-rates> accessed 8 August 2023.

282 On treaties, see Fiskatoris and Svicevic, § 6.1, in this textbook. On the history of international organisations, see Bob Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day* (Taylor & Francis 2009)

283 On the concept of legal subject, see Engström, § 7, in this textbook.

284 *Reparation for Injuries* (n 7).

domestic law of its member States.[285] Like all provisions of the constituent instrument, this grant of domestic legal personality only applies in relation to the members of the organisation. Explicit provisions on international legal personality, on its part, is a rarity especially in open international organisations, whereas such provisions may be found in closed organisations.[286]

While the question of legal personality may seem rather theoretical, in practice the absence of legal personality has proved problematic as it can prevent an organisation, for example, from concluding agreements or renting buildings.[287] Due to the lack of legal personality, for example, the Organization for Security and Co-operation in Europe has faced several practical obstacles.[288]

II. COMPETENCES/POWERS

The question of personality and powers are so closely intertwined that they may sometimes be difficult to distinguish from one another. This has to do with the fact that the exercise of powers is an inherent element by which legal personality manifests itself.[289] An organisation performs its tasks by exercising legal powers. As these powers are organisation specific, they can range from being very limited to exceeding the powers of its member States. There are very few organisations that can make decisions that become directly binding on member States (basically the European Union, and the UN Security Council [UNSC]). Most exercises of powers, in other words, gain their regulatory impact through other means.[290]

The main source of the legal powers of an organisation is the conferral or attribution by members as provided in its constituent instrument.[291] The basic rule governing acts of organisations is that they must remain within the confines of their attributed powers.[292] This principle is explicit for example in the Treaty on the European Union, article 5.[293] Similar provisions are explicit in constituent instruments of several organisations.

---

285 See for example Charter of the United Nations 1945 (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI article 104; Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326 (adopted 13 December 2007, entered into force 26 October 2012) (TFEU) article 335.

286 See for example TFEU (n 19), article 47, and Agreement Establishing the African Development Bank (adopted 4 August 1963, entered into force 10 September 1964) 510 UNTS 3, article 10.

287 Schermers and Blokker (n 282).

288 Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 *NJIL* 403; Isabelle Ley, 'Legal Personality for the OSCE?: Some Observations at the Occasion of the Recent Conference on the Legal Status of the OSCE' (*Völkerrechtsblog*, 8 August 2016) <https://voelkerrechtsblog.org/legal-personality-for-the-osce/> accessed 8 August 2023.

289 Klabbers (n 275).

290 José E Alvarez, *International Organizations as Law-Makers* (OUP 2005).

291 Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP 2007).

292 *Jurisdiction of the European Commission of the Danube* (Advisory Opinion), PCIJ Rep Series B No 14, 64.

293 Article 5 states: '1. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the

In addition to explicitly conferred powers, organisations can also exercise such 'implied powers' as are necessary for the performance of their duties.[294] An express embodiment of this idea can be found in the Treaty on the Functioning of the European Union, article 352.[295] The element of attribution/conferral emphasises that organisations do not, unlike States, possess a general competence (also called the 'principle of speciality'). However, the 'necessities of international life' may reveal the need for the exercise of implied powers that are not expressly provided for in the constituent instrument.[296] As long as an act of an organisation is necessary for achieving the purpose of the organisation, and there is political agreement on that necessity, such an act is not *ultra vires* (Latin: 'beyond the powers'). The two doctrines are tools for constructing and adjusting the functions and tasks of organisations in accordance with the desires of their membership.[297]

The commonality of certain powers, such as the capacity to conclude treaties and to bring international claims, has tempted some academics to locate those powers in the mere possession of legal personality. There is a bulk of powers, in this logic, that have become customary, which means that as soon as an organisation comes into existence, it would enjoy those powers.[298] In the 'inherent powers approach' organisations are potentially free, like States, to perform any sovereign act which they are in a practical position to perform.[299] In practice, claims to inherent powers are more common in the context of international courts and tribunals. However, the distinction to implied powers is in this practice not always consistent.[300] In the context of international organisations, the more common position is that particular powers cannot be derived from the mere possession of legal personality.

III. OTHER ASPECTS OF THE AUTONOMY OF INTERNATIONAL ORGANISATIONS

While legal powers may be the most visible way by which organisations assert an autonomy, it is not the only expression of it. Organisations and their employees enjoy

competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'. Consolidated version of the Treaty on European Union (adopted 13 December 2007, entered into force 26 October 2012) OJ C 326.

294 *Reparation for Injuries* (n 7).

295 Article 352(1) TFEU (n 19) states: 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council . . . shall adopt the appropriate measures'.

296 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66.

297 Viljam Engström, *Constructing the Powers of International Institutions* (Martinus Nijhoff 2012).

298 On customary law, see Victor Stoica, § 6.2, in this textbook.

299 As argued by Finn Seyersted, *Common Law of International Organizations* (Martinus Nijhoff 2008).

300 Viljam Engström, 'Article 4. Legal Status and Powers of the Court' in Mark Klamberg (ed), *The Commentary on the Law of the International Criminal Court* <https://cilrap-lexsitus.org/en/clicc/4> accessed 8 August 2023.

immunities which secure a degree of physical autonomy.[301] To act independently of any particular State interest and free from political pressure, organisations and staff commonly enjoy those immunities that are necessary for the performance of the functions of the organisation.[302] In respect of membership, the autonomy of organisations expresses itself, for example, through a right to include and exclude States. There is no automatic right of States to become members in any organisation of choice. Also membership rights, such as the right to participate in the work of organs and/or the right to vote, can be restricted by the organisation.[303]

BOX 7.3.5 Example: Losing Membership Rights

A member that acts in breach of the constituent instrument of an organisation may be expelled from that organisation. As a reaction to the Russian aggression against Ukraine in 2022, the Committee of Ministers of the Council of Europe decided on the 16 March 2022 to exclude the Russian Federation as of that date from the organization (in anticipation of which The Russian Fedaration withdrew from the organisation the preceding day).[304] Although the same mechanism exists in the UN Charter,[305] it has never been used. Instead, the UN has used other means towards States that act in violation of the Charter, such as withholding credentials.[306]

D. THE UNITED NATIONS

I. OVERVIEW

The core goal of the UN is the maintenance of peace. The horrors of World War I and World War II are reflected in the preamble of the UN Charter, its foundational treaty, where the first stated aim of the organisation is 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to [human]

301 On immunities, see Walton, § 11, in this textbook.

302 And as defined in separate treaties. See for example UN Charter (n 288), article 105(1), and Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entry into force 17 September 1946, 1 UNTS 15.

303 UN Charter (n 288), article 19.

304 Council of Europe, 'The Russian Federation Is Excluded from the Council of Europe' (16 March 2022) <www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe> accessed 8 August 2023.

305 Article 6 of the UN Charter stating: 'A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council'.

306 Viljam Engström, 'Credentials and the Politics of Representation: What's in It for the UN?' (*EJILtalk*, 11 October 2021) <www.ejiltalk.org/credentials-and-the-politics-of-representation-whats-in-it-for-the-un/> accessed 9 August 2023.

kind'.[307] This overarching goal is further reflected in article 1(1) of the Charter, where it is stated that the purpose of the UN is 'to maintain international peace and security'.[308] Article 1 defines as goals of the UN in the following terms: maintenance of peace by collective measures and settlement of disputes; development of friendly relations, equal rights and self-determination; promoting human rights; and international cooperation.[309] Whereas the primary goal of maintaining peace is a prerogative of the UN main bodies, as stated by the ICJ in its *Nuclear Weapons* opinion,[310] in the pursuit of the broader set of goals the UN not only works through the core organisation but also the broader UN system.

II. THE DRAFTING HISTORY AND LEGAL STATUS OF THE CHARTER

The term 'United Nations' was first coined on 1 January 1942 in the 'Declaration by United Nations',[311] which pledged to uphold the purposes and principles of the Atlantic Charter (a joint statement between Churchill and Roosevelt on 14 August 1941).[312] At the close of World War II, this term became the basis of the new organisation to replace the League of Nations. The UN was formed through the drafting of the UN Charter at the San Francisco Conference in April 1945, with 50 nations present, and Poland signing once a government was formed to constitute the 51st original member State.[313] As of June 2023, the UN has 193 member States.[314] The volume of membership gives it near universal status, and also gives rise to a strong argument that the principles enshrined in the Charter should be considered customary law. The Charter is a multilateral treaty, binding upon its member States, that creates a permanent venue for diplomatic relations. The UN Charter establishes the basic structure and procedures of the organisation. The most forceful tool at the disposal of the UN is the binding nature of Chapter VII resolutions by the UNSC, when it finds that there is a threat to international peace.[315] Today the organisation's main areas of work are international peace and security, the protection of human rights, humanitarian aid, sustainable development and climate action, and upholding international law.

---

307 UN Charter (n 288), preamble.

308 UN Charter (n 288), article 1(1).

309 UN Charter (n 288), article 1(2)–(4).

310 *Legality of the Use* (n 299).

311 Dag Hammarskjöld Library, '1942–26 Nations Declare Themselves United' <https://un-library.tumblr.com/post/108736439924/1942-26-nations-declare-themselves-united> accessed 24 January 2022.

312 Dag Hammarskjöld Library, '1941 – A Special Relationship Helps Forge the Beginnings of the United Nations' <https://un-library.tumblr.com/post/108647995769/1941-a-special-relationship-helps-forge-the> accessed 24 January 2022.

313 United Nations, 'The San Francisco Conference' <www.un.org/en/about-us/history-of-the-un/san-francisco-conference> accessed 24 January 2022.

314 United Nations Treaty Collection, 'Status of Charter of the United Nations and the Statute of the International Court of Justice' <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-1&chapter=1&clang=_en> accessed 24 January 2022.

315 On 'Chapter VII determinations' see Svicevic, § 13, in this textbook.

BOX 7.3.6 Advanced: The Charter as a Global Constitution

The UN Charter is sometimes characterised as a world constitution.[316] The argument builds on the fact that article 103, which grants the UN Charter precedence over conflicting obligations of member States, elevates the status of the Charter to a superior source of international law. Interestingly, article 2(6) of the Charter also states that 'the Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles'. Yet, there are also profound problems with the idea of global constitutionalism.[317] Article 2(6) can also be considered to contradict the fundamental principle of the Law of Treaties whereby '[a] treaty does not create either obligations or rights for a third State without its consent'.[318]

III. THE LAW OF THE UNITED NATIONS

Article 2 is one of the most important provisions of the Charter, as it lists the principles that the UN and its members States commit to respect. These principles have been reproduced and further defined in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (1970).[319] Given the near-universal membership of the UN, these principles are often referred to as the fundamental principles of international law and international relations.[320] Some of them can even be considered *peremptory* norms.[321] These principles are:

- Sovereign equality
- Fulfilment of obligations in good faith
- Peaceful settlement of disputes
- Prohibition on the use of force
- Non-intervention in internal affairs
- The duty to cooperate
- The right of self-determination of peoples.[322]

316 See for example: Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009); Ronald St. John Macdonald, 'The International Community as a Legal Community' in Ronald St. John Macdonald and Donald M Johnston (eds), *Towards World Constitutionalism – Issues in the Legal Ordering of the World Community* (Brill 2005).

317 See Christine Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8 I-CON 611.

318 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 34. On the law of treaties, see Fiskatoris and Svicevic, § 6.1, in this textbook.

319 UNGA Res 2624 (XXV) (24 October 1970).

320 Paola Gaeta, 'The Fundamental Principles Governing International Relations' in Paola Gaeta, Jorge E Viñuales, and Salvatore Zappalá (eds), *Cassese's International Law* (OUP 2020).

321 On *jus cogens* and hierarchy in international law, see Eggett, § 6, in this textbook.

322 For an overview, Kolb (n 11). For discussions of the principles, see e.g. Tamsin Phillipa Paige, *Petulant and Contrary: Approaches by the Permanent Five Members of the UN Security Council to the Concept of 'Threat to the*

III. THE GENERAL ASSEMBLY

The UNGA is the primary organ of diplomatic relations within the UN and was established to be the principal forum for multilateral negotiations. Article 9 of the Charter grants all UN member States representation in the UNGA. The UNGA meets annually from September to December to discuss issues on its agenda. In addition, the UNGA can meet in special sessions and emergency special sessions.[323] Articles 10 to 17 outline the scope of the UNGA's functions and powers, with voting and procedure set out in articles 18 to 22. Most voting in the UNGA requires a simple majority, whereas voting on 'important matters' (such as the membership of the non-permanent members of the UNSC, membership of the Human Rights Council, membership of the Economic and Social Council, or the budget of the UN) requires a two-thirds majority.[324] All voting in the UNGA is done on a 'one member, one vote' basis.[325]

Apart from the annual sessions, most of the work of the UNGA is conducted by six committees that it oversees. These are Disarmament and International Security (First Committee); Economic and Financial (Second Committee); Social, Humanitarian and Cultural (Third Committee); Special Political and Decolonisation (Fourth Committee); Administrative and Budgetary (Fifth Committee); and Legal (Sixth Committee). Each member State of the UN may assign one person to each committee.[326] The committees, for example, prepare draft resolutions to the UNGA.

It is important to note that UNGA resolutions, with the exception of budgetary matters under article 17, are not formally legally binding.[327] In terms of legal status they can, however, be considered expressions of State practice and/or *opinio juris*, thus supporting the formation of customary law.[328] UNGA resolutions may themselves gain the status as customary law, as for example in the case of the Universal Declaration of Human Rights.[329] An important function of the UNGA as a permanent multilateral diplomatic forum is the ability to request advisory opinions from the ICJ, thereby contributing to the development of the articulation of the current status of international law.[330]

Peace' under Article 39 of the UN Charter (Brill/Nijhoff 2019); Simon Chesterman, 'An International Rule of Law?' 56 American Journal of Comparative Law 331, 357; Gerry J Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004) 5; James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press; OUP 2006) 126. On the distinction between rules and principles, see Eggett, § 6.3.B.II., in this textbook.

323 UN Charter (n 288), article 20.

324 UNGA Rules of Procedure of the General Assembly, UN Doc A/520/Rev 15 (1984) paras 82–95.

325 UN Charter (n 288), article 18(1).

326 Rules of Procedure (n 327) para 38.

327 The Charter of the UN label GA decisions as recommendations, UN Charter (n 288), chapter IV.

328 On customary law, see Stoica, § 6.2, in this textbook.

329 On human rights, see Ciampi, § 21, in this textbook.

330 UN Charter (n 288), article 96.

IV. THE SECURITY COUNCIL

The UNSC is the executive body of the UN, charged with the primary responsibility for the maintenance of international peace and security.[331] The UNSC is made up of five permanent members (China, France, Russia, the UK, and the US) and ten non-permanent members who are elected by the UNGA for two years at a time.[332] The composition of the non-permanent members is fixed: five members from African and Asian States, one from Eastern European States, two from Latin American States, and two from Western European and other States.[333] The special role of the UNSC is reflected in its structure, the binding nature of its resolutions, and the right of veto granted to the permanent members of the UNSC.

Unlike the UNGA, the UNSC sits permanently and meets whenever necessary to discuss any situation that falls within its mandate (the maintenance of international peace and security). When making decisions, the UNSC has the option to make recommendations with relation to any situation under Chapter VI (Pacific Settlement of Disputes) of the Charter. Resolutions made under Chapter VII of the Charter (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) are binding upon all member States of the UN by virtue of article 25 of the Charter.

The threshold for UNSC action according to article 39 of the Charter is the finding of 'the existence of any threat to the peace, breach of the peace, or act of aggression'. Voting in the UNSC on any resolution (Chapter VI or Chapter VII) is governed by article 27 of the Charter. In all other than procedural decisions, this must, according the the Charter, include the concurring vote of all permanent members. This requirement has become colloquially known as the veto power (although the word `veto' is not mentioned in the Charter as such). Practice has however developed a divergent interpretation of the text of the Charter according to which abstention from voting by a permanent member does not prevent the adoption of a decisions.[334] A Chapter VII resolution is the only generally accepted exception (beside self-defence) to the prohibition on the use of force found in article 2(4) of the UN Charter.[335]

---

331 UN Charter (n 288), article 24(1).

332 UN Charter (n 288), article 23.

333 UNGA A/RES/1990 (XVIII) (17 December 1963).

334 Kolb (n 11).

335 On the system of collective security, see Svicevic, § 13, in this textbook.

BOX 7.3.7 Example: Limits to UNSC Powers

A claim has been made that 'the Security Council may basically decide or do anything it wishes and it will remain within the limits of the legal framework for its action'.[336] The interpretation of what can be considered a 'threat to the peace, breach of the peace, or act of aggression', triggering the article 39 threshold, has indeed expanded.[337] While UNSC decisions must be consistent with the purposes and principles of the Charter, the UNSC has for example relied upon its implied powers in order to establish criminal tribunals.[338] The UNSC has also made decisions obliging UN member States to undertake legislative measures domestically, hereby assuming something of a role of a 'world legislature'.[339]

V. THE SECRETARIAT

The UN Secretariat is set up under articles 97 to 101 of the Charter, and operates as the administrative arm of all UN activities. The Secretary-General is appointed by the GA, upon the recommendation of the UNSC. The SG (awkwardly referred to as 'he' in the Charter) is responsible for overseeing all the activities of the Secretariat, and reporting annually to the GA on the activities of the UN. The SG is also charged with bringing before the UNSC any matter that may threaten the maintenance of international peace and security. The Secretariat itself is made up of a number of departments that cover the broad functions of the UN each with a specific focus, acting on direction from the UNSC, the GA, and other UN bodies (e.g. the Human Rights Council, or the Economic and Social Council).

VI. OTHER UN BODIES

1. The Economic and Social Council

The Economic and Social Council is established under article 61 of the Charter, and is made up of 54 members of the UN elected for three-year terms by the GA. The role of the Economic and Social Council is to conduct studies and reports with respect to international economic, social, cultural, educational, health, and related matters

336 Inger Österdahl, Threat to the Peace: *The Interpretation by the Security Council of Article 39 of the UN Charter* (Iustus 1998) 98.

337 Christopher J Le Mon and Rachel S Taylor, 'Security Council Action in the Name of Human Rights: From Rhodesia to the Congo' (2004) 10 U.C. Davis Journal of International Law & Policy 197, 207; Paige (n 325) 20; Daniel Pickard, 'When Does Crime Become a Threat to International Peace and Security?' (1998) 12 Florida Journal of International Law 1, 19–20.

338 *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (1995) ICTY IT-94–1-AR-72.

339 Stefan Talmon, 'The Security Council as World Legislature' 2005 (99) AJIL 175–93. On 'law-making' resolutions, see Kunz, Lima, and Castelar Campos, § 6.4 D.II.1 in this texbook.

and to make recommendations to the GA on the basis of those reports, as well as recommendations for the purpose of promoting respect and observance of human rights.

2. The Trusteeship Council

The Trusteeship Council was established under article 86 of the Charter and charged with overseeing the administration of UN trust territories. The Trusteeship Council suspended operations on 1 November 1994, a month after the last remaining UN trust territory, Palau, gained independence. While its abolishing has been proposed, it may also experience a revival due to climate change events.[340]

3. The International Court of Justice

The International Court of Justice (ICJ) was established under article 92 of the UN Charter, and the annexed statute of the ICJ.[341] The ICJ was established as a successor to the Permanent Court of International Justice.

BOX 7.3.8 Advanced: The Effectiveness of the UN

The UN meets criticism from many directions. The UNSC in particular is, for example, accused of applying double standards and selectivity. The UN has also been accused for failing to deliver on the maintenance of international peace and security, such as preventing the genocide in Rwanda.[342] The Russian aggression against Ukraine has recently highlighted anew the structural problem of the veto power of permanent members in the UNSC, which can render the Council incapable of acting. While the shortcomings of the Charter have been subject of debate at least since the Cold War, the veto power was at the time of the UN's establishment a prerequisite for granting a monopoly for authorisation of use of force to the UNSC.[343] Whereas the UN at the time of its establishment was strongly focused on the prevention of war, it is nowadays engaged in activities across societal sectors.[344] While many of the criticisms towards the UN are valid, the UN still remains 'the go-to forum in a time of crisis, and is likely to remain so well into the future'.[345]

340 Dag Hammarskjöld Library, 'Proposals Related to the Reform of the Trusteeship Council' <https://research.un.org/en/docs/tc/reform> accessed 18 June 2023.

341 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. On peaceful settlement of disputes, see Choudhary, § 12, in this textbook.

342 See generally, Paige (n 325).

343 Peter Nadin, 'United Nations Security Council 101' (*Our World*, United Nations University, 15 April 2014) <https://ourworld.unu.edu/en/united-nations-security-council-101> accessed 8 August 2023.

344 Kolb (n 11); Sir Brian Urquhart, 'The Role of the United Nations in a Changing World' (UN Audiovisual Library 2008) <https://legal.un.org/avl/ls/Urquhart_UN_1.html> accessed 8 August 2023.

345 Nadin (n 342).

E. CONCLUSION

This chapter has provided an overview of international organisations as subjects of international law. In characterising and classifying organisations, the role of State consent was noted as central both for the establishment of an organisation and for delimiting it, for example, from non-governmental organisations. One of the defining features of international organisations is their autonomy from their member States. While this autonomy may take various forms, the conferral of legal personality upon an organisation, and its exercise of legal powers, are undoubtedly crucial features. The second part of the chapter introduced the UN as the primary example of a global/open organisation with an openly political agenda. The UN Charter assumes a special position among legal sources of public international law, and the UNGA and the Security Council are important venues for bringing States together in addressing global challenges. Although the international legal system today acknowledges a range of non-State actors,[346] international organisations have retained their central role as venues for State collaboration in global governance.

BOX 7.3.9 Further Readings and Further Resources

Further Readings

- FA Chittharanjan, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2005)
- R Kolb, *An Introduction to the Law of the United Nations* (Bloomsbury 2010)
- J Klabbers, *An Introduction to International Organizations Law* (CUP 2022)
- HG Schermers and NM Blokker, *International Institutional Law: Unity Within Diversity* (6th edn, Martinus Nijhoff 2018)

Further Resources

- The United Nations system chart: https://www.un.org/en/delegate/page/un-system-chart
- The United Nations Dag Hammarskjöld Library: https://www.un.org/en/library
- The United Nations treaty collection: https://treaties.un.org/

§ § §

346 On the pluralisation of international law, see Engström, § 7, in this textbook.

§ 7.4 INDIVIDUALS

JENS T. THEILEN

BOX 7.4.1 Required Knowledge and Learning Objectives

Required knowledge: Subjects and Actors in International Law

Learning objectives: Understanding the development of individuals' international legal personality, and being able to critically assess the narratives of progress that often accompany it.

A. INTRODUCTION

The role of individuals in international law is complex, contested, and shifting. Whether and what kind of international legal personality individuals possess,[347] in particular, is a much-debated topic that is poised between somewhat technical definitions and doctrinal debates on the one hand and implications for the very foundations of the international legal order on the other. Any stance on individuals' international legal personality or subjecthood[348] presumes a definition of how such subjecthood is constituted, which in turn reveals a particular theoretical outlook on international law. The dominant position as a matter of legal doctrine seems to be that international legal personality is the capacity to occur rights and duties under international law.[349] On that account, the question becomes, empirically, whether and to what extent such rights and duties have, in fact, been imparted upon individuals and, conceptually, what this means for the subjecthood of individuals under international law, especially in relation to the prototypical subject of international law on traditional accounts – the State.[350] This section will trace the different steps of what the chapter calls the standard narrative regarding the position of individuals before questioning, by reference to the related field of global constitutionalism, whether it should be considered a narrative of progress.

B. ORIGINS OF INDIVIDUALS' INTERNATIONAL LEGAL PERSONALITY

To legitimise the international legal personality of individuals, some authors point to history: at the very origins of international law,[351] it is said, no distinctions were

347 On subjecthood in international law generally, see Engström, § 7, in this textbook.

348 For the purposes of this chapter, the terms are used interchangeably, as they often have been since Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174, 179.

349 See Engström, introduction to § 7, in this textbook.

350 On the State, see Green, § 7.1, in this textbook.

351 On international law's founding myths, see González Hauck, § 1, in this textbook.

made between the subjecthood of individuals and communities such as States. Many proponents of individuals' international legal personality point to the writings of the Spanish theologian Francisco de Vitoria, particularly his treatise *De Indis* (published posthumously in 1557) on the relations between the Spanish and the indigenous peoples they conquered during their transatlantic voyages.[352] Vitoria is said to have established 'natural law as the universal law of all humanity', including individuals among its subjects.[353] He is summarised as arguing 'that the Native Americans in the territories conquered by Spain and Portugal had rights and claims under both public law and private law, just like Christians' – hence implicitly recognising individuals including indigenous persons as subjects under international law without distinction, for example, between 'private' and 'public' wars.[354]

These celebratory tones[355] are misleading, however. Vitoria's ostensibly humane characterisation of indigenous persons as possessing reason led them to be bound, on his account, to the principles of international law: 'it is precisely *because* the Indians possess reason that they are bound by *jus gentium*', as Antony Anghie, one of the leading scholars associated with the Third World Approaches to International Law (TWAIL),[356] has put it.[357] But the content of *jus gentium* mirrored Spanish norms and cast alternate social practices as uncivilised.[358] Inevitably, the colonised peoples were held to have violated the international norms they now found themselves subject to, which, in turn, legitimated their conquest and other forms of violence against them.[359] This illustrates that legal subjecthood can fulfil a variety of functions, not all of them benign.

C. FROM STATE-CENTRIC TO HUMAN-CENTRIC INTERNATIONAL LAW

Classical legal positivism brought with it a State-centric view of international law.[360] The orthodox position regarding international legal personality at the beginning of the 20th century was aptly summed up by Lassa Oppenheim, one of the most famous

352 Franciscus de Victoria, *De Indis et de Iure Belli Relectiones* (Ernest Nys ed., Carnegie Institution of Washington 1917).

353 Christopher Barbara, 'International Legal Personality: Panacea or Pandemonium? Theorizing About the Individual and the State in the Era of Globalization' (2007) 12 ARIEL 17, 32.

354 Anne Peters, *Beyond Human Rights. The Legal Status of the Individual in International Law* (CUP 2016) 11–12.

355 See e.g. Antônio Augusto Cançado Trindade, 'The Emancipation of the Individual from His Own State: The Historical Recovery of the Human Person as Subject of the Law of Nations' (2006) Revista do IBDH 11, 12.

356 On TWAIL, see González Hauck, § 3.2, in this textbook.

357 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 20.

358 On the fusion of civilisation and legal personality, see also Rose Parfitt, 'Theorizing Recognition and International Personality' in Anne Orford and Florian Hoffmann with Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 583, 586; on how the 'Third World individual' was written out of international law, see Vincent O Nmehielle, 'A Just World Under Law: An African Perspective on the Status of the Individual in International Law' (2006) 100 ASIL Proceedings 252, 255.

359 On indigenous peoples and how Vitoria's argument still resonates toady, see Viswanath, § 7.2, in this textbook.

360 On positivism, see Etkin and Green, § 3.1, in this textbook.

positivist international lawyers: 'Since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are subjects of international law'.[361] Individuals were said to be 'objects' rather than 'subjects' of international law.[362] On this view, even when treaties or other sources of international law seemed to provide rights to individuals, they were, in fact, not granted to the individuals themselves but rather to their State of nationality. It was only through the mediation of the State that the individual could appear on the international scene – provided that their State of nationality was willing to engage on their behalf, for example by exercising diplomatic protection but also, potentially, by the use of force. This was particularly relevant in the case of foreign investments, where – despite protest by Latin American States in particular[363] – it was increasingly regarded as legitimate for the investor's home State to intervene on their behalf in cases of expropriation or public debt.

Over the course of the 20th century, the exclusively State-centred position lost ground significantly. Various academic accounts already argued that the individual should be considered international law's 'ultimate unit' and 'in that capacity a subject of international law'.[364] In the decades that followed the Second World War, human rights came to be seen as an increasingly important sub-field of international law,[365] and a vast number of human rights treaties were concluded. This 'proliferation' or 'inflation'[366] of individual rights also includes fields which were traditionally viewed as merely the purview of States, such as consular relations.[367] In the famous *LaGrand* case, the ICJ was seized of a dispute regarding consular law: two German nationals, the LaGrand brothers, had been sentenced to death in the United States without being informed of the possibility of contacting and communicating with the consular post of their State of nationality. Germany contended that this entailed not only a breach of its own rights, but also those of the LaGrand brothers themselves. In its 2001 judgment, the ICJ concluded that

---

361 Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green 1912) 19.

362 For an overview and criticism, see George Manner, 'The Object Theory of the Individual in International Law' (1952) 46 AJIL 428; see also PK Menon, 'The Legal Personality of Individuals' (1994) 6 Sri Lanka Journal of International Law 127, noting that non-Western territories, too, were considered 'objects'; for further reflections on objects (and their relation to subjects) in international law, see the contributions in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (OUP 2018).

363 See Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital* (CUP 2013) 47 et seq.; Fabia Fernandes Carvalho Veçoso, 'Resisting Intervention through Sovereign Debt: A Redescription of the Drago Doctrine' (2020) 1 TWAIL Review 74; Arnulf Becker Lorca, *Mestizo International Law. A Global Intellectual History 1842–1933* (CUP 2014) 62 et seq., 145 et seq.

364 Hersch Lauterpacht, 'The Subjects of the Law of Nations' in Elihu Lauterpacht (ed), *International Law. Being the Collected Papers of Hersch Lauterpacht. Volume 2* (CUP 1975) 487, 526–527; see also Georges Scelle, *Précis de droit des gens: principes et systématique* (Recueil Sirey 1932) 42.

365 On the history of human rights, see Samuel Moyn, *The Last Utopia. Human Rights in History* (Belknap 2012); Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019). On human rights, see Ciampi, § 21, in this textbook.

366 For a critique of the 'inflation objection', see Jens T Theilen, 'The Inflation of Human Rights: A Deconstruction' (2021) 34 LJIL 831.

367 On diplomatic and consular relations, see Arévalo Ramírez, § 10, in this textbook.

> Article 36, paragraph 1 [of the Vienna Convention on Consular Relations], creates individual rights, which, by virtue of Article I of the Optional Protocol [of that Convention], may be invoked in this Court by the national State of the detained person.[368]

Besides this landmark judgment and the field of human rights as the paradigm of individual rights, proponents of individuals' international legal personality point to developments in many other fields of international law, including but not limited to humanitarian law, the law of the sea, and economic law.[369] The field of investment law, previously the poster child of individuals being perceived on the international legal scene only when mediated through action of their home State, now provides a prime example of individuals not only being accorded their own rights under international law, but of participating in the law-making process through 'State contracts' between investors and host States and of individuals enforcing their rights before arbitral tribunals. Thus, in some cases individual rights also include standing to bring cases before regional or international courts or other quasi-judicial bodies. This possibility is seen by some authors as in turn enshrined within international law as an individual right of petition and characterised as 'the most luminous star in the universe of human rights' and an expression of the individual as the 'ultimate subject' of international law.[370]

In terms of duties, too, there have been clear developments since the Second World War. Already in its immediate aftermath, the Military Tribunal at the trials of Nuremberg noted that 'International Law imposes duties and liabilities upon individuals as well as upon States'.[371] Today, the field of international criminal law has spread to a number of other contexts.[372] Most notably, the Rome Statute brought the International Criminal Court (ICC) into being at the turn of the century – although it has to be said that the duties which the Rome Statute imposes have, in practice, fallen only on some individuals, particularly those from Africa, while others seem exempt.[373]

---

368 *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466 [77]; confirmed in *Avena and other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12; see also previously *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* Advisory Opinion OC-16/99 (IACtHR, 1 October 1999).

369 See on humanitarian law Dienelt and Ullah, § 14, in this textbook; on law of the sea, Dela Cruz and Paige, § 15, in this textbook; on economic law, Hankings-Evans, § 23, in this textbook. For overviews of the status of individuals in these fields, see e.g. Peters (n 356); Kate Parlett, *The Individual in the International Legal System. Continuity and Change in International Law* (CUP 2011); Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (OUP 2018).

370 Cançado Trindade (n 357) 23.

371 International Military Tribunal (Nuremberg), judgment of 1 October 1946, in: The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, 446–447.

372 On international criminal law, see Ciampi, introduction to § 22, in this textbook.

373 For this aspect but also broader and more complex critiques of the ICC from a TWAIL perspective, see John Reynolds and Sujith Xavier, '"The Dark Corners of the World". TWAIL and International Criminal Justice' (2016) 14 JICJ 959; Asad G Kiyani, 'Third World Approaches to International Criminal Law' (2016) 109 AJIL Unbound 255; for an assessment of African States' response, see Dorothy Makaza, 'Towards Afrotopia: The AU Withdrawal Strategy Document, the ICC, and the Possibility of Pluralistic Utopias' (2017) 60 GYIL 481.

This brief overview has merely scratched the surface; a great many other legal developments could be mentioned. Taking them all together, it is easy to understand why the dominant position on the international legal personality of individuals has shifted: if legal personality is understood as the capacity to have international rights and duties, then the sheer volume of individual rights and duties under modern international law makes the recognition of individual subjecthood inevitable by implication. Denying international legal personality to individuals entirely has, accordingly, become a minority position based on highly restrictive readings of international law and additional prerequisites for legal personality such as significant participation in international law-making processes.[374]

Debates now rage, rather, on the question of how to qualify individuals' subjecthood. One position is that States continue to be the primary subjects of international law, and that individuals' international legal personality is partial and derivative – in other words, restricted to those rights and duties that States have bestowed upon them by way of treaties and other sources of international law.[375] On the other hand, the idea that individuals rather than States are in some sense the 'primary', 'principal', 'original', or 'natural' subjects of international law is gaining ground and can increasingly be viewed as the new orthodoxy.[376]

Proponents of both views typically tell the story of international legal personality's development over the last century or so as a success story: from being on the fringes of international law in the heyday of legal positivism, the individual has now emerged as a subject of international law in its own right, forming part of the overall 'humanisation' of international law.[377] In this narrative, the individual's international legal personality merges into a claim about the normative importance of the human being which, it is implied, makes for a more just and ethical international legal order. State-centrism has thus become a pejorative concept, whereas its critics associate themselves 'with a progressive and enlarged angle of vision'.[378]

---

374 E.g. Alexander Orakhelashvili, 'The Position of the Individual in International Law' (2001) 31 CWIJL 241.

375 Parlett (n 371) 359–360; Petra Perišić, 'Some Remarks on the International Legal Personality of Individuals' (2016) 49 CILJSA 223; this view is often traced back to *Reparation for Injuries Suffered in the Service of the United Nations* (n 1) which was not, however, specifically concerned with individuals; see e.g. Menon (n 364) 148–150.

376 Peters (n 356); Cançado Trindade (n 357); Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (Asser 2004); Sinthiou Estelle Buszewski, 'The Individual, the State and a Cosmopolitan Legal Order' in Norman Weiß and Jean-Marc Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer 2015) 201; though combining his approach with a more formal conception of subjecthood, Roland Portmann, *Legal Personality in International Law* (CUP 2010) 273 also tends in this direction 'in the context of international crimes and fundamental human rights'.

377 E.g. Rein A Mullerson, 'Human Rights and the Individual as Subject of International Law: A Soviet View' (1990) 1 EJIL 33, 35.

378 Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 LJIL 339, 339–340.

D. INDIVIDUALISATION, HUMANISATION, AND GLOBAL CONSTITUTIONALISM

It is worth pausing here to ask ourselves why the increasing individualisation of international law is, often without further reasoning, seen as progressive in this way. After all, there is a long line of critique, reaching back at least to Karl Marx and further developed, for example, in Marxist perspectives[379] and critiques of human rights,[380] that problematises individualisation as giving way to egoism and self-interest, disregarding 'species-life' in society, and constituting a set of social relations that prevent emancipation.[381] Feminist critique,[382] too, has long grappled with the ambiguities of individual rights and the 'standing' that comes with them: 'rights secure our standing as individuals even as they obscure the treacherous ways in which that standing is achieved and regulated', thus forming part of historically specific power structures and entrenching subordination even as they offer limited redress.[383]

Part of the answer to the continuing popularity of individuals as subjects of international law presumably lies simply in the positive feelings that speaking of an 'international law for humankind' evokes.[384] It is associated, for example, with a 'substantive core' of 'flesh and blood' for international law.[385] Given the affective impact that the 'humanisation' of international law seems to invoke, debates over the international legal personality of individuals in such terms may function primarily as a placeholder for broader debates on the nature and ultimate function of international law as such.[386] This hypothesis is confirmed by the connection often drawn between the international legal personality of individuals and the constitutionalisation of international law.[387] The field of global constitutionalism is itself a broad church, but can be summarised as an attempt to give meaning and legitimacy to international law by understanding it as a constitutional order imbued with certain foundational values. Particular emphasis tends to be placed

379 See Bagchi, § 3.4, in this textbook.

380 See Ananthavinayagan and Theilen, § 21.8, in this textbook.

381 Karl Marx, 'On the Jewish Question' in Robert C Tucker (ed), *The Marx-Engels Reader* (Norton 1978) 26; see also Anthony Carty, 'International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law' (2005) 6 MJIL 534, 551–552 on individualism and 'collective life' with reference to international legal personality.

382 See Kahl and Paige, § 3.3, in this textbook.

383 Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7 Constellations 230, 238.

384 Cançado Trindade (n 357) 25; see also Nijman (n 378) 473.

385 Barbara (n 355) 47.

386 On this connection, see also Nehal Bhuta, 'The Role International Actors Other Than States Can Play in the New World Order' in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law* (OUP 2012) 61.

387 E.g. Anne Peters, 'Are We Moving Towards Constitutionalization of the World Community?' in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law* (OUP 2012) 122 and 129; for a critical overview, see Astrid Kjeldgaard-Pedersen, 'Global Constitutionalism and the International Legal Personality of the Individual' (2019) 66 NILR 271; Ekaterina Yahyaoui Krivenko, *Rethinking Human Rights and Global Constitutionalism* (CUP 2017) 19 et seq.

on the 'holy trinity' of human rights, democracy and the rule of law[388] – all associated, in some way, with individuals.

But if the approaches share ground in this way, they are also open to similar objections. Global constitutionalism has been rightly criticised for the active neglect of its own history, particularly colonialism, slavery, and their legacies[389] – in much the same way as the colonial origins of individuals' international legal personality are commonly glossed over, as described above. Another crucial shortcoming of global constitutionalism is the way in which it reinscribes liberal values as universal, including the liberal distinction between politics and economics. Indeed, global constitutionalism tends to take the market as a given and to relegate economic matters to the private sphere, untouched by the public law principles it propounds for international law – thus legitimising structures of global capitalism and shielding them from democratic contestation.[390]

A similarly liberal outlook on economic matters is also often implied, although rarely made explicit and certainly not politicised, in the insistence on international legal personality of individuals. It shines through, for example, in the analogisation of the individual under international law to 'a global *bourgeois* in the dual sense of an economic actor and bearer of so-called unpolitical international rights that secure his or her personal freedom and development'.[391] The individual here becomes individual-as-free-economic-actor. Simultaneously, most proponents of individuals as the primary subjects of international law relegate market structures and economic matters to the unquestioned background in much the same way as global constitutionalists – for example, the complex economic phenomenon of globalisation and the social relations of racialised and gendered exploitation that accompany it are reduced to a manifestation of humans' ostensible nature as 'social animals', with an emphasis on communication and technological innovation.[392]

Against this backdrop, it becomes vital to question which individuals are ascribed international legal personality, and which of them stand to profit from it. While the rhetoric of humanisation and of 'flesh and blood' leads us to equate the individual and the human being, the technical meaning of 'individuals' on most accounts is by

388 Mattias Kumm and others, 'How Large Is the World of Global Constitutionalism?' (2014) 3 Global Constitutionalism 1, 3.

389 Vidya Kumar, 'Towards a Constitutionalism of the Wretched. Global Constitutionalism, International Law and the Global South' (*Völkerrechtsblog*, 27 July 2017) <doi:10.17176/20170727-141227> accessed 10 August 2023.

390 Sigrid Boysen, 'Postcolonial Global Constitutionalism' in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (2nd edn, Edward Elgar forthcoming); from broader critiques of global constitutionalism, see also Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011).

391 Peters (n 356) 553 (emphasis in original); see also Oliver Dörr, '"Privatisierung" des Völkerrechts' (2005) 60 JZ 905, 908, considering *Marktbürgerrechte* (literally 'rights of market citizens') in the law of regional integration as a reference point for individual rights.

392 Barbara (n 355) 44–46.

no means restricted to natural persons. As the inclusion of investment law alongside other fields in which the rights of individuals are enshrined in international law shows, the term also includes juridical persons constituted by private law under its ambit – and it is notable that investment law, commonly acknowledged as particularly important to the entrenchment of imperialist, capitalist structures through international law,[393] forms one of the crucibles in which the international legal personality of individuals was forged. For that matter, human rights doctrine likewise recognises juridical persons as bearers of 'human' rights.[394] Although transnational corporations tend to be discussed separately under the rubric of international legal personality,[395] then, there is a significant but underacknowledged area of overlap with discussions of the international legal personality of individuals and their (economic) rights. The ostensible humanisation of international law of which individual subjecthood is said to form part thus turns out to include the kind of economic freedom that underlies a liberal capitalist order which serves the interests of corporations in the Global North.

E. CONCLUSION

The doubts canvassed above are intended to contextualise the debates on individuals' international legal personality, not to argue against it – States are no more 'natural' candidates for international legal personality than individuals,[396] and no less entangled with civilisational hierarchies and the structures of global capitalism. In any case, that individuals possess some form of subjecthood under international law is nowadays almost indisputable. Its form and extent hinges not only on one's definition of international legal personality but also on various precommitments as to the nature and ultimate function of international law. What stands out about the new orthodoxy emphasising the development from State-centric to human-centric international law, however, is its self-presentation as a narrative of progress – a characterisation which not only elides the downsides of individualisation and the politics of claiming primary subjecthood for individuals, including juridical persons, but also delegitimises broader doubts about the concept of international legal personality as such.[397] Against this narrative of progress, it is worth asking: why individualise, which 'individuals', and who profits from approaching international law in this way?

---

393 Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital* (CUP 2013); David Schneiderman, *Investment Law's Alibis. Colonialism, Imperialism, Debt and Development* (CUP 2022); Muthucumaraswamy Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law (2011) 3 Trade, Law and Development 203.

394 See critically Anna Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7 HRLR 511. On human rights doctrine, see Milas, § 21.1, in this textbook.

395 See González Hauck, § 7.7, in this textbook.

396 See also Portmann (n 378) 274.

397 For a starting point on such doubts, see Rose Parfitt (n 360) 599.

BOX 7.4.2 Further Readings

Further Readings

- A Peters, *Beyond Human Rights. The Legal Status of the Individual in International Law* (Cambridge University Press 2016)
- SE Buszewski, 'The Individual, the State and a Cosmopolitan Legal Order' in N Weiß and J-M Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer 2015) 201
- A Kjeldgaard-Pedersen, 'Global Constitutionalism and the International Legal Personality of the Individual' (2019) 66 NILR 271
- VO Nmehielle, 'A Just World Under Law: An African Perspective on the Status of the Individual in International Law' (2006) 100 ASIL Proceedings 252
- A Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7 HRLR 511

§ § §

§ 7.5 WOMEN

JULIANA SANTOS DE CARVALHO
AND VERENA KAHL

BOX 7.5.1 Required Knowledge and Learning Objectives

Required knowledge: Feminism and Queer Theory; Individuals; Human Rights Law; International Criminal Law

Learning objectives: Understanding how women have been included as subjects of international law; how they have contributed to the development of international legal practice; and taking stock of (some) persisting challenges to gender equality in the field.

A. INTRODUCTION

Despite the well-documented (white) masculine dominance,[398] women have long been a part of international law both as subjects of international legal instruments and as agents within the profession. This chapter aims to give a brief overview of how women are addressed in international law and their contributions to the field. It first introduces international legal instruments that recognise and advance women's rights internationally. The chapter then addresses the persisting widespread invisibility of women as active designers and interpreters of international law and casts a spotlight on selected women as key actors and active agents of and within public international law.

B. WOMEN AS SUBJECTS OF INTERNATIONAL LAW

Women have long been the subject of different international legal instruments, either as a central group category for the norms in question or as a specially protected group within a larger framework of rights and protection. International law's attention to women is mainly owed to the continuous activism from international and transnational coalitions of different women's movements and civil society,[399] and has encompassed a great variety of sub-fields in the international legal order.

---

398 Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 AJIL 613.

399 See, among others, Jane Addams, Emily Greene Balch, and Alice Hamilton, *Women at the Hague: The International Congress of Women and Its Results* (Garland 1972); Devaki Jain, *Women, Development, and the UN: A Sixty-Year Quest for Equality and Justice* (Indiana UP 2005); Katherine M Marino, *Feminism for the Americas: The Making of an International Human Rights Movement* (University of North Carolina Press 2019); Rebecca

Perhaps one of the most emblematic inclusions of women as subjects of international law is contained in the UN Charter. In its preamble, the Charter introduces among the UN's objectives the equal rights of men and women.[400] Additionally, in article 8, the Charter makes explicit that the UN's principal and subsidiary organs are to follow the equality between men and women in their functioning.[401]

Similarly, the Universal Declaration of Human Rights (UDHR)[402] in its article 2 reiterates the right of all individuals, without distinction as to their sex,[403] to fully enjoy the human rights set out in the Declaration. Further, article 16 of the UDHR recognises the right of men and women of full age to marry and found a family.

The International Covenant on Civil and Political Rights (ICCPR), establishes that State parties are to respect all individuals' civil and political rights irrespective of their sex.[404] Article 3 indicates explicitly that States need to ensure that men and women will enjoy the rights enshrined in the document equally.[405] Similarly, articles 4(1), 23(2), 24, 25, and 26 contain provisions protecting individuals from discrimination on the basis of their sex.[406] Mirroring these provisions, articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights also establish equality provisions for men and women in relation to the rights established therein.[407] Additionally, article 7(a)(i) requires States to ensure equal pay for equal work,[408] something that is also ensured

---

Adami and Dan Plesch (eds), *Women and the UN: A New History of Women's International Human Rights* (Routledge 2021); Giusi Russo, *Women, Empires, and Body Politics at the United Nations, 1946–1975* (University of Nebraska Press 2023).

400 Charter of the United Nations 1945 (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

401 Ibid article 8.

402 Although non-binding in character, the UDHR has been understood as having been (partially) solidified as international custom. See, for instance, John Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Judicial Character' in BG Ramcharan (ed), *Human Rights. Thirty Years After the Universal Declaration* (Martinus Nijhoff 1979) 21–37; Hurst Hannum, 'The UDHR in National and International Law' (1998) HHR 144, 147–149.

403 In this article, we understand sex as also being socially constructed (see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* [Routledge 1999] 1–32; Brenda Cossman, 'Gender Performance, Sexual Subjects and International Law' [2002] 15 CJLJ 281; Dianne Otto, 'Queering Gender [Identity] in International Law' [2015] 33 NJHR 299).

404 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

405 Given ICCPR's article 3 central focus on gender equality, it is important to note that some State Parties have explicitly made reservations or interpretative declarations on this regard, namely Bahrain (reservation), Liechtenstein (declaration), Monaco (declaration), Kuwait (declaration), and Qatar (reservation).

406 State Parties have also issued declarations and reservations to these ICCPR articles. For a full list, see <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#29> accessed 11 August 2023.

407 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3. The State Parties that have made reservations or interpretative declarations on article 3 of the ICESCR are Kuwait and Qatar.

408 Some States have issued reservations to postpone the application of this provision, namely Barbados and the UK.

by the International Labour Organization (ILO) Convention 100 (Equal Remuneration Convention) of 1951.[409]

Going beyond equality clauses, international legal instruments also add special protective provisions for women. In this regard, for instance, article 6(3) of the ICCPR prohibits the execution of capital punishment on pregnant women. Additionally, several ILO conventions establish specific protective measures for women, such as the Maternity Convention (first established in 1919, with the latest revised variant in 2000),[410] night work,[411] plantation work,[412] among others.

However, perhaps one of the most comprehensive legal regimes of special rights and protection accorded to women have been those elaborated by the Commission on the Status of Women (CSW). Established by the UN Economic and Social Council in 1946,[413] the CSW was fundamental for the drafting and adoption of several international conventions on women's rights,[414] including the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[415] CEDAW provisions encompass a variety of issues, including, but not limited to, equality before the law and within cultural practices, access to education, political rights, equal representation in national governments and international bodies, specific rights for rural women, and economic and social benefits, among others. Nevertheless, it bears noting that the CEDAW is one of the universal human rights instruments with the most significant number of State reservations.[416]

The CEDAW also has an Optional Protocol with 115 States parties.[417] This document establishes a monitoring Committee, competent to receive and consider communications concerning alleged Convention violations. Moreover, article 8 enables the Committee to conduct an inquiry procedure when it receives 'reliable information indicating grave or systematic violations by a State Party'.[418]

---

409 Convention (No. 100) concerning equal remuneration for men and women workers for work of equal value (adopted 29 June 1951, entered into force 23 May 1953) 165 UNTS 303 (C100).

410 Convention (No. 183) concerning the revision of the Maternity Protection Convention (adopted 15 June 2000, entered into force 7 February 2002) 2181 UNTS 253 (C183).

411 ILO Night Work Convention 1990 (No. 171) (adopted 26 June 1990, entered into force 4 January 1995) (C171).

412 Convention (No. 110) concerning conditions of employment of plantation workers (adopted 24 June 1958, entered into force 1960) 348 UNTS 275 (C110).

413 UN Economic and Social Council resolution 11(II), *Commission on the Status of Women*, E/RES/11(II) (21 June 1946).

414 Most notably, see Convention on the Political Rights of Women (adopted 31 March 1953, entered into force 7 July 1954) 193 UNTS 135; Convention on the Nationality of Married Women (adopted 20 February 1957, entered into force 11 August 1958) 309 UNTS 65.

415 Convention on the Elimination of all forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1982) 1249 UNTS 13 (CEDAW).

416 Seo-Young Cho, 'International Women's Convention, Democracy, and Gender Equality' (2014) 95 SSQ 719.

417 Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83.

418 Ibid article 8.

Other noteworthy special instruments adopted on women's rights are those concerning the regional systems of human rights, such as the 2003 Maputo Protocol on the Rights of Women in Africa,[419] the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women,[420] and the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).[421]

Aside from international human rights, women have been particularly included in international criminal law. Most notably, the Rome Statute of the International Criminal Court (ICC) includes gender as a protected category for the crime of persecution,[422] recognises women as a specific vulnerable group to specific international crimes,[423] and indicates that gender equality and expertise should count in the selection of judges for the ICC.[424]

Despite its contested legal status,[425] the Women, Peace and Security (WPS) agenda of the UN Security Council is also considered an influential set of documents that reinforce existing legal obligations of parties to armed conflicts concerning the rights and specific needs of women and girls. Initiated by the unanimously adopted Resolution 1325 (2000),[426] and comprising nine different sister resolutions under the same rubric,[427] the WPS agenda encompasses several issues relating to women and girls during and after conflict settings, such as prevention and protection against conflict-related sexual violence (CRSV), increased participation of women in peace processes, and specific measures to ensure the specific needs of women and girls in humanitarian relief. The fact that women have often been depicted merely as victims of conflict-related sexual violence, as mothers, or as peacemakers has been criticised.[428]

---

419 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) (adopted 11 July 2003, entered into force 25 November 2005).

420 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará', adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534.

421 The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 November 2022) CETS 210.

422 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, article 7(3).

423 More specifically, these are enslavement and forced pregnancy when committed as a crime against humanity. See Rome Statute articles 7(2)(c) and 7(2)(f).

424 Ibid 36(8)(a), 36(8)(b).

425 Christine Chinkin, *Women, Peace and Security and International Law* (CUP 2022) chapter 2.

426 UN Security Council resolution 1325 (2000), S/RES/1325(2000) (31 October 2000).

427 These are resolutions 1820(2008), 1888(2009), 1889(2009), 1960(2010), 2106(2010), 2122(2013), 2242(2015), 2467(2019), 2493(2019).

428 Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 AJIL 379, 381; Dianne Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10 MJIL 11; Dianne Otto, 'Feminist Approaches to International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 496; Christine Chinkin, 'Gender and Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Vol 1, OUP 2014); Nicola Pratt, 'Reconceptualizing Gender, Reinscribing Racial-Sexual Boundaries in International Security: The Case of UN Security Council Resolution 1325 on "Women, Peace and Security"' (2013) 57 ISQ 772.

C. WOMEN AS AGENTS OF INTERNATIONAL LAW

I. EXPLAINING THE INVISIBILITY OF WOMEN IN INTERNATIONAL LAW

Systematic and structural discrimination[429] and marginalisation of women in all their diversity has had yet another effect: the invisibility and non-recognition of women as active agents in international law. Various factors are said to have contributed to this, including the public-private divide,[430] behavioural stereotypical gender roles, power imbalances and corresponding lack of or aggravated access to financial resources, land and property, and educational institutions and offices.[431]

BOX 7.5.2 Advanced: The Public-Private Divide

The approach of the public-private divide, following Western political and legal philosophy,[432] explains the structural discrimination of women in the context of socio-political spheres: based on stereotyped gender roles, women are associated with and relegated to a domestic, private, and devalued sphere, while men are rather assigned to a public, political, and economic sphere, which, among others, influences the distribution of work and professions within the dominant gender dichotomy.[433] The function of the State and international law as a gendered system have been associated with the public sphere and therefore described as 'operating in the . . . male world'.[434] While the public-private divide, in combination with discrimination-related lack of or limited access to resources, education, and offices, may to a certain extent

429 On structural discrimination, see Kahl and Paige, § 3.3, in this textbook.

430 For an emblematic example, see Cynthia Enloe who underscored that '[g]overnments . . . need wives who are willing to provide their diplomatic husbands with unpaid services so these men can develop trusting relationships with other diplomatic husbands. They need a steady supply of women's sexual services to convince their soldiers that they are manly [and] depend on ideas about masculinized dignity and feminized sacrifice to sustain [a] sense of autonomous nationhood'. Cynthia Enloe, *Bananas, Beaches, and Bases: Making Feminist Sense of International Politics* (Pandora Press 1989) 196–197.

431 See, inter alia, Caroline ON Moser, 'Planning in the Third World: Meeting Practical and Strategic Gender Needs' (1989) 17(11) World Development 1799, 1801, 1803, 1812–1813; Maxine Molyneux, 'Mobilization without Emancipation? Women's Interests, State and Revolution in Nicaragua' (1985) 11(2) Feminist Studies 227, 232–233.

432 For the distinction made between *polis* (public sphere) and *oikos* (private sphere) in ancient Greece, see Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (OUP 1995) 2–4.

433 Ibid 2–3; similarly, inter alia, Rebecca Grant, 'The Sources of Gender Bias in International Relations Theory' in Rebecca Grant and Kathleen Newland (eds), *Gender and International Relations* (Indiana UP 1991) 8, 11–12.

434 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law – A Feminist Analysis* (Manchester UP 2000) 56. See also the connection between sovereign men and sovereign States in V. Spike Peterson and Anne Sisson Runyan, *Global Gender Issues* (Avalon 1993) 34.

> explain the absence and invisibility of women agents in international law, the Western character of the concept and its (necessarily) oversimplified categories neglect the discriminatory patterns and corresponding struggles of women across spheres, particularly those of the Global South, that also contribute to the complex combination of factors that drive the persisting prevention, invisibility, and non-recognition of women agents of international law.[435]

The structural discrimination, which manifests itself differently depending on the specific situation of a woman,[436] continues in the denial of or difficult access to and participation in international institutions, key positions, and corresponding law- and decision-making processes. It is also worth mentioning that the struggles caused by and the fight against patriarchal structures also tie up important resources, such as money, time, and energy, that could otherwise be invested differently.[437] Invisibility therefore refers to all those women of diverse backgrounds that could not participate in the 'game' of international law in the first place.[438] This absence of women in the international sphere is also reflected in their continuous underrepresentation in important and influential international legal institutions, such as the ILC[439] or international courts and tribunals.[440] No woman has been nominated UN Secretary-General so far.[441]

---

435 See, inter alia, Susan B Boyd, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press 1997).

436 On intersectionality, see Kahl and Paige, § 3.3, in this textbook.

437 As Rebecca Solnit underscored: 'Think of how much more time and energy we would have to focus on other things that matter if we weren't so busy surviving'. *Men Explain Things To Me* (Haymarket Books 2014) 35.

438 See, by way of illustration, the tragic story of Shakespeare's fictional sister described by Virginia Woolf. Virginia Woolf, *A Room of One's Own* (Hogarth Press 1929) 39–41.

439 From 1947 until 2022, there were seven women at the ILC compared to 229 men. See Priya Pillai, 'Symposium on Gender Representation: Representation of Women at the International Law Commission' (*Opinio Juris*, 7 October 2021) <http://opiniojuris.org/2021/10/07/symposium-on-gender-representation-representation-of-women-at-the-international-law-commission/> accessed 11 August 2023. See also Lorenzo Gradoni, 'Still Losing: A Short History of Women in Elections (and By-Elections) for the UN International Law Commission' (*EJIL: Talk!,* 25 November 2021) <www.ejiltalk.org/still-losing-a-short-history-of-women-in-elections-and-by-elections-for-the-un-international-law-commission/> accessed 11 August 2023.

440 See the description of women representation in international courts with further sources in Catherine Kessedjian, 'Gender Equality in the Judiciary – With an Emphasis on International Judiciary' in Elisa Fornalé (ed), *Gender Equality in the Mirror: Reflecting on Power, Participation and Global Justice* (Brill 2022) 195, 201. See also Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' (2012) Chicago Journal of International Law 647; Leigh Swigart and Daniel Terris, 'Who Are International Judges?' in Cesare PR Romano, Karen J Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 619.

441 On the topic, see Heather Barr, 'Time for a Female UN Secretary-General? Guterres Reelection Run Shouldn't Deter Nominations of Qualified Women' (*Human Rights Watch*, 2 March 2021) <www.hrw.org/news/2021/03/02/time-female-un-secretary-general> accessed 11 August 2023.

In addition, international law has also fostered patterns of overseeing, ignoring, and denying adequate recognition to those women that *have* been active designers of the international legal order, often precisely despite the very difficult conditions they faced.[442] Invisibility and non-recognition of women agents in the realm of international law is also owed to a patriarchal system that operates in invisibility itself.[443]

The mechanism that fuels invisibility of these women agents can particularly be observed where international law is taught, described, analysed, and criticised. Trailblazing women in international law are largely absent in universities' classrooms in comparison to their men colleagues. The 'classics of international law' seldom include contributions of women. These 'classics' go beyond the eponymous series edited by James Scott,[444] as they refer to preselected works, which are considered contributions of such significance that they are regularly addressed in seminars, lectures, and academic publications. Besides losing valuable contributions to the development of international law, the resulting invisibility and recognition of women's contributions also lead to a presumption of their nonexistence and a lack of role models for younger women.

Recently, some important scholarly projects have tried to break the glass ceiling in favour of the visibility and recognition of women as active agents and designers of international law, such as the works of Rebecca Adami and Dan Plesch[445] as well as Immi Tallgren.[446]

II. TRAILBLAZING WOMEN IN INTERNATIONAL LAW

Despite the aforementioned hurdles, women have made important contributions to the development of international law in different roles, such as diplomats, judges, scholars, lawyers, and active members of civil society. Nevertheless, it is important to highlight that white, Western women have notably gained more recognition than their racialised and Global South counterparts. We thus aim at modestly correcting this bias by foregrounding the diverse set of women who have contributed to substantial landmarks of contemporary international law.

In this sense, while Eleanor Roosevelt has become much more visible in her efforts to encourage the adoption of the UDHR, Dominican Minerva Bernardino was crucial in her promotion of the rights of women in the document.[447] Bernardino, along with

---

442 Nancy Fraser has described such cultural injustice as being rooted 'in social patterns of representation, interpretation, and communication'. Nancy Fraser, *Justice Interruptus: Critical Reflections on the* '*Postsocialist Condition*' (Routledge 1997) 14.

443 Mary Becker, 'Patriarchy and Inequality: Towards a Substantive Feminism' (1999) University of Chicago Legal Forum 21.

444 See James Brown Scott, *Classics of International Law* (volumes I and II, Carnegie Institution 1912).

445 Rebecca Adami and Dan Plesch, *Women and the UN: A New History of Women's International Human Rights* (Routledge 2022).

446 Immi Tallgren (ed), *Portraits of Women in International Law: New Names and Forgotten Faces?* (OUP 2023).

447 Johannes Morsink, 'Women's Rights in the Universal Declaration' (1991) 13(2) HRQ 229.

other Latin American diplomats, such as the Brazilian Bertha Lutz and Mexican Amalia González Caballero de Castillo Ledón, have also had an important role in the inclusion of women's rights during the negotiations of another landmark international legal document: the UN Charter. Both Bernardino and Lutz were active in the drafting process of the Charter, especially in their work of including crucial wording on the equality of men and women.[448] An equally outstanding international figure of that time is Hansa Mehta from India, the only woman delegate to the UN Commission on Human Rights besides Eleanor Roosevelt in 1947.[449] The change in the wording of article 1 of the Universal Declaration from 'All men are born free and equal' to 'All human beings are born free and equal' is to her merit.[450]

Even before the birth of the UN System, as early as 1889, Bertha von Suttner formulated her (at that time) very progressive thoughts on peace and the international legal order in her bestselling anti-war novel, *Die Waffen nieder!* She envisaged an international legal order with international institutions, international jurisdiction, and peaceful cooperation among States. Suttner was the first woman to participate as an observer at the First Hague Peace Conference (in 1899) and the first woman to be awarded the Nobel Peace Prize (in 1912).[451] Nearly a century before, another trailblazing woman, a feminist, abolitionist playwright fought against discrimination of women and publicly opposed slavery in the context of the French revolution: Olympe de Gouges.[452] As a response to the 1789 Declaration of the Rights of Man and of the Citizen, she published a 'Declaration of the Rights of Women and of the Female Citizen', advocating for equal rights and challenging male authority and oppression of women.

Nowadays, outstanding women from the Global South and their important contributions to international law are gaining more and more attention, such as Navanethem Pillay, Hauwa Ibrahim, Xue Hanqin, Unity Dow, Taghreed Hikmat, and Cecilia Medina Quiroga, besides many others.

This is only a very limited selection and therefore a very incomplete list of many trailblazing women and their important contributions to international law across different times and cultures. (Re)discovering the contributions of women to international law is still the subject of ongoing scholarly research and discussion.

---

448 Elise Dietrichson and Fatima Sator, 'The Latin American Women: How They Shaped the UN Charter and Why Southern Agency Is Forgotten' in Rebecca Adami and Daniel Plesch (eds), *Women and the UN: A New History of Women's International Human Rights* (Routledge 2022).

449 United for Human Rights, 'Meet the Women Who Shaped the Universal Declaration of Human Rights' <www.humanrights.com/news/2021-news-meet-the-women-who-shaped-the-universal-declaration-of-human-rights.html> accessed 12 August 2023.

450 Khushi Singh Rathore, 'Excavating Hidden Histories: Indian Women in the Early History of the United Nations' in Rebecca Adami and Daniel Plesch (eds), *Women and the UN: A New History of Women's International Human Rights* (Routledge 2022).

451 See e.g. Janne Elisabeth Nijman, 'Bertha von Suttner: Locating International Law in Novel and Salon' in Immi Tallgren (ed), *Portraits of Women in International Law: New Names and Forgotten Faces?* (OUP 2023).

452 See e.g. Anne Lagerwall and Agatha Verdebout, 'Olympe de Gouges: Beyond the Symbol' in Immi Tallgren (ed), *Portraits of Women in International Law: New Names and Forgotten Faces?* (OUP 2023) 56.

D. CONCLUSION

This chapter has demonstrated that, despite the structural gender bias and barriers in the international legal field, women have been a significant part of international law – both as subjects of international legal instruments and as agents contributing to the development of the international legal order. However, there is still a long way to go to achieve full gender equality and meaningful inclusion in the international legal order. Women – especially those positioned within an intersectional background of discrimination and oppression – still face structural marginalisation in the international legal field, despite their continued relevance for the profession. As such, striving for gender equality and the recognition of women's contribution to international law is still an important and much needed endeavour.

BOX 7.5.3 Further Readings and Further Resources

Further Readings

- R Adami and D Plesch, *Women and the UN: A New History of Women's International Human Rights* (Routledge 2022)
- R Adami, *Women and the Universal Declaration of Human Rights* (Routledge 2019)
- H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis*, With a New Introduction (Manchester University Press 2022)
- I Tallgren (ed), *Portraits of Women in International Law: New Names and Forgotten Faces?* (OUP 2023)

Further Resources

- 'Calendar on Outstanding Women of International, European and Constitutional Law' <www.jura.uni-hamburg.de/forschung/institute-forschungsstellen-und-zentren/iia/kooperationen-projekte/womencalendar.html>
- 'Women and War: A Feminist Podcast' <www.rsc.ox.ac.uk/research/women-war-a-feminist-podcast>

§§§

§ 7.6 NONGOVERNMENTAL ORGANISATIONS

HE CHI

BOX 7.6.1 Required Knowledge and Learning Objectives

Required knowledge: Subjects of International Law; Sources of International Law; International Organisations; International Human Rights Law

Learning objectives: Understanding the role of NGOs in international law and different lenses to appraise their functions.

A. INTRODUCTION

Nongovernmental organisations (NGOs) are generally not regarded as formal subjects of international law. However, these actors are active and vital in today's international order. Indeed, one cannot miss the headlines occupied by the several prominent NGOs in the global media: Amnesty International, Save the Children, Doctors Without Borders/Médecins Sans Frontières (MSF), and Transparency International.

NGOs are often hailed as a crucial force to legitimise international law, a forum to voice the concerns of the global civil society, or even the vanguards of a post-sovereigntist, cosmopolitan world. In recent years, however, the world has witnessed criticism against NGOs.[453] This chapter will turn from descriptive to normative to examine NGOs' role in international law.

B. WHAT ARE NONGOVERNMENTAL ORGANISATIONS?

I. DEFINITION

NGOs are generally defined as 'groups of persons or societies, freely created by private initiative, that pursue an interest in matters that cross or transcend national borders and are not profit-seeking'.[454] However, this definition cannot provide meaningful information about NGOs' nature, organisation, and function. NGOs as a social phenomenon are complex.

---

453 See Kenneth Anderson and David Reiff, 'Global Civil Society: A Skeptical View' in Marlies Glausis, Mary Kaldor, and Helmut Anheier (eds), *Global Civil Society* (SAGA 2004) 35.

454 Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 AJIL 348, 350.

So, what exactly is an NGO? First, it is an organisation made by individuals. It gathers people in one group, regardless of its organisational structure. Second, an NGO is independent of the government. This distinguishes it from international organisations and is one of its most salient features.[455] However, this feature is blurred as government-organised nongovernmental organisations (GONGOs) have emerged recently.[456] Third, an NGO is not-for-profit,[457] relying on voluntary contributions from external parties to ensure its existence. Its operation creates intangible results, such as environmental protection, charity, hobbies or interest groups, human rights, and legal or economic communities.

II. FROM LOCAL TO INTERNATIONAL: NGOS IN THE GLOBAL DOMAIN

We are living in a globalised era. Nevertheless, since people tend to focus on the things around them, civil society has traditionally been local oriented. The earliest form of NGOs that spanned continents was religious groups and secret organisations.[458] The British and Foreign Anti-Slavery Society, established in London in 1839, is often considered the earliest modern NGO.[459]

In the 19th century, we witnessed a boom in the amount and scope of NGOs. The Union of International Associations sought to compile a complete record of NGOs, making the 19th century the starting point of 'globalisation' for NGOs.[460] The development of NGOs on the international stage was not a linear but rather a cyclical process. The NGO sector has been profoundly shaped by the global environment brought out by the end of the Cold War, technological advancement, and globalisation.

C. THE LEGAL STATUS OF NGOS IN INTERNATIONAL LAW

The legal status of NGOs, along with other non-State actors, has been subject to continuous debate. The focus of the discussion centres around the fact that NGOs, according to dominant accounts, do not hold international legal personality. Even though

---

455 On international organisations, see Baranowska, Engström, and Paige, § 7.3, in this textbook.

456 See Reza Hasmath, Timothy Hildebrandt, and Jennifer YJ Hsu, 'Conceptualizing Government-Organized Non-Governmental Organizations' (2019) 15 JCS 267. See also Fiona McGaughey, 'From Gatekeepers to GONGOs: A Taxonomy of Non-Governmental Organizations Engaging with United Nations Human Rights Mechanisms' (2018) 36 NQHR 111.

457 It is debatable whether NGOs include profit-making organisations. In this chapter, the author tends not to have those profit-making organisations and focuses on those not-for-profit.

458 See Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 MJIL 184.

459 Charles Chatfield, 'Intergovernmental and Non-Governmental Associations to 1945' in Jackie Smith, Charles Chatfield, and Ron Pagnucco (eds), *Transnational Social Movements and Global Politics: Solidarity Beyond the State* (Syracuse UP 1997) 21.

460 See Thomas Davies, 'Understanding Non-Governmental Organizations in World Politics: The Promise and Pitfalls of the Early "Science of Internationalism"'(2017) 23 EJIR 884.

non-State actors thus occupy an 'inferior' position compared to States, one cannot neglect that the roles played by these actors are becoming increasingly significant.[461]

I. THE UN SYSTEM

In article 71, the UN Charter stipulates that 'the Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence'.[462]

For many, this article signified a great leap forward in democracy on the international stage and initiated an exciting institutional linkage between States and NGOs. It is the first time NGOs can occupy an official place and make their voices heard in an international organisation dominated by States. All NGOs participating in the work of the UN Economic and Social Council, based on the working field and competence, are classified into three types: general consultative status, special consultative status, and roster status.[463]

With the consultative status, NGOs can participate in conferences convened by the UN, including meetings convened by the ECOSOC, its subsidiary bodies, and various UN human rights organs.

More recently, a participatory relationship has been proposed to integrate NGOs even more actively in the day-to-day working of the UN system, moving beyond the consultative status stipulated in article 71.[464] One of the reasons for the UN's welcoming attitude towards NGOs might be that the UN and NGOs can achieve a kind of 'mutual legitimacy', concretising each other's role in the State-centric international society.[465]

II. REGIONAL BODIES

Following the UN, the Organization of American States (OAS), in its Charter of 1948, laid out several provisions concerning NGOs. The Council of Europe established formal working relationships with NGOs as early as 1951.[466] It distinguished international and domestic NGOs and gave the former participatory

---

461 On States, see Green, § 7.1, in this textbook; on the pluralisation of international legal personhood, see Engström, introduction to § 7, in this textbook.

462 The Charter of the United Nations (signed on 26 June 1945, entered into force 24 October 1954) 1 UNTS XVI.

463 UN ECOSOC 'Consultative Relationship between the United Nations and Non-Governmental Organizations' Res 1996/31 (25 July 1996) 60–61.

464 UNGA 'We the Peoples: civil society, the United Nations and global governance: Report of the Panel of Eminent Persons on United Nations – Civil Society Relations' UN Doc A/58/817(2004).

465 See Peter Willets, 'The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?'(2006) 12 Global Governance 305.

466 CoE 'Relations with International Organizations, Intergovernmental and Non-governmental' Res(51)30 F(3 May 1951).

and later partnership status. One notable point is that in 1999, the general assembly of the OAS established a commission for civil society participation in the OAS activities within the permanent council and a guideline for civil society participation.[467] One salient feature of NGO participation in the OAS system is its term used. 'Civil society' rather than 'NGO' is used frequently, symbolising an optimistic attitude toward the NGOs, and attaches a progressive narrative towards the role of NGOs in the international arena. This mentality can be summarised as treating NGOs as a force for good.[468]

The African Union (AU) is unique in its relationship with civil society organisations (CSOs).[469] Only some NGOs have been granted observer status, but no explicit legal basis was provided to entitle NGOs to work with the AU at the general level.[470] Article 22 of the Constitutive Act on the AU established an Economic, Social, and Cultural Council (ECOSOCC).[471] The ECOSOCC is an advisory body comprising different social and professional groups. Although the aim and purpose of the ECOSOCC are expansive, what comes with this expansiveness is the vagueness. Evaluating NGOs' roles and actual positions in the AU is challenging. In the meantime, Africa has also been an important place of activity for Western NGOs, which has led to controversial debate.[472]

D. THE ROLE OF NGOS IN INTERNATIONAL LAW

I. INTERNATIONAL LAW-MAKING

NGOs have been increasingly influential in international law-making as a response to concerns about a democracy deficit in international law, for it can supplement the State-centrism of international law and bring more voices into legislative processes. For one, they can influence agenda-setting in international affairs.[473] For example, in the Convention on Biological Diversity drafting process,[474] the World Conservation Union intensely participated in discussing and wording several vital articles and successfully

467 OAS 'Guidelines for Participation by Civil Society Organizations in OAS Activities' CP/RES 759 (1217/99) (15 December 1999).

468 See George Kaloudis, 'Non-Governmental Organisations: Mostly a Force for Good' (2017) 34 IJWP 81.

469 In the AU document, 'civil society organisation' (CSO) is the preferred usage. However, CSO primarily refers to NGOs, and the author uses the two terms interchangeably.

470 On the African human rights system, see Rachovitsa, § 21.3, in this textbook.

471 Constitutive Act of the African Union (adopted 11 July 2000, enter into force 26 May 2001) 2158 UNTS I-37733.

472 See Usman A Tar, 'Civil Society and Neoliberalism' in E Obadare (ed), *The Handbook of Civil Society in Africa* (Springer 2014) 253–270.

473 Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination (1992) 46 IO 3.

474 Convention on Biological Diversity (adopted 5 June 1992, enter into force 29 December 1993) 1760 UNTS 79.

integrated its agenda into the Convention.[475] In some instances, NGOs can even join in the drafting process directly. In negotiating the Ottawa Treaty of the Prohibition of Anti-Personnel Mines,[476] the International Campaign to Ban Landmines followed through.[477] Occasionally, NGOs may furthermore directly join government delegations as counsels or delegates. This happened in negotiating the Rome Statute of the International Criminal Court.[478] Finally, NGOs also engage in advocacy. Even when excluded from the negotiation process, NGOs can exert influence as pressure groups, demonstrating before venues.

II. ADMINISTRATION OF INTERNATIONAL AFFAIRS

NGOs also engage with the daily routines of international affairs. Many international organisations enlist NGOs to provide professional opinions on the issues or discuss policies and documents. In the UN system, various working groups work with relevant NGOs. For example, in the UN Global Compact Initiative,[479] NGOs have been pioneers in taking advantage of the voluntary code of conduct to induce good behaviour of transnational corporations in human rights and the environment. The tripartite decision-making structure in the International Labour Organization gives NGOs critical outlets to participate in global labour rights management.[480] As an NGO specialising in standards-making, the International Organization for Standardization (ISO) provides a case in point of NGOs' role in the administration of international affairs.[481]

Some NGOs are particularly worth mentioning. These are the International Committee of the Red Cross (ICRC); the International Union for Conservation of Nature (IUCN), the Global Fund to Fight AIDS, Tuberculosis and Malaria; Gavi, the Vaccine Alliance (Gavi), and the World Anti-Doping Agency (WADA). The particularity of these NGOs is that they have a hybrid character, and they all share a mission of international interest. To a certain extent, especially in the case of the ICRC,

475 Erik B Bluemel, 'Overcoming NGO Accountability Concerns in International Governance' (2005) 31 Brooklyn Journal of International Law 141, 162.

476 The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction (adopted December 3 1997, entered into force on March 1 1999) 2056 UNTS 211.

477 Williams and Goose, 'The International Campaign to Ban Landmines' in Maxwell A Cameron, Brian W Tomlin, and Robert J Lawson (eds), *To Walk without Fear: The Global Movement to Ban Landmines* (OUP 1998) 20.

478 See Michael J Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan 2008).

479 Peter J Spiro, 'New Global Potentates: Nongovernmental Organizations and the Unregulated Marketplace' (1996) 18 Cardozo Law Review 962.

480 See Sergey Ripinsky and Peter Van Den Bossche, *NGO Involvement in International Organizations: A Legal Analysis* (British Institute of International and Comparative Law 2007) 67–69.

481 See Karsten Ronit and Volker Schneider, 'Global Governance Through Private Organisations' (1999) 12 Governance 243.

they are deemed as having legal personality and enjoy the privilege of immunity.[482] The reasons for this are closely connected to the functions these institutions played in the administration of international affairs.

III. INTERNATIONAL LAW ENFORCEMENT

Enforcement of international law has long been dubbed as the 'vanishing point of international law'.[483] However, this defect of problematic enforcement can be remedied by the 'soft' enforcement which NGOs lead. With the help of modern information technology, NGOs worldwide can cause a 'boomerang effect' that can equip them with the necessary civil power – public opinion – to compel or even coerce States into compliance.[484]

One can observe these trends in human rights and environmental protection in particular. In the Montreal Protocol on Substances That Deplete the Ozone Layer, NGOs are implicitly tasked to monitor State parties' compliance. If they find any treaty breach, they can notify the secretariat, thus ensuring a quick sanctioning process.[485] In the human rights field, by issuing shadow reports and adopting the 'naming and shaming' strategy, human rights NGOs can pressure States to comply with relevant human rights norms. In the meantime, some judicial or quasi-judicial mechanisms have opened the door to NGOs.[486] For example, in the WTO dispute settlement mechanism, NGOs may submit amicus curiae opinions to assist in resolving trade disputes.[487] NGOs may press States to conform to relevant international standards through domestic litigation.

E. A CRITICAL APPRAISAL OF NGOs IN INTERNATIONAL LAW

Some scholars praise NGOs as the vanguard of global democracy.[488] Acting individually, NGOs have allowed ordinary people to make their voices heard worldwide. NGOs are leading a 'global association revolution'.[489] Organisations such as Greenpeace, Amnesty International, Human Rights Watch, and the recent Nobel Peace Prize winner

---

482 The ICRC stands alone among NGOs for it attains *sui generis* status as a subject of international law.

483 On enforcement, see Quiroga Villamarín, § 2.3, in this textbook.

484 See Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998).

485 Elizabeth P Barratt-Brown, 'Building a Monitoring and Compliance Regime Under Montreal Protocol' (1991) 16 Yale Journal of International Law 564.

486 See Robyn Eckersley, 'A Green Public Sphere in the WTO? The Amicus Curiae Interventions in the Transatlantic Biotech Dispute' (2007) 13 EJIL 329.

487 See Michelle Ratton Sanchez, 'Brief Observations on the Mechanisms for NGO Participation in the WTO' (2006) 4 Sur 103.

488 See Jan Aart Scholte, 'Global Governance, Accountability, and Civil Society' in Jan Aart Scholte (ed), *Building Global Democracy: Civil Society and Accountable Global Governance* (CUP 2011) 1–40.

489 Lester M Salamon, 'The Rise of the Nonprofit Sector' (1994) 73 Foreign Affairs 109.

International Campaign to Abolish Nuclear Weapons are fighting at the forefront for world peace, a sustainable environment, and human rights. NGOs are not powerless actors protesting in the corner. Constituting the main body of Global Civil Society (GCS), NGOs gained legitimacy and potency to occupy streets, block unfavourable bills, and criticise governments.

However, NGOs, or GCS, have ambiguities. First, GSC is not a bounded 'non-governmental' space but a means of making global politics governable in particular ways. In this regard, NGOs, States, and markets are closely intertwined and mutually constituting. Second, by being nongovernmental, one may presume that NGOs are neutral actors; however, occasionally, NGOs represent certain social groups' interests and potent groups. Third, against NGOs' progressive and empowering image, NGOs also engage in power struggles and cannot escape tensions and contradictions as they try to transform politics.[490]

The term 'NGOisation' is commonly used among many social movements, activist networks, and academics to refer to the institutionalisation, professionalisation, depoliticisation, and demobilisation of movements for social and environmental change.[491] As many scholars have pointed out, NGOisation is a relatively new phenomenon that concurred with the outgrowth of neoliberalism, or, put another way, NGOisation is a 'symptom' desired by neoliberal ideology. Some scholars put it directly: 'The greater the devastation caused by neoliberalism, the greater the outbreak of NGOs'.[492] Only by following the path of NGOisation do some NGOs gain the organising imperative and internal momentum to participate in the world struggle under the disguise of non-government, impartiality, and independence.

F. CONCLUSION

The case of NGOs has provided us with a vivid example to observe the perils of international law. By embracing NGOs or the more intriguing term 'Global Civil Society' without a second thought, international lawyers celebrate the advent of a more democratic, inclusive, and cosmopolitan international law, which can bring hope for a murky world dominated by greedy, aggressive, and violent States. NGOs are caring agents for the sake of humanity, but they can also be shrewd groups with the sheer aim of attracting donors and fulfilling formal obligations, which is far from the real needs of the weak. NGOs are also part of a world of struggle.[493] As international lawyers, we must note the losses and gains that are present in this struggle.

---

490 See Sangeeta Kamat, 'The Privatization of Public Interest: Theorizing NGO Discourse in a Neoliberal Era' (2004) 11 RIPE 156.

491 See Aziz Choudry and Dip Kapor (eds), *NGOization: Complicity, Contradiction, and Prospects* (Zed Books 2013).

492 Arundhati Roy, 'Help That Hinders' (2004) *Le monde diplomatique* (English Edition).

493 See David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton UP 2016).

BOX 7.6.2 Further Readings

Further Readings

- A Lindblom, *Non-governmental Organizations in International Law* (CUP 2005)
- BK Woodward, *Global Civil Society in International Lawmaking and Global Governance: Theory and Practice. Queen Mary Studies in International Law* (Vol. 2, Martinus Nijhoff 2010)
- B Reinalda, M Noortmann, and B Arts (eds), *Non-State Actors in International Relations* (Ashgate 2001)
- D Chandler, *Constructing Global Civil Society: Morality and Power in International Politics* (Palgrave Macmillan 2004)
- J Keane, *Global Civil Society?* (CUP 2003)

§ § §

§ 7.7 CORPORATIONS

SUÉ GONZÁLEZ HAUCK

BOX 7.7.1 Required Knowledge and Learning Objectives

Required knowledge: History, Subjects, and Actors

Learning objectives: Understanding the role corporations have played in the creation of international law; having a cursory knowledge of corporations' rights and obligations under contemporary international law.

A. INTRODUCTION

Corporations are entities endowed with legal personality separate from their owners. The International Court of Justice (ICJ) recognised corporations' separate legal personality in *Barcelona Traction*[494] and *Ahmadou Sadio Diallo.*[495] This distinct legal identity empowers corporations to own assets, conclude contracts, acquire rights, and assume obligations in their own name.[496] Under international law, corporations enjoy various rights, notably property, freedom of establishment and movement, and access to markets. A whole branch of international law – international investment law – is devoted to securing the rights of corporations.[497] In contrast, international law imposes only minimal obligations on corporations. This chapter retraces historical factors shaping corporations' international legal status, examines their role as ostensibly private entities with often public functions, highlights key corporate rights in international law, and briefly surveys ongoing efforts for corporate legal accountability.

B. HISTORY OF INTERNATIONAL LAW AND THE CORPORATION

One of the key tenets of mainstream international law is that the State is the sole 'natural' subject of international law and that granting rights to or, especially, imposing obligations on other actors requires specific rules.[498] This means that the commonly

494 *Case Concerning the Barcelona Traction, Light, and Power Company, Limited* (Belgium v Spain) (Second Phase) (Judgment) [1970] ICJ Rep 3 [33], [38].

495 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) (Judgment) [2007] ICJ Rep 582 [61].

496 Peter T Muchlinski, 'Corporations in International Law' (*Max Planck Encyclopedia of International Law*, June 2014) para 2.

497 See Hankings-Evans, § 23.1, in this textbook.

498 On States, see Green, § 7.1, in this textbook; on subjects and actors in international law more generally, see Engström, Introduction to § 7, in this textbook.

held position is that corporations can only be held accountable under national jurisdictions.[499] A glance at the history of modern international law shows that this narrative is, at best, incomplete.

The emergence of international law is inextricably linked to chartered companies, that is, commercial organisations endowed with special privileges by States, usually through a royal charter.[500] At the beginning of the 17th century, two particularly influential colonial empires, the Dutch and the British, founded the Dutch East India Company (Vereenigde Oost-Indische Compagnie, VOC) and the British East India Company, respectively. Both companies exhibited features that became typical of modern corporations: they were endowed with permanent capital, legal personhood, and tradable shares, and their governance structures allowed for separation between ownership and management and for limited liability for shareholders and for directors.[501]

The memoranda Hugo Grotius crafted for the VOC[502] influenced international trade law and the international law of the sea,[503] as well as central doctrines of international law, including sovereignty and subjects.[504] To justify the VOC's seizure of foreign vessels, Grotius extended just war concepts to ostensibly private entities like the VOC, thus granting them public sovereign powers.[505] The structure of international law Grotius put forward, therefore, is one in which the chartered company is a central actor and subject.[506] Chartered companies concluded contracts with local authorities and established titles over territory.[507] Incrementally, the VOC used such contracts to claim trade monopolies and the right to punish violations of these claimed monopoly rights, including by conquest. These claims and the resulting forcible actions resulted in hollowing out the sovereign rights of local authorities.[508]

A new model of cross-border business enterprise started to emerge with the Industrial Revolution. New modes of transport like railroads and steamboats and new modes of communication like the telegraph made it possible and capitalism's inherent drive for

499 Muchlinski (n 495) para 7.

500 Tony Webster, 'British and Dutch Chartered Companies' (*Oxford Bibliographies*) <www.oxfordbibliographies.com/display/document/obo-9780199730414/obo-9780199730414-0099.xml> accessed 25 August 2023.

501 Oscar Gelderblom and others, 'The Formative Years of the Modern Corporation: The Dutch East India Company VOC 1602–1623' (2013) 73 The Journal of Economic History 1050.

502 See González Hauck, § 1.B.II., 1.C.II., in this textbook.

503 Koen Stapelbroek, 'Trade, Chartered Companies, and Mercantile Associations' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2013) 338, 347.

504 José-Manuel Barreto, 'Cerberus: Rethinking Grotius and the Westphalian System' in Martti Koskenniemi and others (eds), *International Law and Empire: Historical Explorations* (OUP 2017) 149, 156.

505 Barreto (n 503) 156 et seq.; Richard Tuck, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant* (OUP 1999) 85; Eric Wilson, 'The VOC, Corporate Sovereignty and the Republican Sub-Text of *De iure praedae*' (2005–2007) 26–28 Grotiana 310.

506 Barreto (n 503) 158.

507 Stapelbroek (n 502) 341.

508 Ibid 350.

expansion made it necessary for businesses to establish permanent subsidiaries in other countries. This was mainly focused on resource extraction like mining companies, but not limited to them. In the second half of the 19th century, starting with the British New Company Law of 1844, many States, including France, the United States, Germany, and Japan established laws allowing for the free incorporation of private companies.[509] This turn from chartered companies to private corporations entailed a shift in how business enterprises were perceived: from vehicles of State power to entities operating separately from the State.[510]

C. THE CORPORATION AND THE PUBLIC-PRIVATE DIVIDE

Exploring the role of corporations in international law naturally involves delving into the well-known distinction between public and private law. International law's 'public' nature arises from its focus on sovereignty and States. On the flip side, corporations are typically considered private entities.[511] However, corporations wield considerable public power, not only by leveraging their economic power to pressure governments, but also in ways that can be seen as expressions of autonomous regulatory force or governance. Corporations create transnational rules and regulations through their business practices, contractual agreements, and private dispute resolution mechanisms.[512] They can shape the interpretation of established legal norms, particularly when official judicial or public interpretative guidance is absent – a common situation in international law.[513] Adding to this complexity is the prevalence of modern-day public-private partnerships, where public State entities collaborate with private, often foreign, investors. These partnerships often involve entrusting functions like utility service provision to private parties.[514]

D. RIGHTS OF CORPORATIONS UNDER INTERNATIONAL LAW

A corporation's links to a State via incorporation or through the centre of administration establishes corporate nationality. Corporations have the rights granted to the nationals of the parties under Treaties of Friendship, Commerce, and Navigation or under Bilateral Investment Treaties (BITs).[515] The traditional way of enforcing these rights is through diplomatic protection.[516] Establishing the link of nationality between

509 Doreen Lustig, *Veiled Power: International Law and the Private Corporation, 1886–1981* (OUP 2020) 15.

510 Ibid 16.

511 Lustig (n 508) 2–3.

512 Dan Danielsen, 'Corporate Power and Global Order' in Anne Orford (ed), *International Law and its Others* (CUP 2006), 86–88.

513 Ibid.

514 Muchlinski (n 495) para 3.

515 Ibid para 9.

516 See Arévalo-Ramírez, § 10, in this textbook.

the corporation and the State willing to exercise diplomatic protection can be difficult, especially for transnational entities.[517]

The most important international case concerned with the legal personality and the nationality of corporations is the *Barcelona Traction* case. Barcelona Traction, incorporated in Canada, had subsidiaries there and in Spain, holding bonds and facing financial issues due to the Spanish Civil War.[518] Belgium, among other States, intervened on behalf of their shareholding nationals. The ICJ held the Belgian claims on behalf of the Belgian shareholders to be inadmissible, holding that States could only bring forward claims in the name of shareholders if the corporation had seized to exist or if the State of incorporation lacked the capacity to take action on its behalf.[519] The ICJ explored 'lifting the corporate veil' (i.e. allowing legal claims both on behalf of and against shareholders directly), but decided this was only possible under exceptional circumstances, mirroring domestic law practices for fraud or malfeasance.[520] Additionally, the ICJ affirmed that corporations' nationality should be established based on incorporation and registered office, not on a genuine link test,[521] differing from the *Nottebohm* case's standards for individuals.[522]

Corporations also enjoy rights that they can directly enforce under international law. The most important of these rights are conferred on corporations under international investment law. Corporations can bring claims derived from BITs or other international investment treaties against host States directly before specialised investment tribunals.[523] Despite not being *human*, corporations are also recognised as bearers of human rights within the European human rights system.[524] Some international legal scholars have pushed for a broader recognition of corporate 'human' rights through broad interpretations of the term 'everybody', which human rights treaties often use to describe rights holders.[525] More critical voices have raised concerns that corporate human rights contradict the very idea of human rights and pointed towards them as an illustration of the structural liaison between human rights and capitalism.[526]

---

517 Muchlinski (n 495) para 14.

518 Stephan Wittich, 'Barcelona Traction Case' (*Max Planck Encyclopedia of Public International Law*, May 2007) para 1.

519 *Barcelona Traction* (n 493) [61].

520 Ibid [56–58].

521 Ibid [56].

522 *Nottebohm Case* (Second Phase) (Judgment) [1955] ICJ Rep 4 [23].

523 See Hankings-Evans, § 23.1, in this textbook.

524 Silvia Steininger and Jochen von Bernstorff, 'Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate 'Human' Rights in International Law' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (OUP 2021) 283–284; Marius Emberland, *The Human Rights of Companies. Exploring the Structure of ECHR Protection* (OUP 2006). On the European human rights system, see Theilen, § 21.4, in this textbook.

525 Lucien J Dhooge, 'Human Rights for Transnational Corporations' (2007) 16 Journal of Transnational Law and Policy 197.

526 Steininger and von Bernstorff (n 523); Grietje Baars, *The Corporation, Law and Capitalism. A Radical Perspective on the Role of Law in the Global Political Economy* (Brill 2019); Turkuler Isiksel, 'The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights' (2016) 38 HRQ 294; Anna Grear, 'Challenging Corporate Humanity: Legal Disembodiment, Embodiment and Human Rights' (2007) 7 HRLR 511.

E. OBLIGATIONS OF CORPORATIONS UNDER INTERNATIONAL LAW

International law imposes only minimal obligations on corporations. The rise of the Business and Human Rights movement, however, has pushed for corporate accountability for human rights abuses.[527] The adoption of the United Nations Guiding Principles on Business and Human Rights (UNGPs) is one of the main achievements of this movement, outlining the responsibility of corporations to prevent, address, and remedy human rights violations in their activities.[528] International soft law instruments like the UNGPs, although not legally binding, may exert influence on corporate behaviour.[529] An open-ended working group within the United Nations is currently tasked with developing a legally binding treaty on business and human rights.[530]

Domestic law mechanisms also play a role in holding corporations accountable. The United States Alien Tort Statute (ATS) grants foreign citizens the ability to sue in US federal courts for (at least some) violations of customary international law, including human rights abuses, committed outside the US.[531] In recent years, jurisdictions like the European Union, France, and Germany have introduced legislation imposing due diligence obligations on corporations to ensure their operations do not contribute to human rights abuses or environmental harm.[532]

F. CONCLUSION

Corporations have been a central actor in international law since its inception and they continue to shape international law well beyond their purportedly 'private' role. They enjoy a variety of rights under international law, most importantly the right to own property and other rights conferred on them under international investment law, and can even bring claims before international courts and tribunals. Their rights are still to be matched by international legal obligations. Even though the Business and Human Rights movement has successfully pushed for national legislation imposing due diligence obligations on corporations and for soft law instruments outlining corporations' human rights obligations, no binding international legal rules in this regard have yet been accepted.

---

527 See e.g. Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar 2020).

528 United Nations Human Rights – Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (United Nations 2011).

529 On soft law, see Kunz, Lima, and Castelar Campos, § 6.4.C.I., in this textbook.

530 Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 BHRJ 41.

531 Anthony J Bellia and Bradford R Clark, 'The Alien Tort Statute and the Law of Nations' (2011) University of Chicago Law Review 445.

532 Christopher Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment' (2022) 7 BHRJ 291; Philip Nedelcu and Stefan Schäferling, 'The Act on Corporate Due Diligence Obligations in Supply Chains – An Examination of the German Approach to Business and Human Rights' (2021) 64 GYBIL 443.

BOX 7.7.2 Further Readings and Further Resources

Further Readings

- D Lustig, *Veiled Power: International Law and the Private Corporation, 1886–1981* (OUP 2020)
- G Baars, *The Corporation, Law and Capitalism. A Radical Perspective on the Role of Law in the Global Political Economy* (Brill 2019)
- D Danielsen, 'Corporate Power and Global Order' in Anne Orford (ed), *International Law and Its Others* (CUP 2006) 85

Further Resources

- Sundhya Pahuja, 'The Changing Place of Corporation in International Law' (Hersch Lauterpacht Memorial Lecture, 2018) <www.sms.cam.ac.uk/media/2696888> accessed 25 August 2023
- 'Laureate Research Program Global Corporations and International Law' <www.lpgcil.org/> accessed 25 August 2023

§ § §

§ 7.8 ANIMALS

ANNE PETERS

BOX 7.8.1 Required Knowledge and Learning Objectives

Required knowledge: Subjects and Actors

Learning objectives: Understanding the status of animals as objects rather than subjects of international law; getting an overview of the relevant legal regimes that protect animal collectives as natural resources or commodified endangered species; understanding possible advantages of the concept of personhood in international law.

A. INTRODUCTION

International law as it stands has not only failed to acknowledge non-animal personhood but has overall paid very little attention to non-human animals (in the following: animals) at all and is inconsiderate of animal needs. Animals are not international legal persons (subjects). Both the legal status of animals and the regulation of how humans should treat them lies in the *domaine réservé* (French: 'reserved domain') of States. As this chapter shows, the domestic shield is only gradually and selectively punctuated by some international or EU norms, often only soft ones. International (and European) law is most developed with regard to wildlife, or attached to transboundary constellations (international animal trade and livestock transport), or to animals outside national jurisdiction (in the High Seas). The chapter argues that recognising legal personhood of animals would signal that they 'count' in international law and would convey the message that animals are intrinsically valuable.

B. WILD ANIMALS: STATUS AND PROTECTION

Wild animals are commodified under international law (just as under domestic laws) and are qualified as natural resources.[533] They therefore fall both under the States' 'permanent sovereignty over natural resources'[534] and under the self-determination of

533 See article XX(g) General Agreement on Tariffs and Trade (signed 30 October 1947, provisionally applied 1 January 1948) 55 UNTS 194 and WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R [131]. See also article V(1) of the Revised African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003, entered into force 23 July 2016) <https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources-revised-version> accessed 22 June 2023; article 77(4) United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1982) 1833 UNTS 397.

534 UNGA Res 1803 (14 December 1962) UN Doc A/RES/1803; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*) (Judgment) [2005] ICJ Rep 168 [244].

peoples over natural resources.[535] The legal consequence of this status is that each State has the 'sovereign' right to exploit its 'own' resources pursuant to its own environmental and developmental policies. The interests of the animals themselves play no role here.

The status as a resource under the sovereignty of the territorial or range State and for disposal of its people is mitigated but not eliminated by universal and regional treaties on species conservation, trade in endangered species, habitat protection, and biodiversity. In these regimes, very few groups of animals (belonging to certain species) are the objects of protection and conservation, or otherwise indirectly benefit from ecological measures. The overarching paradigm is one of human stewardship over nature and its elements.

BOX 7.8.2 Advanced: Tensions Between Conservation and Exploitation

Under the purview of these regimes, the tension between conservation and human interests constantly comes up in the meetings or conferences of the parties. The intensification of international habitat and species conservation law would be more acceptable for humans in the Global South if wildlife protection included also the restoration of wild animals in Europe and North America that were extinguished by human civilisation. Scholars have read out such an obligation out of article 8(f) of the Biodiversity Convention, but with no acceptance in State practice so far.[536]

The international legal status of animals in areas beyond national jurisdiction (especially in the High Seas) is different but equally inconsiderate to the interests of the animals themselves. Marine life was here historically regarded as *res nullius* (Latin: 'nobody's thing', open to acquisition and exploitation by all). After the experience of over-exploitation and risk of depletion, the concept of *res communis* (or *res communis omnium* or *res omnium*; Latin: 'thing of the [entire] community'), that is, common property, emerged for wildlife in international spaces.[537] More recent scholarly concepts are wildlife as a global 'common concern',[538] 'common heritage',[539] and 'global

535 Common article 1(2) of the UN Human Rights Covenants (International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 and International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171); article 21 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

536 Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79. Arie Trouwborst, Jens-Christian Svenning, 'Megafauna Restoration as a Legal Obligation: International Biodiversity Law and the Rehabilitation of Large Mammals in Europe' (2022) 31 RECIEL 182.

537 Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff 1998) 312.

538 Werner Scholtz, 'Animals in International Law (Book Review)' (2023) 117 AJIL 386, 387.

539 Rachelle Adam and Joan Schaffner, 'International Law and Wildlife Well-Being: Moving from Theory to Action' (2017) 20 Journal of International Wildlife Law and Policy 1, 14.

environmental resource',[540] up to biodiversity as a 'global public good'.[541] These novel qualifications were first applied to wild animals in areas beyond national jurisdiction, and later also to wildlife inside national jurisdictions.

These concepts are valuable answers to problems of global distributive justice and inter-generational fairness. However, the aspiration of justice is still limited to humans, and not directed toward the animals themselves. The principal legal consequence of all these categories remains identical: States are (at most) obliged to manage the animals (as living resources) in a cooperative and sustainable way, to secure their common exploitation by humans, including their killing. Moreover, the focus is still almost exclusively on the protection of species as a group and not on the welfare of animals as suffering individuals. Although animal welfare may be promoted as a side effect of species conservation, both goals often stand in tension (e.g. when combating 'invasive species'). Finally, all new international law-based labels still treat animals as things as opposed to persons.

This would change with the recognition of wild animals' right to property or to sovereignty, or other fundamental rights (see on animal rights below). From the property perspective, groups of wildlife should become collective owners of the territory where the groups live or roam. The property (including overlapping and joint property) would be managed by a human trustee who is obliged to act in the best interest of the animal owners.[542]

Alternatively, wild animal sovereignty[543] or wild animal self-determination[544] could be acknowledged. From that perspective, the injustice of human encroachment into wild animal habitats resembles the injustice of colonisation.[545] This injustice needs to be acknowledged and as far as possible remedied through restoration and other measures directed at facilitating and re-enabling wild animal flourishing.[546]

C. CONCERN FOR ANIMAL HEALTH AS AN INTERNATIONAL PRINCIPLE

Animal health is the core mandate of the World Organisation for Animal Health (WOAH), founded under the name OIE in 1924.[547] It is also a main topic of the

---

540 Michael Glennon, 'Has International Law Failed the Elephant?' (1990) 84 AJIL 1, 34.

541 Edith Brown Weiss, 'Establishing Norms in a Kaleidoscopic World: General Course on Public International Law' (2018) 396 RdC 46, 112.

542 John Hadley, *Animal Property Rights: A Theory of Habitat Rights for Wild Animals* (Lexington Books 2015); Karen Bradshaw, *Wildlife as Property Owners: A New Conception of Animal Rights* (University of Chicago Press 2020).

543 On sovereignty, see Green, § 7.1, in this textbook.

544 On self-determination, see Bak McKenna, § 2.4, in this textbook.

545 On consent and colonialism, see González Hauck, § 2.2.B., in this textbook.

546 Sue Donaldson and Will Kymlicka, *Zoopolis* (OUP 2011) Chapter 6.

547 International Agreement for the Creation at Paris of an International Office for dealing with Contagious Diseases of Animals, with annexed Organic Statutes (signed 25 January 1924, entered into force 17 January 1925) 57 LNTS 135.

SPS Agreement,[548] which spells out the WTO members' obligations under GATT in relation to sanitary or phytosanitary measures and the application of the exception in favour of 'animal . . . health' (article XX(b) GATT). Animal health has become a prominent issue since the Covid-19 pandemic. It is one of the three elements in the One Health approach. 'One Health' signals that the health of humans, non-human animals, and the planet are interdependent and indivisible and must therefore be protected in a holistic way. This approach is pursued by an alliance of now four international organisations and programmes (WHO, FAO, WTO, UNEP).[549] It is also proposed as a principle of the draft treaty on pandemic preparedness currently under negotiation at the WHO.[550] However, the attention paid by these regimes to animal health, and the main motivation of the One Health approach has until now been purely anthropocentric, namely to prevent zoonoses and to safeguard human health and food security.

D. ANIMAL WELFARE AS A CUSTOMARY NORM OR GENERAL PRINCIPLE

Animal welfare (i.e. the well-being of animal individuals) has so far been addressed only very scarcely and in an ancillary fashion in some species conservation treaties.[551] Gradually, the international institutions entrusted with animal species conservation or animal health have begun to pay more attention to animal welfare and have even stretched their mandates in that direction.[552]

Notably, chapters with animal welfare standards have since 2002 been inserted into the (soft) animal health codes issued regularly by the WOAH and are regularly updated.[553]

---

548 Agreement on the Application of Sanitary and Phytosanitary Measures (signed 15 April 1994, entered into force 1 January 1995) 1867 UNTS 493.

549 'Memorandum of Understanding between the Food and Agriculture Organization of the United Nations and the World Organisation for Animal Health and the World Health Organization and the United Nations Environment Programme, Cooperation to Combat Health Risks at the Animal-Human-Ecosystems Interface in the Context of the "One-Health" Approach and including Antimicrobial Resistance' (29 April 2022) <www.woah.org/app/uploads/2023/06/20220317-mou-quadripartite-en.pdf> accessed 20 June 2023; 'One Health Joint Plan of Action (2022–2026): Working Together for the Health of Humans, Animals, Plants and the Environment' (14 October 2022) <www.who.int/publications/i/item/9789240059139> accessed 20 June 2023.

550 Art. 5 of the 'Proposal for negotiating text of the WHO Pandemic Agreement' (A/INB/7/3) of 30 October 2023 <https://apps.who.int/gb/inb/pdf_files/inb7/A_INB7_3-en.pdf>

551 See e.g. article VII(7)(c) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (signed 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.

552 International Whaling Commission, 'The Florianópolis Declaration on the Role of the International Whaling Commission in the Conservation and Management of Whales in the 21st Century' (17 September 2018) Res. 2018–5 (Florianópolis Declaration), preamble, 3rd indent. See also International Whaling Commission, Intersessional Working Group on Welfare 'Progress on the Welfare Action Plan' (2022) Doc. No. WKMWI/68/5.1/01.

553 Last: WOAH, 'Terrestrial Animal Health Code' (31st edn, August 2023) (TAHC); 'Aquatic Animal Health Code' (25th edn, August 2023) (AAHC) <www.woah.org/en/what-we-do/standards/codes-and-manuals/> accessed 8 December 2023, reflecting the revisions at the 90th General Session (May 2023).

In 2022, the UN Environmental Assembly adopted a resolution 'Animal Welfare—Environment—Sustainable Development Nexus'.[554] This is the first mentioning of 'animal welfare' by a UN body. It seems to manifest at a 'One Welfare' approach, in extension of the One Health approach.

A WTO Panel acknowledged 'that animal welfare is a matter of ethical responsibility for human beings in general'[555] and that animal welfare is 'a globally recognized issue'.[556] This was confirmed by the WTO Appellate Body.[557] Animal welfare has thus become part of 'public morals'. Under that heading, animal welfare considerations allow States to deviate from obligations to liberalise trade under article XX(a) GATT and parallel provisions in bilateral and regional trade agreements. Concern for animal welfare is also a legitimate objective for limiting the exercise of international human rights (e.g. the right to property and contract, and freedom of research).[558]

Recent formal expressions of commitment to animal welfare seem to manifest the formation of a relevant *opinio juris* (Latin: 'legal opinion').[559] This might constitute one building block for the formation of an international customary norm.[560] Such pronouncements might also demonstrate a convergence upon a 'general principle of law' (article 38(c) ICJ Statute) that is widespread in the domestic legal systems and transposable to international law.[561]

However, a widespread relevant legal practice on respect for animal welfare is lacking. Around 50% of States have no animal protection legislation.[562] Against the background of wide variations in national legislation, the exact contours of the putative customary rule or of a general principle of international law are unclear. The hard core of a

---

554 UNEA resolution 'Animal welfare – Environment – Sustainable Development Nexus' (2 March 2022) UNEP/EA.5/L.10/rev.1.

555 WTO, *European Communities: Measures Prohibiting the Importation and Marketing* of Seal Products – *Reports of the Panel*, WT/DS400/R and WT/DS401/R (25 November 2013) [7.409].

556 *Ibid* [7.420].

557 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body*, WT/DS400/AB/R and WT/DS401/AB/R (22 May 2014) [5.201].

558 See the explicit reference to the protection of morals in article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) on freedom of expression, which includes freedom of research.

559 See with regard to whales *Whaling in the Antarctic* (*Australia v Japan, New Zealand intervening*) (Judgment, Separate Opinion of Judge Cançado Trindade) [2014] ICJ Rep 348 [9].

560 On customary international law, see Stoica, § 6.2, in this textbook.

561 Michael Bowman, 'The Protection of Animals Under International Law' (1989) 4 CJIL 487; Michael Bowman, Peter Davies, and Catherine Redgwell, *Lyster's International Wildlife Law* (2nd edn, CUP 2010) 680; Katie Sykes, '"Nations Like Unto Yourselves": An Inquiry into the Status of a General Principle of International Law on Animal Welfare' (2011) 49 Canadian Yearbook of International Law 3. On general principles, see Eggett, § 6.3, in this textbook.

562 GAL Association, 'Animal Legislations in the World at National Level' <www.globalanimallaw.org/database/national/index.html> accessed 20 June 2023.

possibly emerging universal principle (in one of the mentioned 'forms') seems to be only a prohibition of deliberate and wanton cruelty against animals.

E. PATHS TO FUTURE INTERNATIONAL ANIMAL PERSONHOOD

International legal personhood could be conferred on animals explicitly or even implicitly by treaty, and it could emerge as a customary rule, or as a general principle of international law. International law is particularly open to the personhood of non-humans – with States being the main persons in this legal order. The circle of international legal persons has never been closed but has been continuously expanded.[563] There is no intrinsic conceptual barrier against assigning legal personality to animals.

The concomitant change of the status of animals from 'things' ('objects') to 'persons' ('subjects') under international law would even match the status change of humans in international law that was triggered by legal developments after 1918 and completed only after 1945. In the early 20th century – when the idea of international legal personhood was first sharply conceptualised – humans were relegated to the realm of things, they were explicitly and adamantly qualified as 'objects', not 'subjects' of international law, by influential scholars.[564]

The currently booming case law on animal personhood in domestic law might in the long run give rise to a general principle of animal personhood that could then enter into the realm of international law (article 38(1)(c) ICJ Statute), provided that it is sufficiently widespread and transposable to the international legal order. The extant case law has been produced only by courts in the Global South, with Latin American courts being front runners. This regional concentration might actually facilitate the spread of the underlying principle. Its universalisation would be less suspect of legal imperialism, because it would travel in the opposite direction than the traditional legal migration that has almost always flowed from the North-Western legal orders (backed by economic and political power) to the South. However, such a maturation of animal personhood into a general principle in international law is not yet in sight and is not very likely.

Alternatively, animals could potentially benefit from the highly dynamic legislation and case law recognising Rights of Nature in all world regions, again mostly in the Global South.[565] It is not unlikely that these domestic developments will in the future give rise to a general principle of Rights of Nature. Then, it would be possible that

563 On the pluralisation of subjecthood in international law, see Engström, § 7.C., in this textbook.

564 See Heinrich Triepel, *Völkerrecht und Landesrecht* (Verlag von CL Hirschfeld 1899) 20–21; Lassa von Oppenheim, *International Law – A Treatise* (Ronald F Roxbourgh ed, 3rd edn, Longmans, Green 1920) Vol 1, Peace, para 290. On the individual in international law, see Theilen, § 7.4, in this textbook.

565 See UNGA 'Harmony with Nature: Report of the Secretary General' (26 July 2019) UN Doc A/74/236.

the animals which form part of nature would also be elevated to a rights-holder under international law, with a right to exist in integrity and flourish.[566] This would at the same time constitute an international legal personhood of animals, even if only a so-called partial one.

Animal international personhood would – unlike the international legal personhood of international organisations – not be an extension of States, but would rather feed on the moral pedigree of the personhood of humans. In this context, personhood appears to be more than a purely technical juridic device. It would signal that animals 'count' in international law and would convey the message that animals are intrinsically valuable. However, animals would always need some form of political and legal representation by humans to vindicate their legal status and rights if these are challenged or infringed.

F. CONCLUSION

Non-human animals are still far away from being recognised as international legal persons. More even, international law has up to now been a mixed blessing for them. Public international law treaties, due to their focus on animal species conservation, suffer not only from an animal welfare gap but even risk to pit animal species survival against individual animal welfare. Recent steps in the direction of upgrading the status and the interests of animals in international law are the expansion of regimes and institutional activity to cater for animal welfare, the Rights of Nature movement, and the insertion of the One Health principle into international governance.

These observations allow the conjecture that an overarching international norm of 'animal *protection*' is emerging. This emerging norm seems to encompass both the conservation of wild animals against extinction and the safeguarding of welfare and rights of individual animals of all groups (domestic, wild, and liminal) against suffering.[567]

If developed (much) further along these lines, international law in the Anthropocene might cater for the interests of animals to live in peace, even without enjoying the status of international legal persons. Importantly, however, the relevant international norms must be properly applied and implemented in the first place by national and local authorities. The need to design and monitor such domestic implementation warrants a global animal law approach.

---

566 This consequence has been drawn for the law of Ecuador by Constitutional Court of Ecuador, *Mona Estrellita,* Sentencia No. 253–20-JH/22, 27 January 2022.

567 Katie Sykes, 'Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection' (2016) 5 TEL 55–79.

BOX 7.8.3 Further Readings

Further Readings

- C Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (OUP 2019)
- M Bowman, P Davies, and C Redgwell, *Lyster's International Wildlife Law* (2nd edn, CUP 2010)
- A Peters, *Animals in International Law* (Brill 2021)
- W Scholtz (ed), *Animal Welfare and International Environmental Law* (Edward Elgar 2019)
- S Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Springer 2022)

§ § §

§ 7.9 CITIES

SUÉ GONZÁLEZ HAUCK AND RAFFAELA KUNZ

BOX 7.9.1 Required Knowledge and Learning Objectives

Required knowledge: Subjects and Actors, History of International Law

Learning objectives: Understanding how cities and other local governments shape and are shaped by international law.

A. INTRODUCTION

Although having played a role in shaping the global economy and international order,[568] cities are not among the traditional subjects of international law. Globalisation has sparked renewed interest in the concept of the 'Global City'.[569] Today, cities are vital sites for global concerns such as human rights, environmental sustainability, economic development, and inequality.[570] Some international instruments explicitly recognise cities as important actors. For example, the Paris Agreement recognises the importance of the subnational and local levels (articles 7(2) and 11(2)).[571] Transmunicipal networks like Local Governments for Sustainability and C40 address climate change mitigation, partly bridging gaps left by inconsistent commitments from national governments, notably the US.[572] Within the UN system, the United Nations Human Settlements Programme (UN-HABITAT) is devoted to issues of urbanisation and of people's lives in cities. Additionally, cities play a prominent role within the UN Sustainable Development Goals (SDGs), SDG 11 being devoted to inclusive, safe, resilient, and sustainable cities.[573] Cities are the spaces where international law plays out in people's everyday lives, where international norms are implemented, enforced, and challenged.[574] Given cities' role as hubs for social movements, studying them is crucial for engaging with international law

568 A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (CUP 2003) 112 et seq.

569 Saskia Sassen, *The Global City – New York, London, Tokyo* (2nd edn, Princeton University Press 2001); Diane E Davis, 'Cities in Global Context: A Brief Intellectual History' (2005) 29 International Journal of Regional and Urban Research 92.

570 Janne E Nijman, 'The Future of the City and the City and the International Law of the Future' in Sam Muller and others (eds), *The Law of the Future and the Future of Law* (Torkel Posahl Academic 2011) 213.

571 Paris Agreement (adopted 12 December 2015, entered into force on 4 November 2016) 3156 UNTS 79.

572 Kelsey Coolidge, 'Cities and the Paris Agreement' in Vesselin Popovski (ed), *The Implementation of the Paris Agreement on Climate Change* (Routledge 2019) 263–282; Anél du Plessis, 'Climate Change Law and Sustainable Development' in Aust and Nijman (n 34) 187; Jolene Lin, 'The Role of Transnational City Networks in Environmental Governance' in Aust and Nijman (n 34) 201–213.

573 Helmut Philipp Aust and Anél du Plessis (eds), *The Globalisation of Urban Governance* (Routledge 2019).

574 Luis Eslava, *Local Space, Global Life. The Everyday Operation of International Law and Development* (CUP 2015); Luis Eslava, 'Istanbul Vignettes: Observing the Everyday Operation of International Law' (2014) 2 LRIL 3.

'from below'.[575] This section provides a concise overview of how cities have increasingly become subjects of international regulation and how they shape international law. At the same time, it urges caution against romanticising cities' roles.

B. DEFINITION AND LEGAL STATUS OF CITIES

Cities are defined by characteristics like population density, spatial expansion, diverse socio-economic activities, and land use.[576] Some interpretations equate cities with other forms of local governments, understood as subnational entities authorised to govern various matters.[577] Currently, cities lack recognition as subjects of international law or international legal personality.[578] Examples of cities apart from city States gaining international status independently are few, such as the Free City of Danzig and the International City of Tangiers, placed under international administration.[579] The starting point under international law is that cities are State organs and thus remain 'hidden behind the veil or the "black box" of their state'.[580] The status as State organs has international legal consequences. First, cities are bound by the international obligations of their mother State. If their conduct is not consistent with those obligations, this is attributed to the State (article 4 of the Articles on State Responsibility).[581] Second, their behaviour counts as State practice and may thus contribute to the formation of customary international law.

Cities' growing international role suggests rethinking their status as mere State organs. Arguably, cities' engagement with international law today is such that they gained international legal personality.[582] Arguments supporting this view include the dense web of agreements local governments conclude among themselves in the form of

---

575 Balakrishnan Rajagopal, *International Law from Below. Development, Social Movements, and Third World Resistance* (CUP 2003).

576 United Nations Human Settlements Programme (UN-HABITAT), 'What Is a City?' (2020) <https://unhabitat.org/sites/default/files/2020/06/city_definition_what_is_a_city.pdf> accessed 11 August 2023.

577 Yishai Blank, 'International Legal Personality/Subjectivity of Cities' in Aust and Nijman (n 34) 105.

578 Ibid; Chrystie Swiney, 'The Urbanization of International Law and International Relations: The Rising Soft Power of Cities in Global Governance' (2020) 41 Michigan Journal of International Law 227, 234; Anirudh Vijay and Jamia Millia Islamia, 'A Case for the International Legal Status of Cities and Local Sub-National Governments' (2019) Novum Jus 165, 167.

579 Yishai Blank, 'The City and the World' (2006) 44 Columbia Journal of Transnational Law 875, 886.

580 Blank, 'International Legal Personality/Subjectivity of Cities' in Aust and Nijman (n 34) 107.

581 ILC, 'Responsibility of States for Internationally Wrongful Acts (53rd session 23 April–1 June and 2 July–10 August 2001) UN Doc A/RES/56/83 Annex; see also James Crawford and Murielle Mauguin, 'Les collectivités territoriales non-étatiques et le droit international de la responsabilité' in Société française pour le droit international (ed), *Les collectivités territoriales non-étatiques dans le système juridique international* (Pedone 2002) 157; Katja Creutz, 'Responsibility' in Aust and Nijman (n 34). On State responsibility, see Arévalo-Ramírez, § 9, in this textbook.

582 For an overview, see Blank, 'International Legal Personality/Subjectivity of Cities' (n 35) 106–114; On international legal personhood and the pluralisation of subjects of international law, see Engström, Introduction to § 7, in this textbook.

transnational networks, with the field of climate change law being only the most prominent example.[583] International organisations as well started to 'go local' and cooperate with cities.[584] In some cases, cities forge direct links with international organisations that can be considered international obligations.[585] Furthermore, cities in many instances symbolically ratify treaties and enforce them, sometimes in response to their governments' inaction, such as in the case of 'sanctuary cities'[586] in the field of migration law or the activities of the C40 network to combat climate change mentioned in the introduction. Another often-mentioned development concerns cities' increasing involvement in proceedings before international courts, mostly in the area of international trade and economic law, with standing before international courts being another element of international legal personality.[587]

C. CITIES AND SPECIFIC SUBJECT AREAS

I. CITIES AND SUSTAINABLE DEVELOPMENT

Cities play a pivotal role in pursuing 'sustainable development'.[588] The 1972 Stockholm Declaration states that local governments, not just national ones, 'bear the greatest burden for large-scale environmental policy and action within their jurisdictions' (paragraph 7 of its preamble).[589] Principle 15 directly addresses cities, asserting that 'planning must be applied to human settlements and urbanization to avoid adverse environmental effects while maximizing social, economic, and environmental benefits for all'. Another milestone is Agenda 21, adopted at the 1992 'Earth Summit' in Rio de Janeiro.[590] This document mentions local authorities throughout, with article 28.2(a) setting a key objective for them to create a 'local Agenda 21'. In 2000, the World Bank introduced the 'Cities in Transition' guideline document, outlining a 'new strategy for an urbanizing world'.[591] This strategy envisions sustainable cities that are liveable, competitive, well governed, and financially solvent. Together with the 2002

583 For an overview, see David Gordon and Michele Acuto, 'If Cities Are the Solution, What Are the Problems? The Promise and Perils of Urban Climate Leadership' in Craig Johnson, Noah Toly, and Heike Schroeder (eds), *The Urban Climate Challenge – Rethinking the Role of Cities in the Global Climate Regime* (Routledge 2015).

584 See the overview in Jacob Katz Cogan, 'International Organizations and Cities' in Aust and Nijman (n 34).

585 See Michael Riegner, 'Development Cooperation and the City' in Aust and Nijman (n 34), using the example of the World Bank.

586 See e.g. Rose Cuisine Villazor and Pratheepan Gulasekaram, 'Sanctuary Networks' (2019) 103 Minnesota Law Review 1209.

587 Moritz Baumgärtel, 'Dispute Settlement' in Aust and Nijman (n 34).

588 Ileana M Porras, 'The City and International Law: In Pursuit of Sustainable Development' (2009) 36 Fordham Urban Law Journal 537; On sustainable development, see Poorhashemi, § 16.D.III., in this textbook.

589 'Report of the United Nations Conference on the Human Environment' (Stockholm 5–16 June 1972) UN Doc A/CONF.48/Rev.1.

590 'Report of the United Nations Conference on Environment and Development' (Rio de Janeiro 3–14 June 1992) UN Doc A/CONF.151/26 (Vol I).

591 Christine Kessides, *Cities in Transition: World Bank Urban and Local Government Strategy* (World Bank Group 2000); cf. Luis Eslava and George Hill, 'Cities, Post-Coloniality and International Law' in Aust and Nijman (n 34) 77; 82.

Johannesburg Declaration[592] and, notably, the 2007 UN-HABITAT International Guidelines on Decentralisation and the Strengthening of Local Authorities,[593] these documents constitute what Luis Eslava and George Hill call 'international urban law'.[594] Eslava and Hill offer examples of how this international urban law, applied specifically to cities in the Global South, can adversely affect local communities. For instance, in Rio de Janeiro, a World Bank–backed land-titling initiative forcibly displaced slum-dwellers.[595] Similarly, in Ulaanbaatar, an Asian Development Bank project implementing the World Bank's above-stated vision had a disciplining impact on local life without considering Ulaanbaatar's unique circumstances.[596]

In some instances this approach arguably bears resemblance to the 'indirect rule' model implemented during the late colonial period and particularly within the League of Nations' Mandate System.[597] In contrast to this top-down approach, there are instances of community-led, bottom-up projects originating within marginalised communities themselves. These projects aim to achieve social inclusion by reclaiming a portion of the city's economic and political capital for its residents, especially those living in informal urban settlements.[598]

II. CITIES AND HUMAN RIGHTS

Another important field concerns human rights law, originating in the human rights cities movement in the late 1990s.[599] Today communities around the globe gather at human rights cities meetings and engage with human rights in diverse forms.[600] In addition, there are numerous examples of local authorities adopting specific human rights treaties despite – or because of – their local governments refusing to do so.[601] An example is San Francisco, which ratified the Convention on the Elimination of All Forms of Discrimination against Women.[602] Another area where cities actively engage with human rights law often against contrary State policies is the protection of migrants.[603]

---

592 Report of the World Summit on Sustainable Development (Johannesburg 26 August–4 September 2002) UN Doc A/CONF.199/20.

593 United Nations Human Settlements Programme (UN-HABITAT), *International Guidelines on Decentralisation and the Strengthening of Local Authorities* (2007).

594 Eslava and Hill (n 593) 82.

595 Ibid 84.

596 Ibid 86.

597 Eslava, *Local Space, Global Life* (n 576) 20.

598 Maria Clara Dias and Luis Eslava, 'Horizons of Inclusion: Life Between Laws and Developments in Rio de Janeiro' (2013) 44 IALR 177, 182.

599 Barbara Oomen, Martha Davis, and Michele Grigolo (eds), *Global Urban Justice – The Rise of Human Rights Cities* (CUP 2016); Michele Grigolo, *The Human Rights City – New York, San Francisco, Barcelona* (Routledge 2019).

600 Martha Davis, 'Finding International Law "Close to Home": The Case of Human Rights Cities' in Aust and Nijman (n 34) 227–228.

601 For an overview, see Barbara Oomen and Moritz Baumgärtel, 'Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law' (2018) 29 EJIL 607, 616–617.

602 Stacy Laira Lozner, 'Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative' (2008) 104 CLR 768.

603 Oomen and Baumgärtel (n 600) 617–619.

D. CONCLUSION

These brief elaborations have shown that cities occupy an important space on the international scene. Some even argue that they should be recognised as new subjects of international law. This position, however, has not yet entered the mainstream discourse. The city thus provides another example illustrating that the narrow category of subjects of international law does not capture all actors that play a role in the international legal order. In the current discourse, cities often form part of a progress narrative and are described as forces for good, strengthening international law from the bottom up and stepping in when governments fail to act in the interest of the local population. Yet, it is important to keep in mind that recognising the personhood of cities under international law would not be a positive development per se. Examples show that cities, just as any other actor holding power over people, may engage in discriminatory practices against minorities[604] or participate in upholding (national and global) economic inequalities.[605] While cities certainly shape international law, the internationalisation of the city also has repercussions for cities, exerting pressure to conform to an internationalised model of what a sustainable city should look like, which often runs counter to the needs and perspectives of marginalised local populations and echoing colonial models of indirect rule. Cities remain, however, important hubs for contestation, resistance, and community organising, which grapple with the contradictions that come with the internationalisation of cities.

BOX 7.9.2 Further Readings and Further Resources

Further Readings

- HE Aust and JE Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar 2021)
- HE Aust and A du Plessis (eds), *The Globalisation of Urban Governance* (Routledge 2019)
- L Eslava, *Local Space, Global Life. The Everyday Operation of International Law and Development* (CUP 2015)

Further Resources

- China Miéville, *The City & the City* (Novel) (Macmillan 2009)
- Benjamin Barber, 'If Mayors Ruled the World' (*TedX Talks*) <www.youtube.com/watch?v=3BJgmV7GRVc> accessed 14 August 2023

§ § §

604 Patrick Lukusa Kadima, 'Afro-Phobia and the Law: How Has the South African Judiciary Responded to Cases of Afro-Phobia' (LLB dissertation, University of the Witwatersrand 2019).

605 Yishai Blank, 'Urban Legal Autonomy and (de) Globalization' (2020) 79 Raison Politique 57.