Handbook of International Law

Second Edition

ANTHONY AUST



Contents

	Foreword to the First Edition	page xxv
	Preface to Second Edition	xxvii
	Acknowledgements	xxxi
	Table of treaties	xxxii
	Table of MOUs	xliv
	Table of cases	xlv
	Glossary of legal terms	liv
	List of abbreviations	lviii
1	International law	1
	Introduction	1
	Private international law	1
	Transnational law	2
	The nature of international law	2
	But is international law really law?	3
	International lawyers	4
	The sources of international law	5
	Treaties	5
	Customary international law	6
	General principles of law recognised by 'civilized' nations	8
	Good faith	8
	Estoppel	8
	Norms	8
	Judicial decisions	9
	Teachings of the most highly qualified publicists	9
	General international law	9
	Obligations erga omnes	10
	Jus cogens	10
	'Soft law'	11
	Comity	11
	Domestic law	11
	Subjects and objects of, and actors in, international law	12
	National liberation movements	13
	NGOs	13

page xxv

ix

2	States and recognition	
	Introduction	15
	Criteria for statehood	15
	Recognition of States	15
	Vatican City	16
	Taiwan	18
	Turkish Republic of Northern Cyprus	18
	Soviet Republics and former Soviet Republics	19
	Yugoslavia	19
	Domestic courts and unrecognised States	21
	Self-determination	21
	Secession	22
	Territorial integrity and uti possidetis	23
	Recognition of governments	24
	Governments in exile	25
	De jure and de facto recognition	26
	Palestine	26
	Western Sahara	26
	Means of recognition	28
	Overseas territories	28
	British territories	29
	Colonies	29
	Protectorates	30
	Protected States	31
	Condominiums	31
	Mandated and trust territories	31
3	Territory	32
	Introduction	33
		33
	Boundary, border or frontier? Delimitation and demarcation	34
	Intertemporal rule	34
	Critical date	35
	Means of acquisition	35
	Discovery	35
	Conquest and annexation	36
	Cession	36
	Occupation and prescription	37
	Acquiescence, estoppel and recognition Boundary treaties	37
	Boundary treaties	38
	Leases	38
	Rivers	39
	State servitudes	39
	Res communis	40
		40

	Common heritage of mankind	40
12	Territorial integrity and uti possidetis	40
4	Jurisdiction	42
	Introduction	42
	Territorial principle	43
	Nationality principle	43
	Passive personality principle	44
	Protective principle	44
	Universal and quasi-universal jurisdiction	44
	Effects doctrine	45
	Alien Tort Claims Act 1789	47
	Abduction	47
5	The law of treaties	49
	Introduction	
	The Vienna Convention on the Law of Treaties 1969	49
	What is a treaty?	50 50
	Concluded between States	51
	In written form	51
	Governed by international law	51
	Embodied in a single instrument or in two or more	31
	related instruments	52
	Given any name	52
	Signed?	53
	MOUs	53
	But are MOUs really treaties?	54
	Agreements between States governed by domestic law	55
	Capacity to make treaties	55
	Federations	55
	Overseas territories	55
	International organisations	56
	Credentials and full powers	56
	Credentials	56
	Full powers	57
	Adoption and authentication	57
	Adoption	57
	Consensus	58
	Authentication	58
	Final act	59
	Consent to be bound	59
	Signature only	59
	'Open for signature'	59
	Witnessing	60

Exchange of instruments

60

60

Ratification	60
Who can sign the instrument of ratification?	61
Acceptance or approval	61
Accession	61
Any other agreed means	61
'Signatory', 'party' and 'adherence'	62
The 'all States' and 'Vienna' formulas	62
Rights and obligations before entry into force	62
Obligation not to defeat the object and purpose of a treaty before	e its
entry into force	63
Withdrawal of consent to be bound before entry	
into force	63
Development of treaties	63
Reservations	64
Bilateral treaties	64
Multilateral treaties	64
Interpretative declarations	65
Disguised reservations	65
Reservations generally not prohibited	65
Acceptance of, and objection to, reservations	66
'Plurilateral treaties'	67
Constituent instrument of an international organisation	67
All other cases	67
The legal effects of reservations and of objections to reservations	68
Unresolved issues	69
Reservations to human rights treaties	70
Treaty-monitoring bodies	71
Some ways of minimising the problem of reservations	71
Procedure	72
Late reservations	72
The International Law Commission study	72
Entry into force	73
Express provisions	73
Date of entry into force	74
Provisional application	74
Preparatory commissions	74
Treaties and domestic law	74
Duty to perform treaties	75
Constitutional provisions	75 75
Dualism	75 76
Monism	76
United Kingdom	78
United States	80
Implementation by states of a federation	00

Territorial application	
Territorial extension clauses	
Declaration on signature or ratification of a multilateral	
treaty	
Political subdivisions of metropolitan territory	
Successive treaties	
Interpretation	
Article 31 General rule of interpretation	
Paragraph 1	
Paragraph 2 (context)	
Paragraph 3(a) (subsequent agreements)	
Paragraph 3(b) (subsequent practice)	
Paragraph 3(c) (relevant rules of international law)	
Paragraph 4 (special meaning)	
Supplementary means of interpretation	
Implied terms	
Interpretation of treaties in more than one language	
Third States	
Amendment	
Bilateral treaties	
Multilateral treaties	
Duration and termination	
Express provisions	
Termination or withdrawal by consent	
No provision for termination or withdrawal	
Termination or suspension for breach	
Supervening impossibility of performance	
Fundamental change of circumstances (rebus sic stantibus)	
Severance of diplomatic or consular relations	
Outbreak of hostilities	
Can one validly withdraw from a treaty and immediately b	ecome a
party again?	
Desuetude	
Invalidity	
'Unequal treaties'	
The depositary	
Designation of a depositary	
Multiple depositaries	
Duty to act impartially	
Functions of the depositary	
Correction of errors	
Registration and publication	
Registration	
Publication	

	Sources of treaty texts	
	Treaty indexes	
	Further reading on treaties	
5	Diplomatic privileges and immunities	
	Introduction	
	The establishment of diplomatic relations and permanent	
	diplomatic missions	
	The functions of a diplomatic mission	1
	The members of the mission	1
	Persona non grata	1
	Size and composition of the mission staff	1
	The premises of the mission	1
	Facilitating the acquisition of premises for the mission	1
	Help with facilities for the mission	11
	Inviolability of the premises of the mission	11
	Police action	11
	Service of legal process	11
	Immunity from jurisdiction	11
	Bank account of the mission	11
	Protection from intrusion or damage	111
	Disturbance of the peace of the mission and impairment	
	of its dignity	118
	Asylum	118
	When inviolability of mission premises begins and ends	118
	Exemption of mission premises from taxation	119
	Inviolability of mission archives	120
	Means of transport	120
	Freedom of movement	121
	Freedom of communication	121
	Inviolability of official correspondence The diplomatic bag	121 122
	What is a diplomatic bag?	122
	What may the diplomatic bag?	122
	What may the diplomatic bag contain? Prohibition on opening or details and the little of the little	123
	Prohibition on opening or detaining the diplomatic bag Scanning the diplomatic bag	123
	Diplomatic couriers	124
	Personal inviolability	125
	No arrest or detention	125
	Safeguarding from attack	125
	Inviolability of the private residence	126
	inviolability of private papers, correspondence and property	126
	and diplomatic immunity and	
	State immunity	127

XIII

Diplomatic immunity	12
Exception (a): private immovable property in the territory of the	
receiving State	128
Exception (b): private involvement in succession proceedings	128
Exception (c): private professional or commercial activity	128
Proof of diplomatic immunity	129
Immunity from giving evidence	129
What immunity is not	130
Immunity from execution	130
Waiver of immunity	130
Social security exemption	131
Exemption from taxation	132
Exemption from personal services	133
Exemption from customs duties and inspection	133
Members of the family of a diplomatic agent	134
Working spouses	134
Administrative and technical staff	135
Service staff	135
Private servants	135
Nationals and permanent residents of the receiving State	136
Commencement of privileges and immunities	136
Termination of privileges and immunities	137
Third States	137
Diplomats in transit	137
Communication in transit	138
Duties of the mission to the receiving State	138
End of the functions of a diplomatic agent	139
Facilities for depature	139
Breach of diplomatic relations and the protection of the interests of the	139
sending State	139
Non-discrimination and reciprocity	140
Special missions	141
Consular relations	142
tate immunity	
ntroduction	145
	145
The relationship of State immunity to other legal doctrines	146
Diplomatic immunity distinguished Non-justiciability	146
Act of State	146
	147
Human rights	147
ources of the law on State immunity	148
Vhich entities enjoy immunity?	149
exceptions to immunity	150

	Consent	150
	Commercial transactions	151
	Contracts of employment	153
	Torts (delicts)	154
	Ownership, possession and use of property	155
	Intellectual and industrial property rights	156
	Ships	156
	Aircraft and space objects	157
	Registration of a foreign judgment	157
	Criminal jurisdiction	157
	Enforcement	157
	Pre-judgment measures of constraint	157
	Execution of the judgment	158
	Procedure	158
	Service of process	158
	Judgment in default	159
	Visiting forces	159
	Civil claims	159
	Criminal jurisdiction	160
	Heads of State, heads of government, foreign ministers and other	
	senior officials	161
	Civil proceedings	161
	Criminal proceedings	161
,		163
,	Nationality, aliens and refugees	
	Nationality	163
	Introduction	163
	Dual nationality	163
	Citizenship	164
	The right to leave and return to one's State of nationality	165
	Passports	165
	Statelessness	165
	Legal persons	166
	Ships and aircraft	167
	Diplomatic protection	167
	Aliens	168
	Property of aliens	169
	Asylum	170
	Diplomatic asylum	17/
	Refugees	171
	Definition of refugee	171
	Application for refugee status	173
	Fear of persecution	174
	Exceptions to refugee status	175

	Non-refoulement	17
	Protection for the State of refuge	170
	Obligations of the State of refuge to the refugee	177
9	9 International organisations	178
	Introduction	178
	Membership and representation	179
	Credentials	180
	Withdrawal	180
	International legal personality	180
	Immunities and privileges	181
	Liability	183
	Dispute settlement	184
	The United Nations	184
	The (so-called) UN specialised agencies	185
	Staff disputes	185
10	The United Nations, including the use of force	186
	Introduction	186
	Membership	186
	Withdrawal, suspension and expulsion	188
	Regional groups	188
	The UN's principal organs	189
	The UN's specialised agencies	189
	The General Assembly	190
	Main Committees of the General Assembly	190
	Sixth Committee	191
	The Security Council	192
	Membership	192
	Working methods	192
	Powers of the Security Council	195
	Sanctions	199
	Human rights	203
	Uniting for peace	204
	Charter amendment	204
	Use of force	205
	Prohibition on the use of force	206
	Security Council authorisation for the use of force	206
	Self-defence	208
	Humanitarian intervention	211
	A responsibility to protect?	214
11	Human rights	215
	Introduction	215
	Who enjoys the rights?	216

12

What is a human right?	
What is a human rights treation	217
Universal human rights treaties United Nations	217
ILO	217
	219
Regional human rights treaties	219
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950	
	219
African Chartes at Human Rights 1969	221
African Charter on Human and Peoples' Rights 1981	221
Arab Charter on Human Rights 1994	221
Outline of the principal civil and political rights	221
Right to life Prohibition of torture	221
	221
Prohibition of slavery and forced labour	221
Right to a fair trial	223
Right to a fair trial	223
No punishment without law	224
Respect for private and family life	224
Freedom of thought, conscience and religion	224
Freedom of expression	225
Freedom of assembly and association	225
Right to marry	225
Right to an effective remedy	225
Prohibition of discrimination	226
Freedom of movement	226
Right to free elections	226
Right to property	227
Right to education	227
General qualifications to rights	227
Reservations	228
Derogations Enforcement	228
	229
European Court of Human Rights	223
Other regional treaties	232
Human Rights Committee	231
Other UN monitoring bodies	
The law of armed conflict (international humanitarian law)	235
Introduction	235
Sources	236
International and internal armed conflicts	237
weaponry	238
Conventional weapons	238
Nuclear, chemical and biological weapons (WMD)	239

xvii Contents

	Reprisals	240
	Prisoners of war	240
	Mercenaries	241
	Civilians and civilian objects	242
	Occupied territory	242
	Palestine	243
	Enforcement	243
	UN forces	244
	International Committee of the Red Cross	244
13	International criminal law	245
	Introduction	245
	Mutual legal assistance	245
	Extradition	246
	Political offence/exception	248
	Simplified extradition	248
	Irregular means	249
	International crimes	250
	Piracy	250
	Slavery	251
	Genocide	251
	Crimes against humanity	252
	War crimes	253
	Aggression	253
	Responsibility of superiors	253
	Superior orders	254
	International tribunals	254
	International Criminal Tribunal for the Former Yugoslavia (ICTY)	255
	International Criminal Tribunal for Rwanda (ICTR)	256
	Sierra Leone Special Court	257
	Extraordinary Chambers of the Courts of Cambodia	257
	Special Tribunal for Lebanon	258
	International Criminal Court (ICC)	258
	Jurisdiction	259
	Surrender of accused persons	260
	Personal responsibility	261
	United States	261
	Procedure	262
14	Terrorism	264
	Introduction	264
	Definitions	265
	'State terrorism'	265
	'State-sponsored terrorism'	265
	Universal terrorism conventions	265

	No international definition of terrorism	
	The sectoral, segmental or incremental approach	265
	The main provisions of the universal terrorism conventions	267
	'International' terrorism	26)
	Definition of the offences	26
	Quasi-universal jurisdiction	269
	'Refugees' and terrorism	271
	Security Council	274
	Lockerbie	274
	Bin Laden, Al-Qaida and the Taliban	275
15	The law of the sea	274
		278
	Introduction	278
	Internal waters	275
	Right of access by foreign ships	279
	Baselines	281
	Territorial sea	281
	Islands	281
	Innocent passage	280
	Rights of the coastal State over ships in innocent passage	283
	Contiguous zone	284
	Exclusive economic zone	284
	Rights, jurisdiction and duties of the coastal State in the EEZ	285
	Rights and duties of other States in the EEZ	285
	International straits	285
	Archipelagos	286
	Continental shelf	287
	Construction of artificial islands and other installations in the EEZ of	or
	on the continental shelf	288
	Delimitation	288
	Territorial sea	288
	EEZ and continental shelf	289
	The Area	290
	The high seas	290
	Freedom of navigation	290
	Hot pursuit	293
	Other freedoms	294
	Nationality of ships	295
	Warships and ships used only on government non-commercial	206
	scrvice	296 297
	Landlocked and geographically disadvantaged States	291
	Toming .	291
	In internal waters and the territorial sea In EEZs	298

	On the high seas	-
	Shared and straddling stocks and highly migratory	29
	species	20
	Sedentary species	29
	Whales and other marine mammals	29
	Wrecks	30
	Underwater cultural heritage	30 30
	Dispute settlement under the Convention	30
	The International Tribunal for the Law of the Sea	30
	Means of dispute settlement	30
16	International environmental law	30
	Introduction	
	What is the environment?	30
	The development of international environmental law	30:
	Concepts	30.
	The precautionary approach	300
	The polluter pays	300
	Sustainable development	307
	Environmental impact assessment (EIA)	308
	Whaling	309
	Other fishing	309
	Wildlife	311
	Biological diversity	312
	The ozone layer, climate change and the Kyoto	
	Protocol	313
	Nuclear material	314
	The marine environment	315
	Emergencies	316
	Liability	316
	Dumping	317
	Hazardous wastes	317
	Liability for environmental damage	317
	Enforcement	318
7	International civil aviation	319
	Introduction	319
	International Civil Aviation Organization	319
	Meaning of aircraft	320
	Civil and State aircraft, induding military aircraft	320
	National airspace	320
	Domestic air services	321
	International air services, scheduled and non-scheduled	321
	International airspace	321
	Civil aircraft and airlines	322

xxi

Contents

	Air services agreements		
	Warsaw and Rome Conventions		
	Jurisdiction over civil aircraft	Energy Charter Treaty	353
	Use of force against aircraft	World Trade Organization	353
	37	Dispute Settlement	354
18	Special regimes	Panels	356
	Introduction	Appellate Body	356
	Antarctica	Recommendations	357
	The Antarctic Treaty System (ATS)	Compensation and countermeasures	357
	The Antarctic Treaty	NAFTA	358
	Sovereignty clause	MERCOSUR	359
	Measures	International commercial arbitration	359
	The Environmental Protocol	20 Succession of States	361
	33	Introduction	361
	Amendment of the Treaty and the Protocol and its Annexes Secretariat	Independence of an overseas territory	362
	CCAMLR	Secession	362
	33.	Dissolution	362
	The Arctic	Merger	363
	Svalbard	Absorption and extinction	363
	Canals	Recovery of sovereignty	363
	Suez Canal	Transfer of territory	364
	Panama Canal	Continuity of statehood	364
	Kiev Canal	Succession to treaties	364
	International rivers	Customary law principles	365
	Freedom of navigation	Former colonies and other dependent territories	366
	Other uses of watercourses 33	Germany	368
	Outer space 39	Russia	368
	Outer space treaties	Former Soviet republics	368
	The geostationary orbit	The Baltic States	369
	The International Space Station	Former Yugoslav republics	369
	International space organisations	Czechoslovakia	370
	Intelsat	Hong Kong and Macao	371
	Inmarsat 34	Succession to State property, archives and debts	371
19	International economic law	Former Yugoslav republics	372
		Membership of international organisations	372
	Introduction 34	Representation in international organisations	374
	Bilateral investment treaties	Hong Kong Special Administration Region	374
	A typical BIT	Nationality of natural persons	374
	The entities protected	21 State responsibility	376
	Types of investment product	Introduction	
	Treatment of investments	Terminology	376
	Expropriation and compensation	General matters	377
	Civil disturbance, etc.	The internationally wrongful act of a State	378
	Dispute settlement	General principles	378
	Duration of BITs	Attribution of conduct to a State	378
	ICSID 39	to a state	379

22

xxiii

Organs of the State	
Unauthorised or ultra vires conduct	30
Other conduct attributable to the State	38
Breach of an international obligation	3
Intertemporal rule	1
Extension in time of breach of an international	3
obligation	
Breach consisting of a composite act	3.
Circumstances precluding wrongfulness	3
Content of the international responsibility of a State	1
Cessation and non-repetition	36
Reparation	36
Forms of reparation	36
Serious breaches of obligations under peremptory norms of	.00
general international law	39
The implementation of the international responsibility	
of a State	38
Invocation of responsibility by an injured State	39
Notice of claim by an injured State (Article 43)	38
Admissibility of claims	39
Loss of right to invoke responsibility	39
Plurality of injured or responsible States	3)(
Countermeasures	H
Objects and limits of countermeasures	3%
Proportionality	35
Procedural conditions	36
Obligations not affected by countermeasures	391
Responsibility of an international organisation	39
Individual responsibility	35
Settlement of disputes	391
Introduction	3%
Informal means	39
Negotiations and consultations	3%
Involvement of third parties	39
Compulsory binding settlement	41
Jurisdiction and admissibility	41
Jurisdiction	41
Admissibility	4)
International arbitration	40
Permanent Court of Arbitration (PCA)	40
wiixed arbitral tribunals	40
International Court of Justice	411
Composition of the ICI	411

	Jurisdiction	41
	Reciprocal declarations	41
	Variations of declarations	42
	Admissibility	42
	Intervention by third parties	42
	The applicable law	42
	Non-appearance	422
	Provisional measures/interim measures of protection	422
	Judicial review?	424
	Procedure and practice	424
	Judgments	426
	Effect, interpretation and revision	426
	Advisory opinions	427
23	The European Union	
	300039000000000000000000000000000000000	430
	Introduction	430
	A brief history	431
	Member States	431
	European Communities, European Community or	
	European Union?	432
	Institutions	433
	Council of Ministers	434
	Commission	435
	Parliament	435
	Court of Auditors	436
	Legislative procedure	436
	Consultative procedure	437
	Co-decision procedure	437
	EU law	437
	The Treaty and legislation	438
	Supremacy of EU law	438
	Court of Justice	438
	Court of First Instance	440
	Preliminary rulings	440
	Common Foreign and Security Policy and Police and Judicial	
	Co-operation in Criminal Matters	441
	Legal personality and treaties	442
	Human rights	443
	Acquis communautaire	444
	Competence	444
	Comitology	444
	European Economic Area	444
	Languages	444
	Qualified majority voting	445

XXIV

Contents

Schengen Subsidiarity The Lisbon Treaty Documentation

Index