

HANDBOOK OF INTERNATIONAL LAW

A concise account of international law by an experienced practitioner, this book explains how states and international organisations, especially the United Nations, make and use international law. The nature of international law and its fundamental concepts and principles are described. The difference and relationship between various areas of international law which are often misunderstood (such as diplomatic and state immunity, and human rights and international humanitarian law) are clearly explained. The essence of new specialist areas of international law relating to the environment, human rights and terrorism is discussed.

Aust's clear and accessible style makes the subject understandable to non-international lawyers, non-lawyers and students. Abundant references are provided to sources and other materials, including authoritative and useful websites.

ANTHONY AUST is a former Deputy Legal Adviser of the Foreign and Commonwealth Office, London. A solicitor, he now practises as a consultant on international law and constitutional law to governments and international organisations, both privately and with the law firm Kendall Freeman of London. He is a visiting professor at the London School of Economics. His publications include *Modern Treaty Law and Practice* (Cambridge University Press, 2002).

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ANTHONY AUST
*London School of Economics and
Kendall Freeman Solicitors*



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For Kirsten

CONTENTS

<i>Foreword</i>	xvi	
<i>Preface</i>	xix	
<i>Acknowledgments</i>	xxiii	
<i>Table of treaties</i>	xxiv	
<i>Table of MOUs</i>	xxxiv	
<i>Table of cases</i>	xxxv	
<i>Glossary of legal terms</i>	xl	
<i>List of abbreviations</i>	xliii	
1 International law	1	
Private international law/conflict of laws	1	
The nature of international law	2	
The sources of international law	5	
Domestic law	12	
Subjects of international law	13	
2 States and recognition	16	
Criteria for statehood	16	
Recognition of states	17	
Self-determination	21	
Secession	23	
Recognition of governments	24	
<i>De jure</i> and <i>de facto</i> recognition	26	
Means of recognition	28	
Overseas territories	29	
3 Territory	33	
Boundary, border or frontier?	34	
Delimitation and demarcation	34	

Intertemporal principle	35
Critical date	35
Means of acquisition	35
<i>Res communis</i>	40
Common heritage of mankind	41
Territorial integrity and <i>uti possidetis</i>	41
4 Jurisdiction	43
Territorial principle	44
Nationality principle	44
Passive personality principle	45
Protective principle	45
Universal and quasi-universal jurisdiction	45
Effects doctrine	46
Alien Tort Claims Act 1789	48
Abduction	49
5 The law of treaties	51
The Vienna Convention on the Law of Treaties 1969	52
What is a treaty?	52
MOUs	55
Capacity to make treaties	57
Credentials and full powers	59
Adoption and authentication	60
Final act	61
Consent to be bound	62
Rights and obligations before entry into force	66
Reservations	67
Entry into force	77
Treaties and domestic law	79
Territorial application	86
Successive treaties	88
Interpretation	88
Third states	97
Amendment	98
Duration and termination	100

Invalidity	107
The depositary	109
Registration and publication	111
Sources of treaty texts	114
Further reading on treaties	116
6 Diplomatic privileges and immunities	117
The establishment of diplomatic relations and permanent diplomatic missions	118
The functions of a diplomatic mission	119
The members of the mission	120
The premises of the mission	123
Inviolability of mission archives	130
Means of transport	131
Freedom of movement	131
Freedom of communication	132
The diplomatic bag	132
Diplomatic couriers	135
Personal inviolability	136
Inviolability of the private residence	137
Inviolability of private papers, correspondence and property	138
The difference between diplomatic immunity and state immunity	138
Diplomatic immunity	139
Waiver of immunity	143
Social security exemption	144
Exemption from taxation	144
Exemption from personal services	146
Exemption from customs duties and inspections	146
Members of the family of a diplomatic agent	147
Administrative and technical staff	148
Service staff	148
Private servants	149
Nationals and permanent residents of the receiving state	149

	Commencement of privileges and immunities	150
	Termination of privileges and immunities	150
	Third states	151
	Duties of the mission to the receiving state	152
	Breach of diplomatic relations and the protection of the interests of the sending state	153
	Non-discrimination and reciprocity	154
	Special missions	155
	Consular relations	156
7	State immunity	159
	The relationship of state immunity to other legal doctrines	160
	Sources of the law on state immunity	162
	Which entities enjoy immunity?	163
	Exceptions to immunity	164
	Enforcement	173
	Procedure	174
	Visiting forces	175
	Heads of state, heads of government, foreign ministers and other senior officials	177
8	Nationality, aliens and refugees	179
	Nationality	179
	Aliens	184
	Asylum	187
	Refugees	188
9	International organisations	196
	Membership and representation	197
	International legal personality	198
	Immunities and privileges	199
	Liability	202
	Dispute settlement	203
10	The United Nations, including the use of force	205
	Membership	205
	Withdrawal, suspension and expulsion	206

CONTENTS

xi

Regional groups	207	
The UN's principal organs	207	
The UN's specialised agencies	208	
The General Assembly	208	
The Security Council	211	
Charter amendment	222	
Use of force	223	
11 Human rights	233	
Who enjoys the rights?	234	
Legal nature of human rights and exhaustion of domestic remedies	235	
Universal human rights treaties	235	
Regional human rights treaties	237	
Outline of the principal civil and political rights	239	
General qualifications to rights	244	
Reservations	245	
Derogations	245	
Enforcement	246	
12 The law of armed conflict (international humanitarian law)	251	
Sources	252	
International and internal armed conflicts	254	
Weaponry	255	
Prisoners of war	257	
Mercenaries	258	
Civilians and civilian objects	259	
Occupied territory	259	
Enforcement	260	
UN forces	261	
International Committee of the Red Cross	262	
13 International criminal law	263	
Mutual legal assistance	263	
Extradition	264	
International crimes	268	

	International tribunals	273
	International Criminal Court (ICC)	277
14	Terrorism	283
	Definitions	284
	Universal terrorism conventions	284
	Security Council	294
15	The law of the sea	298
	Internal waters	299
	Baselines	300
	Territorial sea	301
	Contiguous zone	304
	Exclusive economic zone	304
	International straits	306
	Construction of artificial islands and other installations in the EEZ or on the continental shelf	309
	Delimitation	309
	The Area	311
	The high seas	312
	Nationality of ships	316
	Warships and ships used only on government non-commercial service	317
	Land-locked and geographically disadvantaged states	319
	Fishing	319
	Whales and other marine mammals	322
	Wrecks	322
	Protection of the marine environment	323
	Dispute settlement under the Convention	323
16	International environmental law	327
	What is the environment?	329
	The development of international environmental law	329
	Concepts	330
	Whaling	333
	Other fishing	334
	Wildlife	336

CONTENTS

xiii

	Biological diversity	337	
	The ozone layer and climate change	338	
	Nuclear material	340	
	The marine environment	341	
	Liability for environmental damage	344	
17	International civil aviation	345	
	International Civil Aviation Organization	345	
	Civil and state aircraft	346	
	National airspace	346	
	International air services, scheduled and non-scheduled	347	
	Domestic air services	347	
	International airspace	347	
	Civil aircraft and airlines	348	
	Air services agreements	349	
	Warsaw and Rome Conventions	350	
	Jurisdiction over aircraft	351	
	Use of force against aircraft	352	
18	Special regimes	354	
	Antarctica	354	
	The Arctic	361	
	Svalbard	362	
	Canals	362	
	International rivers	364	
	Outer space	367	
19	International economic law	372	
	Bilateral investment treaties	373	
	ICSID	379	
	Energy Charter Treaty	382	
	World Trade Organisation	382	
	NAFTA	387	
	MERCOSUR	388	
	International commercial arbitration	389	

20	Succession of states	390
	Independence of an overseas territory	391
	Secession	391
	Dissolution	391
	Merger	392
	Absorption and extinction	392
	Recovery of sovereignty	393
	Transfer of territory	393
	Continuity of statehood	393
	Succession to treaties	393
	Succession to state property, archives and debts	401
	Membership of international organisations	403
	Nationality of natural persons	405
21	State responsibility	407
	Terminology	408
	General matters	409
	The internationally wrongful act of a state	410
	Attribution of conduct to a state	410
	Breach of an international obligation	414
	Circumstances precluding wrongfulness	416
	Content of the international responsibility of a state	417
	Cessation and non-repetition	418
	Reparation	418
	The implementation of the international responsibility of a state	423
	Countermeasures	425
	Responsibility of an international organisation	428
	Individual responsibility	429
22	Settlement of disputes	430
	Informal means	431
	Compulsory binding settlement	435
	Jurisdiction and admissibility	436
	International arbitration	442
	International Court of Justice	448

CONTENTS

xv

23	The European Union	466
	A brief history	467
	Institutions	470
	Council of Ministers	470
	Commission	471
	Parliament	472
	Court of Auditors	473
	Legislative procedure	473
	Community law	474
	Court of Justice	475
	Court of First Instance	476
	Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters	478
	Legal personality and treaties	479
	Human rights	480
	Acquis communautaire	481
	Competence	481
	Comitology	481
	European Economic Area	482
	Languages	482
	Qualified majority voting	482
	Schengen	483
	Subsidiarity	483
	Treaty establishing a Constitution for Europe	483
	Documentation	485
	<i>Index</i>	486

FOREWORD

Tony Aust has already produced *Modern Treaty Law and Practice* (Cambridge University Press, 2000). This was an exercise in the handbook mode which some scholars profess to dislike, and which most of them certainly neglect. In my own case I confess that his handbook is often to hand, because it is a place to start looking at problems in the law of treaties on an everyday basis. It does not claim to be definitive, but it succeeds in its task of introducing and of providing initial guidance in a clear and well-informed way. Take for example the short discussion on provisional application (*ibid.*, pp. 139–41), an issue of great practical significance as to which there is little or nothing in the older treatises. What he says is clear, well illustrated – one is pointed to difficulties and prominent instances (e.g. the Energy Charter Treaty) – and one is told that the case of provisional application which everyone knows – GATT 1947 – is ‘hugely atypical’.

The clear guidance and practical sense of *Modern Treaty Law and Practice* is here repeated on the broader canvas of general international law, an area of equal significance but much less accessible than the law of treaties. These days everyone including taxi-drivers talks about customary international law, although they probably (and wisely) do not use the term. But there is an awareness that an imminent threat is a condition for action in self-defence; that the Security Council can authorise individual states to use force but may be expected to do so in clear language; that crimes against humanity are punishable and might be punished; and that human rights confront state responsibility with consequences for both. Providing guidance in this much broader frame is a challenge. But non-specialists have to start somewhere and this is a good place to start.

Tony Aust brings to the work a sense of humour, of balance and of British practice – but the work is not parochial. Her Majesty’s Government has a long tradition (back to the 1880s) of a legal adviser in the Foreign Office, and there has been a consistent pattern of consultation on issues perceived as legal. It can be traced in the United Kingdom Materials

on International Law (UKMIL), published in the *British Yearbook of International Law* since 1978 and running now to thousands of pages – but it goes back much further than that. Senior decision-makers tend to say that they like their lawyers ‘on tap and not on top’ (as one British ambassador to the UN put it). But if one is ever involved in a long-running international dispute it is a fair bet that the government which has had a consistent, legally informed approach is the more likely to prevail, whatever the initial merits may have been. Aust has been a participant in this process from the British side for as long as thirty-five years – a process sometimes affected by forays from Lord Chancellors (as in Suez in 1956) or Attorneys-General (as with Iraq in 2003) but constant and generally consistent. In turn good international law has reinforced sustainable international policy – witness those two occasions where the costs of the alternatives were considerable.

The treatment of the subject is light and sometimes schematic – more detailed issues will require more detailed research. But he covers the ground and gives a good idea of its shape and contours, and this is a valuable service at a time of overspecialisation.

James Crawford
Whewell Professor of International Law
University of Cambridge
28 April 2005

PREFACE

[Q]uotation is a national vice.

Evelyn Waugh, *The Loved One*, 1948, Ch. 9.

The *Oxford English Dictionary* defines a handbook as a short manual or guide; and this book is intended to be a helpful means of finding out about international law. It is meant to be kept, literally, close at hand, so that when one comes across a problem (perhaps a new area of the law or a new concept or term) one can turn first to it and get a quick answer to questions such as: What is the exclusive economic zone? Who is a refugee? What is the legal regime of Antarctica? How are diplomatic and state immunity confused? What is Palestine? Should one prefer an arbitral tribunal to an international court? What is a Chapter VII resolution? My purpose is to explain international law principles and rules in a clear and concise way. I avoid as far as possible theory and speculation.

Although the book can be read as an introduction to the subject, it is designed to meet the need for a practical guide for those concerned with international law, whether on a regular or occasional basis. In the last century a tremendous amount was written on the subject. General works may be intended rather more for the student. Dealing as they do with the history of international law, its doctrines and intellectual problems, such works do not have enough space to set out the law in detail. That is right. Most students of international law, whether undergraduate or postgraduate, will not practise it.

Yet many other people need to know about international law, not only legal advisers to foreign ministries. Therefore another object of this book is to make more people aware of the international law that lies behind so many ordinary activities. Today international law affects almost every human activity. To take one simple example: foreign flights by air are only possible because of an elaborate network of bilateral treaties; and they have been concluded pursuant to a multilateral treaty of 1944 which provides the basic structure for the regulation of international civil aviation.

And when the aircraft crashes, treaties going back to 1929 may limit the compensation received by your family (see pp. 349–51 below).

In recent years treaties providing for the protection of human rights and the environment have become widely known. But there are many other important areas regulated by treaties, some dating back to the nineteenth century, yet they are largely unknown except to the specialist. That the Table of treaties is much longer than the Table of cases merely reflects the fact that treaties now play a much more important role in the day-to-day work of the international lawyer. Today, decisions of international courts and tribunals have a less central role. Similarly, common law practitioners will be familiar with the way legislation, primary and secondary, has increased so much in volume and complexity in the last fifty years that it is now the principal element in their work.

The vital role played by international law is often not obvious even to lawyers, unless they specialise in the subject. Fortunately, in recent years George W. Bush, Saddam Hussein and Slobodan Milosevic have done much to heighten awareness of the law on the use of force, UN sanctions, war crimes and crimes against humanity. Yet even specialists – whether lawyers or not – in areas such as human rights, the environment or the European Union, often do not have a good grounding in international law, even though their fields have been created wholly or largely by treaties. A physicist needs to have advanced mathematics, and no doctor could qualify without a good knowledge of chemistry and biology. Similarly, international civil servants, government officials, NGO staff and other specialists all need to be more familiar with the international law underlying their subject, not just the particular texts that are immediately relevant.

It is a mistake to think that only international courts and tribunals decide disputes about international law. National courts and tribunals still decide most of them. And international law can reach far down into the internal legal order of states, sometimes with unexpected effects. In 1994, a merchant ship belonging to a former communist state was arrested in Scotland at the initiative of the crew who had not been paid for months. Normally the arrest would have been perfectly proper, but, unknown at first to the local court, there was a bilateral treaty between that state and the United Kingdom which prohibited the arrest of merchant vessels for such a purpose.

Although law is always developing, it is a mistake to think that all of it is uncertain. International law develops continually, and has its share of grey areas, but that does not mean that it is always a matter of opinion.

Most of the basic principles and rules are well established. As with the law of each state, the problems faced daily are concerned more with how to apply a rule to the facts. This goes also for most cases before national courts and tribunals. Cases such as *Pinochet* (see pp. 5 and 178 below) are the exception, not the rule.

All practising lawyers know how different the practice of law is from what they learned as a student. It is the same for international law. I have therefore included as much as possible of its practical aspects. This book explains how the law is actually developed and applied by states and international organisations. I was very fortunate to have been a foreign ministry legal adviser for thirty-five years. It gave me an insight into how things are done, and I have put much of my experience into this book. When I have not been able to draw on that experience, or that of former colleagues, I have been able to use my understanding developed during a lifetime of practice. This inevitably gives one an instinctive feel for what is really important; and I have aimed to convey this throughout.

I hope that teachers and students of international law will also find the book of value. There is an increasing awareness of the need to teach international law, and especially how it is developed, within its proper context. That is largely a diplomatic context. One cannot properly appreciate why a treaty or a UN Security Council resolution was drafted in a particular way unless one understands something of the political or diplomatic process that produced it and how problems are eventually solved. That knowledge helps to explain what diplomats and other international negotiators actually do. I have therefore tried to set the law in that context.

This book is not therefore just of interest to diplomats, as is largely the case with *Satow* and similar books. My aim is to cover most areas of international law, not just those that are of particular interest to a diplomat (Denza's excellent and authoritative *Diplomatic Law* is limited to the Vienna Convention on Diplomatic Relations). Nevertheless, I hope the book will be useful to diplomats, who are concerned with many more aspects of international law than may be thought. Even those who work in foreign ministries or embassies with easier access to expert legal advice have a need to understand that advice so that they can act upon it properly and effectively. And there are all too many diplomats with no or little legal knowledge who have to work largely without legal advice, dealing with international legal problems as best they can.

The chapters vary much in length. The longer ones, such as those on the law of the sea, the law of treaties and diplomatic relations, give a fairly detailed treatment of those topics which are at the centre of international

law. Other, more specialised topics like human rights and environmental law are dealt with more summarily since they cannot be described in detail in a book of this length (the leading British work on international environmental law has nearly 800 pages). So, those chapters are more in the nature of introductions; the background and concepts are briefly described, and learned sources of information are referred to.

Whenever possible, I have tried to use primary sources: treaties, judgments and authoritative commentaries. But, like others, inevitably I have had to rely also on leading general works like *Oppenheim's International Law* (vol. 1, 9th edn, London, 1992), *Shaw's International Law* (5th edn, Cambridge, 2003) and Brownlie's *Principles of Public International Law* (6th edn, Oxford, 2003), as well as many books on specialist areas.

All chapters have references to books and articles, cases and other materials, which the reader is encouraged to consult. Websites are indispensable today. An up-to-date, online list of websites with links to them (www.asil.org/ilmlinks.htm) is used by the American Society of International Law in compiling its indispensable publication *International Legal Materials*. *Shaw's International Law* also has a useful list of websites. This book does not have a list, but wherever possible the text will mention the relevant sites, including some of the more obscure. But one must always remember that website addresses do sometimes change.

As far as possible, the facts and law are stated as at 31 December 2004, though some later developments were added at the proof stage.

All comments and corrections to aiaust@aol.com, please.

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Practitioners and scholars expert in a particular field have been good enough to take time to comment on whole or parts of draft chapters, to point out mistakes and omissions or to provide or suggest material. I must therefore sincerely thank, among others, Roberto Barcella, Alan Boyle, James Crawford, Martin Eaton, Rolf Einer Fife, Malcolm Forster, Martha Haines-Ferrari, Hazel Fox, Richard Gardiner, Philippe Gautier, Christopher Greenwood, Nicholas Grief, Johannes Huber, David Kornbluth, Roderick Liddell, Ruma Mandel, Denzil Millar, Adam Roberts, Julia Schwartz and Elizabeth Wilmshurst. But all opinions and errors are mine.

I must also thank Finola O'Sullivan, and the team at Cambridge University Press. Lastly, I must again thank my wife, Kirsten Kaarre Jensen, for putting up with the demands of writing, as well as reading some of the chapters and making perceptive suggestions from the viewpoint of a former diplomat and non-lawyer.

TABLE OF TREATIES

Where appropriate, a treaty is listed under the name or acronym by which it is commonly known or the subject matter is mentioned first. Today, some multilateral treaties are regularly amended, and therefore the most reliable source for the up-to-date text is an official website.

Multilateral treaties

- Aarhus Convention 1998, 2161 UNTS 450 (No. 37770); ILM (1998) 999 327
- Additional Protocols of 1977 to the Geneva Conventions, 1125 UNTS 3 (No. 17512); ILM (1977) 1391; UKTS (1999) 29 and 30; R&G 419 253, 254, 255, 258, 259, 285
- AETR II Agreement 1970, 993 UNTS 143 (No. 14533) 75, 76
- African Charter on Human and Peoples' Rights 1981, 1520 UNTS 218 (No. 26363); ILM (1982) 58 238
- African Charter, Protocol on Court of Human Rights 1998, ILM (2004) 1 248
- Agreement on Succession (former Yugoslavia), ILM (2002) 1; UNTS No. 40296 403
- Algiers Accords (Iran–US Claims Tribunal) 1981, ILM (1981) 223 445
- American Convention on Human Rights 1969, 1144 UNTS 144 (No. 17955); ILM (1970) 99 75, 238, 248
- Antarctic Marine Living Resources Convention (CCAMLR), 402 UNTS 71 (No. 22301); ILM (1980) 837; UKTS (1982) 48; TIAS 10240; B&B Docs. 628 355, 360–1, 479
- Antarctic Seals Convention 1972, 1080 UNTS 175 (No. 16529); ILM (1972) 837; UKTS (1978) 45 355
- Antarctic Treaty 1959, 402 UNTS 71 (No. 5778); UKTS (1961) 97 67, 71, 354, 355, 356–7
- Antarctic Treaty, Environmental Protocol 1991, ILM (1991) 1460; UKTS (1999) 6; ATS (1998) 6; B&B Docs. 468 329, 333, 355, 358–9
- Arab Charter on Human Rights 1994, BGG 774 238, 248
- Austrian State Treaty 1955, 217 UNTS 223 (No. 2249); UKTS (1957) 58; TIAS 3298 106
- Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concern 1921, 7 LNTS 35; UKTS (1923) 28 364

TABLE OF TREATIES

XXV

- Basel Convention on the Transboundary Movements of Hazardous Wastes 1989, 1673 UNTS 126 (No. 28911); ILM (1989) 657; UKTS (1995) 100; B&B Docs. 322 343
- Basel Convention, Liability and Compensation Protocol 1999, www.basel.int/meetings/cop/cop5/docs/prot-e.pdf 344
- Biological Diversity Convention 1992, 1760 UNTS 9 (No. 30619); ILM (1992) 818; UKTS (1995) 51; B&B Docs. 390 329, 337–8
- Biological Diversity, Cartagena Protocol 2000, 1760 UNTS 79 (No. 30619); ILM (2000) 1027; UKTS (2004) 17 338
- Biological Weapons Convention 1972, 1015 UNTS 163 (No. 14860); ILM (1972) 309; UKTS (1976) 11 256
- Briand–Kellogg Pact 1928, 94 LNTS 57; UKTS (1929) 29 224
- Brussels Convention on the Unification of Certain Rules on the Immunity of State-Owned Vessels 1926, 176 LNTS 199; UKTS (1980) 15 172
- CCAMLR (see Antarctic Marine Living Resources Convention)
- CCWC (Certain Conventional Weapons Convention) 1980, 1342 UNTS 137 (No. 22495); ILM (1980) 1523; UKTS (1996) 105; R&G 515 253, 255
- CCWC Additional Protocol 1995, 2024 UNTS 167 (No. 22495); UKTS (2001) 25 255
- CCWC Protocol II 1996, UKTS (2001) 21; 2048 UNTS 133 (No. 22495) 254
- CEDAW (Convention on the Elimination of Discrimination against Women) 1979, 1249 UNTS 13 (No. 20378); ILM (1980) 33; UKTS (1989) 2; BGG 212 236, 250
- CERD (Convention on the Elimination of All Forms of Racial Discrimination) 1966, 660 UNTS 195 (No. 9464); UKTS (1969) 7; BGG 160 236, 250
- Chemical Weapons Convention 1993 (CWC), 1974 UNTS 317 (No. 33757); ILM (1993) 800; UKTS (1997) 45 69, 101, 104, 256
- Chicago Convention 1944, 15 UNTS 295 (No. 102); UKTS (1953) 8 55, 316, 328, 345, 346
- Chicago Convention, Article 3 *bis* Protocol, ILM (1984) 705; UKTS (1999) 68 95
- CITES (Convention on International Trade in Endangered Species) 1973, 993 UNTS 243 (No. 14537); ILM (1973) 1085; UKTS (1976) 101; 27 UST 1087; TIAS 82249; B&B Docs. 415 337
- Climate Change Convention 1992, 1771 UNTS 1907 (No. 30822); ILM (1992) 849; UKTS (1995) 28 329, 339
- Commonwealth of Independent States (CIS), Minsk Agreement 1991 and Alma Ata Declaration 1991, ILM (1992) 138 23
- Commonwealth of Independent States Charter 1993, ILM (1995) 1279 54
- Comprehensive Nuclear-Test-Ban Treaty 1996 (CTBT), ILM (1996) 1443 90, 100
- CTBT Text establishing the Prepcom 1996, UKTS (1999) 46 65
- Congress of Vienna, Acts, 64 CTS 454 364
- Constantinople Convention (Suez Canal) 1888, 171 CTS 241; 79 BSP 18; and see also 265 UNTS 299 (No. 3821) 363

- Corruption Convention (UN) 2003, A/RES/58/422; ILM (2004) 37 46
 Danube, Belgrade Convention 1948, 33 UNTS 181 (No. 518) 216, 365
 Dayton Agreement 1995, ILM (1996) 75 63, 91, 97
 Dublin Agreement on Refugees (EU) 1990, 2144 UNTS 492 (No. 37439); UKTS (1996) 72 190
 Energy Charter Treaty 1994, 2080 UNTS 100 (No. 36116); ILM (1995) 373; UKTS (2000) 78 382
 ENMOD Convention 1977, 1108 UNTS 151 (No. 17119); ILM (1977) 16; TIAS 9614 91
 Environment, Convention on Liability for Damage Resulting from Dangerous Activities 1993, ILM (1993) 1228; B&B Docs. 132 344
 Espoo Convention 1991, 1989 UNTS 309 (No. 34028); ILM (1971) 802; B&B Docs. 31 333
 Estonia Agreement 1995, 1890 UNTS 176 (No. 32189), with Additional Protocol 1996, UKTS (1999) 74 52, 322
 European Charter of Fundamental Rights 2000, ILM (2001) 266 481
 European Convention for the Peaceful Settlement of Disputes 1957, 320 UNTS 423 (No. 4646); UKTS (1961) 10 437
 European Convention on Extradition (Council of Europe) 1957, 359 UNTS 273 (No. 5146); UKTS (1991) 97 265
 European Convention on Human Rights (ECHR) 1950, 213 UNTS 221 (No. 2889); UKTS (1953) 71 74, 75, 83, 186, 194, 234, 237–8, 239, 240, 241, 242, 243, 244, 245, 246, 247, 440, 481
 European Convention on Human Rights, Protocol No. 14, ETS No. 194 247
 European Convention on Mutual Assistance in Criminal Matters 1959, and Additional Protocol 1978, 472 UNTS 185 (No. 6841) and 1496 UNTS 350 (No. 6841); ILM (1978) 801; UKTS (1992) 24 264
 European Convention on State Immunity 1972, 1495 UNTS 182 (No. 25699); ILM (1972) 470; UKTS (1979) 74 162, 168, 169
 European Convention on the Suppression of Terrorism 1977, 1137 UNTS 93 (No. 17828); ILM (1976) 1272; UKTS (1978) 93 77, 288
 European Convention on the Transfer of Sentenced Prisoners 1983, 1496 UNTS 92 (No. 25703); ILM (1983) 530; UKTS (1985) 51, as amended by Additional Protocol 1997, 2138 UNTS 244 (No. 25703) 266
 European Space Agency (ESA) Agreement 1975, 1297 UNTS 161 (No. 21524); ILM (1975) 864; UKTS (1981) 30 370
 EUROPOL Convention 1995, 2156 UNTS 200 (No. 37663); UKTS (2000) 103 264
 FAO Compliance Agreement 1993, ILM (1994) 968; B&B Docs. 645 76, 100, 335
 Fish Stocks Agreement 1995, 2167 UNTS 3 (No. 37924); ILM (1995) 1542; UKTS (2004) 19 324, 331, 336

TABLE OF TREATIES

xxvii

- GATT (General Agreement on Tariffs and Trade) 1947, 55 UNTS 187 (No. 814) 383
- General Act for the Pacific Settlement of International Disputes 1928 (Revised 1949),
 93 LNTS 343; 71 UNTS 101 (No. 912); UKTS (1931) 32 and 71 437
- Geneva Conventions 1949, 75 UNTS 3 (Nos. 970–973); UKTS (1958) 39; R&G
 195–369 27, 91, 96, 106, 252, 254, 257, 259, 259–61, 262, 285
- Geneva Gas Protocol 1925, R&G 157 256
- Genocide Convention 1948, 78 UNTS 277 (No. 1021); UKTS (1970) 58 71, 235, 270–1
- Hague Conventions for the Pacific Settlement of International Disputes 1899 and
 1907, 187 CTS 410 and 205 CTS 233; UKTS (1901) 9 437, 444
- Hague Conventions on the Laws of War 1907, R&G 67–137 252, 255
- Hague Regulations 1907, R&G 73 27, 259
- Hijacking Convention (Hague Convention) 1970, 860 UNTS 105 (No. 12325); UKTS
 (1972) 39 287, 289
- Hostages Convention 1979, 1316 UNTS 205 (No. 21931); ILM (1979) 1460; UKTS
 (1983) 81 287, 291
- IASTA (International Air Services Transit Agreement) 1944, I71 UNTS 387 (No. 502);
 UKTS (1953) 8 346, 349
- ICSID, Washington Convention on the Settlement of Investment Disputes between
 States and Nationals of Other States 1965, 575 UNTS 159 (No. 8359); ILM
 (1965) 532; UKTS (1967) 25 378, 379, 388, 442–8
- INMARSAT Convention 1976, 1143 UNTS 105 (No. 17948); ILM (1976) 1051 and
 ILM (1988) 691; UKTS (1979) 94; TIAS 9605 370
- Inter-American Terrorism Convention 1971, 1488 UNTS 195 (No. 243381) 288
- International Covenant on Civil and Political Rights (ICCPR) 1966 and Optional
 Protocol, 999 UNTS 171 (No. 14668); ILM (1967) 368; UKTS (1977) 6 22, 76,
 106, 181, 185, 234, 236, 239, 242, 244, 248, 246–50
- International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, 993
 UNTS 3 (No. 14531); UKTS (1977) 6; BGG 172 236, 242, 243
- International Criminal Court (ICC) Statute 1998, 2187 UNTS 91 (No. 38544); ILM
 (1998) 998; UKTS (2002) 35 6, 111, 178, 222–3, 254, 261, 269, 271, 272, 273,
 277, 278–80, 281–2, 440
- International Fund for Agricultural Development 1976, 1059 UNTS 191 (No. 16041);
 ILM (1976) 922; UKTS (1978) 41 429
- International Labour Organization (ILO) Constitution, 15 UNTS 35; UKTS (1948) 47,
 UKTS (1961) 59 and UKTS (1975) 110 203
- International Telegraph Convention 1865, 130 CTS 123, 130 CTS 198 and 148 CTS
 416 371
- Internationally Protected Persons Convention 1973, 1035 UNTS 167 (No. 15410); ILM
 (1974) 41; UKTS (1980) 3 287
- Kuwait Regional Marine Environment Convention 1978, ILM (1978) 511 96
- Kyoto Protocol 1997, UNTS (No. 30822); ILM (1998) 22 339

- Landmines Convention 1997, 2056 UNTS 241 (No. 35597); ILM (1997) 1509; UKTS (2001) 21 254, 256
- Lateran Treaty (Italy–Holy See) 1929, 130 BSP 791 19
- Law of the Sea Conventions 1958, 1. Territorial Sea and Contiguous Zone, 516 UNTS 205 (No. 7477); 2. High Seas, 450 UNTS 11 (No. 6465); 3. Fishing, 559 UNTS 285 (No. 8164); 4. Continental Shelf, 499 UNTS 311 (No. 7302) 93, 298
- League of Nations Covenant, 225 CTS 188; UKTS (1919) 4; 112 BSP 113 32, 224
- London Agreement 1945 establishing the Nuremberg Tribunal, 82 UNTS 279 (No. 251); UKTS (1945) 4 271, 273, 274
- London (Dumping) Convention 1972, ILM (1972) 1294 and ILM (1997) 7 343
- Maastricht Treaty on European Union 1992, UKTS (1994) 12 467, 480
- MARPOL, ILM (1973) 1319; UKTS (1983) 27 341
- Mercenaries Convention 1989, 2163 UNTS 96 (No. 37789); ILM (1990) 89 258
- MERCOSUR Treaty 1991, ILM (1991) 1041 388
- Montevideo Convention 1933, 165 LNTS 19 16
- Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft 1971, 974 UNTS 177 (No. 14118); ILM (1971) 10; UKTS (1974) 10 287, 295, 436, 439, 460
- Montreal Convention, Protocol on Airports 1988, ILM (1988) 627; UKTS (1991) 20; 1990 ATS 39 287
- Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999, UKTS (2004) 44 351
- Montreux Convention 1936, 173 LNTS 213; UKTS (1937) 30 307
- Moon Treaty 1979, 1363 UNTS 3 (No. 23002); ILM (1979) 1434 41, 368
- NAFTA (North American Free Trade Agreement) 1992, ILM (1993) 289 387–8
- NATO Status of Forces Agreement, 199 UNTS 67 (No. 2678); UKTS (1955) 3 175–6, 176
- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 UNTS 38 (No. 4739); UKTS (1976) 26; TIAS 6997 388
- North Atlantic Treaty 1949, 34 UNTS 243 (No. 541); UKTS (1949) 56 228
- Nuclear Accident, Convention on Early Notification 1986, 1457 UNTS 133 (No. 24643); ILM (1986) 1377; UKTS (1998) 1; B&B Docs. 300 340
- Nuclear Damage, Protocol on Civil Liability 1963, ILM (1997) 1462 340
- Nuclear Energy, Convention on Third Party Liability 1963 (Paris Convention), 956 UNTS 251 (No. 13706); UKTS (1968) 69; AJIL (1961) 1082 (for the 1982 amendments, see UKTS (1989) 6 or B&B Docs. 65) 340
- Nuclear Material, UN Convention on Physical Protection, 1979, 1456 UNTS 101 (No. 24631); ILM (1979) 1419; UKTS (1995) 61 287, 294
- Nuclear Non-Proliferation Treaty (NPT) 1968, 729 UNTS 161 (No. 10485); ILM (1968) 809; UKTS (1970) 88; TIAS 6839 101
- Nuclear Safety Convention 1994, ILM (1994) 1518; UKTS (1999) 49; B&B Docs. 307 340

TABLE OF TREATIES

xxix

- Nuclear Test-Ban Treaty 1963, 480 UNTS 43 (No. 6964); UKTS (1964) 3; TIAS 544
 368
- Nuremberg Charter (see London Agreement)
- OAU Convention on African Refugee Problems 1969, 1001 UNTS 60 (No. 14691) 188
- Oil Pollution, Civil Liability Convention, 1992, B&B Docs. 91 342
- Oil Pollution, Compensation Fund Convention 1971, 1110 UNTS 57 (No. 17146);
 ILM (1972) 284; UKTS (1978) 95 342
- Oil Pollution, Compensation Fund Convention, Protocol 1992, UKTS (1996) 87; B&B
 Docs. 107 342
- Oil Pollution, Intervention on the High Seas Convention 1969, 970 UNTS 212 (No.
 14049); ILM (1970) 25; UKTS (1975) 77 342
- Oil Pollution, Preparedness, Response and Co-operation Convention 1990, 1891
 UNTS 78 (No. 32194) 342
- OSCE Convention on Conciliation and Arbitration 1992, ILM (1993) 557 433
- Ouro Preto Protocol 1994, ILM (1995) 1244 388
- Outer Space, Astronauts Agreement 1968, 672 UNTS 119 (No. 9574); ILM (1968)
 149 368
- Outer Space, Liability Convention 1972, 961 UNTS 187 (No. 13810); ILM (1971) 965;
 UKTS (1974) 16; TIAS 7762 368, 370, 409
- Outer Space, Registration Convention, 1975, 1023 UNTS 15 (No. 15020); ILM (1975)
 43 368
- Outer Space Treaty 1967, 610 UNTS 205 (No. 8843); ILM (1967) 386; UKTS (1968)
 10; TIAS 6347 86, 367–8
- Ozone Layer, Vienna Convention on the Protection of, 1985, 1513 UNTS 324
 (No. 26164); ILM (1987) 1529; UKTS (1990) 1 331, 338
- Ozone Layer, Montreal Protocol on Substances that Deplete, 1987, 1522 UNTS 3
 (No. 26369); ILM (1987) 1541; UKTS (1990) 19 331, 338
- Panama Convention (Inter-American Convention on International Commercial
 Arbitration) 1975, 1438 UNTS 249 (No. 24384); ILM (1975) 336 388
- Partial Nuclear Test Ban Treaty 1963, 480 UNTS 43 (No. 6964); UKTS (1964) 3; TIAS
 5433 109
- Plastic Explosives, Convention on the Marking of, 1989, ILM (1991) 726; UKTS
 (2000) 134 287
- Racial Discrimination (see CERD)
- Ramsar Wetlands Convention 1971, 996 UNTS 245 (No. 14583); ILM (1972) 963;
 UKTS (1976) 34; TIAS 11084; B&B Docs. 447 (for a consolidated text, see
 UKTS (1996) 13) 336
- Refugee Convention 1951, 189 UNTS 137 (No. 2545); UKTS (1954) 39 182, 187, 188,
 189, 191, 192, 193–4, 195, 236, 293
- Refugee Convention, Protocol 1967, 606 UNTS 267 (No. 8791); UKTS (1969) 15 188
- Rights of the Child Convention 1989, 1577 UNTS 3 (No. 27531); ILM (1989) 1448;
 UKTS (1992) 44; BGG 241 69, 236, 250

- Rome Convention on Shipjacking and Protocol 1988, 1678 UNTS 222 (No. 29004);
 ILM (1988) 672; UKTS (1995) 64; 1993 ATS 10 287, 289
- Salvage (Brussels) Convention 1910, 212 CTS 187; UKTS (1913) 4 322
- Salvage Convention 1989, UKTS (1996) 93 322
- Schengen Agreement 1990, ILM (1991) 68 184, 483
- Sierra Leone Special Court Agreement 2002, 2178 UNTS 138 (No. 38342) 276
- Special Missions Convention 1969, 1410 UNTS 231 (No. 23431); ILM (1970) 127 155
- Spitsbergen (Svalbard) Treaty 1920, 2 LNTS 8; UKTS (1924) 18 362
- Stateless Persons Convention 1954, 360 UNTS 117 (No. 1518); UKTS (1960) 41 182,
 236
- Statelessness Reduction Convention 1961, 989 UNTS 175 (No. 14458) 236
- Suez Canal Convention (see Constantinople Convention)
- Terrorism, Suppression of the Financing of Convention, 1999, 2178 UNTS 229 (No.
 38349); ILM (2000) 268; UKTS (2002) 28; 2002 ATS 23 286, 288, 289, 291,
 291, 292–3
- Terrorist Bombings Convention 1997, 2149 UNTS 284 (No. 37517); ILM (1998) 251;
 UKTS (2001) 31; 2002 ATS 17 288, 289, 291, 292
- TIR Convention 1975, 1079 UNTS 89 (No. 16510) 70
- Tokyo Convention 1963, 704 UNTS 219 (No. 10106); UKTS (1969) 126 287, 352
- Torture Convention 1984, 1465 UNTS 85 (No. 24841); ILM (1984) 1027; UKTS (1991)
 107; BGG 229 46, 178, 236, 239, 250
- Treaty of Amsterdam 1997, ILM (1998) 56 467
- Treaty of Rome 1957, 298 UNTS 3 (No. 4300) 467, 471, 474, 474–5
- UN Charter 1945, 1 UNTS xvi; UKTS (1946) 67 6, 9, 21, 29, 32, 36, 41, 54, 67, 86, 93,
 99, 111, 112, 205, 222–3, 224, 229, 234, 261, 278, 279, 352, 409–14, 416, 431–4,
 460
- UN Convention on the Jurisdictional Immunities of States, A/RES/59/38 138, 160,
 162, 166, 173, 174, 175
- UN Convention on the Law of the Sea 1982 (UNCLOS), 1833 UNTS 397 (No. 31363);
 ILM (1982) 1261; UKTS (1999) 81 8, 41, 58, 59, 70, 92, 93, 171, 313, 328, 332,
 341, 434
- UNCLOS Implementation Agreement 1994, 1836 UNTS 42 (No. 31364); ILM (1994)
 1309; UKTS (1999) 82 311
- UN Convention on the Privileges and Immunities of the Specialised Agencies 1947, 33
 UNTS 261 (No. 521) 200
- UN General Convention on UN Privileges and Immunities 1946, 1 UNTS 15
 (No. 4) 200
- UN Personnel, Convention on Safety of, 1994, 2051 UNTS 363 (No. 35457); ILM
 (1995) 484 46
- Versailles Treaty 1919, 225 CTS 188; UKTS (1919) 4 364
- Vienna Convention on Consular Relations 1963, 596 UNTS 261 (No. 8638); UKTS
 (1973) 14; TIAS 6820 119, 156

TABLE OF TREATIES

xxxi

- Vienna Convention on Consular Relations, Optional Protocol concerning the Compulsory Settlement of Disputes 1963, 596 UNTS 487 (No. 8640); UKTS (1973) 14 438
- Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95 (No. 7310); UKTS (1965) 19 92, 117, 160
- Vienna Convention on Diplomatic Relations, Optional Protocol concerning the Compulsory Settlement of Disputes 1961, 500 UNTS 241 (No. 7312); UKTS (1965) 19 438
- Vienna Convention on Succession of States in respect of State Property etc. 1983, ILM (1983) 298 390, 401–3
- Vienna Convention on Succession of States in respect of Treaties 1978, 1946 UNTS 3 (No. 33356); ILM (1978) 1488 390, 393–4
- Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 (No. 18232); ILM (1969) 689; UKTS (1980) 58 8, 9, 11, 51, 52, 52, 59, 62, 65, 67, 69, 72, 89, 93, 107, 108–9, 393, 433, 434
- Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986, ILM (1986) 543 53, 58
- Vienna Drugs Convention 1988, 1582 UNTS 165 (No. 27627); ILM (1989) 493; UKTS (1992) 26 46
- Warsaw Convention 1929, 137 LNTS 11; UKTS (1933) 11 98, 350
- Watercourses, International Convention on the Law of the Non-Navigational Uses of, ILM (1997) 719 366–7
- Watercourses, Revised Protocol on Shared Watercourses in Southern Africa 2000, ILM (2001) 317 367
- World Trade Organization (WTO) Agreement 1994, ILM (1994) 1144 186, 203, 382

Bilateral treaties

- Argentina–UK Exchange of Notes on Communications with the Falkland Islands 1971, 825 UNTS 143 (No. 11824); UKTS (1972) 64 356
- Australia–UK Double Taxation Agreement 2003, UKTS (2004) 5 185
- ‘Bermuda 1’, UK–US Air Services Agreement 1946, 3 UNTS 253 (No. 36); UKTS (1946) 3 349
- ‘Bermuda 2’, UK–US Air Services Agreement 1977, 1079 UNTS 21 (No. 16509); UKTS (1977) 76 349, 432, 437
- Chapeau Agreement (UK–US) 1993, UKTS (1993) 69 56
- Chile–UK Drug Trafficking Mutual Assistance Agreement 1995, UKTS (1997) 63 264
- China–UK Exchange of Notes on Consulates 1999, 2139 UNTS 256 (No. 3305); UKTS (2000) 93
- China–UK Joint Declaration on the Question of Hong Kong 1984, 1399 UNTS 33 (No. 23391); ILM (1984) 1366; UKTS (1985) 26 197

- Colombia–UK Mutual Legal Assistance in Criminal Matters Agreement 1997, UKTS (2000) 40 264
- Denmark–UK Agreement on Maritime Delimitation between the Faeroes and the UK 1999, UKTS (1999) 76 309
- Devolution Agreements: Iraq–UK 1931 (UKTS (1931) 15); Indonesia–Netherlands 1949 (69 UNTS 266); France–Vietnam 1954 (161 BSP 649); Malaya–UK 1957 (279 UNTS 287 (No. 4046) 396
- Egypt–Israel Peace Treaty 1979, 1136 UNTS 116 (No. 17813) and 1138 UNTS 72 (No. 17855); ILM (1979) 362 363
- EU–US Mutual Legal Assistance and Extradition Treaties, ILM (2004) 749 268
- Grenada–UK Air Services Agreement 2002, UKTS (2002) 52 349
- Hong Kong–UK Fugitive Offenders Agreement 1997, UKTS (1998) 30 265
- Iran–US Treaty of Amity 1955, 284 UNTS 93 (No. 4132); TIAS 3853 437
- Japan–Pakistan Cultural Agreement 1957, 325 UNTS 22 (No. 4692) 96
- Jay Treaty (UK–US) 1794, 52 CTS 243 436, 437
- Lithuania–Russia ‘Timetable’ on Withdrawal of Russian Forces 1992, 1690 UNTS 395 (No. 29146) 55
- Netherlands–Philippines Bilateral Investment Treaty 1985, 1488 UNTS 304 (No. 25565) 375
- Nicaragua–US Treaty of Friendship, Commerce and Navigation 1956, 367 UNTS 3 (No. 5224) 437
- Norway–UK Agreement on the Murchison Field 1979, 1249 UNTS 174 (No. 20387); UKTS (1981) 39 41
- Panama Canal Treaty (UK–US) 1901, UKTS (1902) 6 364
- Panama–US Canal Treaties 1977, ILM (1977) 1021; see also ILM (1975) 1285 and (1978) 817 364
- Poland–UK Visa Abolition Agreement 1992, UKTS (1992) 69 184
- Russia–UK Agreements on Leases of New Embassy Premises 1996, UKTS (1997) 1 and 2 124, 129
- Slovenia–UK Cultural Cooperation Agreement 1966, UKTS (1996) 14 102
- South Africa–UK Investment Promotion and Protection Agreement 1964, UKTS (1996) 35 87
- Switzerland–UK Treaty for Conciliation, Judicial Settlement and Arbitration 1965, 605 UNTS 205 (No. 8765); ILM (1965) 943; UKTS (1967) 42 434, 437
- Treaty of Utrecht (Great Britain–Spain) 1713, 28 CTS 325; 1 BSP 611 37
- Turkey–UK Agreement on Diplomatic Dependents Employment 2000, UKTS (2000) 98
- Turkmenistan–UK Investment Promotion and Protection Agreement 1995, UKTS (2003) 47 373
- UK–UN ICTY Prisoners Agreement 2004, UKTS (2004) 20 275
- UK–US British Indian Ocean Territory (Diego Garcia) Agreements 1996, 603 UNTS 273 (No. 8737); UKTS (1967) 15; TIAS 6296; 18 UST 28; as amended in 1976, 1032 UNTS 323 (No. 8737); UKTS (1976) 88); and in 1987, UKTS (1988) 60 40

TABLE OF TREATIES

xxxiii

- UK–US Caribbean Interdiction Agreements 1981 and 1998, UKTS (1982) 8 and UKTS (2001) 2 313
- UK–US Extradition Treaty 2003, Cm 5821 268
- UK–US ‘Lend-Lease’ Agreements 1940/1, 203 LNTS 201 and 204 LNTS 15; UKTS (1940) 21 and UKTS (1941) 2 40
- UK–US Mutual Assistance in Criminal Matters Treaty 1994, as amended 1997, 1967 UNTS 102 (No. 33632) and 2114 UNTS 392 (No. 36773); UKTS (1997) 14 and UKTS (2002) 8 101, 264
- UK–Venezuela Investment Promotion and Protection Agreement 1996, UKTS (1996) 83 375, 377
- Unification Treaty (FRG–GDR) 1990, ILM (1991) 457 392, 397
- US–Uzbekistan ICC ‘Art. 98’ Agreement, ILM (2003) 241 281