# 1 The Setting of International Law

## INTRODUCTION

As anyone who has ever bought a product from abroad should realize, the purchase is possible because there are rules that make it so. As everyone who has ever hopped on an aircraft abroad, or sent a postcard abroad or watched a foreign television channel should realize, there are rules that facilitate doing so. These rules form part of a broader network of rules usually referred to as international law. International law is not just the law (if any) that deals with war and peace, or with genocide and human rights; it also encompasses rules on trade, on protection of the environment, on shipping and on the protection of refugees. Few of these rules are uncontroversial, and even fewer work perfectly, but the bottom line should be clear: the existence of international relations, of whatever kind, entails the existence of international law. As the ancient Romans knew, wherever there is a society, there will be law (*ubi societas, ibi jus*), and the rules regulating contacts within the society of states are generally called international law. It is these rules that form the topic of this book or, more precisely, this book is dedicated to providing a framework for the further study of those rules in detail, since there are far too many international legal rules to fit within the pages of a single volume.

More specifically, this book is dedicated to the study of public international law, as opposed to private international law. Whereas private international law regulates individual conduct with a transboundary element (international contracts, international marriages, or international traffic accidents, for example), public international law is often said to regulate relations between states. While saying so is still acceptable, it should come with the caveat that many of the rules of international law have an effect not only on states, but also on other entities, be they companies, individuals, or minority groups. Likewise, many of the rules are shaped not just between states but also involve representatives of international organizations (such as the United Nations – UN), or civil society organizations (such as Greenpeace).

Any international lawyer, whether she realizes it or not, works on the basis of a set of assumptions about what the world is like and, more specifically, what international law is like. In other words, all international lawyers utilize some kind of theory of international law. This can be a highly pragmatic theory, something to the effect that international law

exists to serve peaceful relations between states and should be regarded from that perspective as a technical discipline, providing the tools for statesmen. This, arguably, is the dominant approach among international lawyers. It can also be a highly sophisticated and politically self-conscious theory, for example a theory holding that international law is the handmaiden of global capitalism, therewith complicit in oppression, and thus to be regarded with suspicion and a critical eye. It can be a theory viewing international law as a beacon of hope for the poor and oppressed – such a theory often undergirds the activities of those who specialize in human rights. And it can be a nationalist theory that starts with national self-interest, in which case international law is often viewed as an intruder, aiming to undermine national decision-making processes – such a view is not uncommon among social conservatives. Those who tend to view international law as either a tool for statesmen or as a beacon of hope tend to have a cosmopolitan outlook; they expect international law to be able to bring about a better world, and for them, 'sovereignty' is a four-letter word. By contrast, those who view international law as either intrusive or as the handmaiden of global capitalism tend to be less cosmopolitan; to them, 'sovereignty' is actually a useful shield.

Either way, whatever the lawyer does, whatever the lawyer writes, and whatever the lawyer thinks will in some way be based on an underlying set of ideas and assumptions about what the function of international law is, and what role it should play. International law, in other words, cannot be portrayed as politically innocent. This makes it imperative that a book such as this one starts with an overview of how international law has come about, what role it has played and what sort of role it could play.

## THE SEVENTEENTH CENTURY

By general acclamation, the history of modern international law (international law as we know it) is usually said to have started in the seventeenth century.[1] That is not to say that there were no international rules before that date; the ancient Greek city states had already concluded treaties with each other on such matters as how best to treat prisoners of war; the Roman Republic devised an intricate system for dealing with foreign merchants; and, during the Middle Ages, when the city states of Italy were significant actors, the institutions of diplomacy developed, complete with embassies and diplomats and guarantees that their activities would not be interfered with by their host states.[2]

Still, the seventeenth century stands out, for a variety of reasons. One of these is that for much of the time preceding the seventeenth century, much of Europe tended to be organized in large empires, from the Roman Empire to the reign of Charlemagne. And since Europe, in those days, was thought to be congruent with the world at large, the result was that people did not think too much in terms of there being different political entities requiring a specific legal system to organize their relations. Instead, they tended

[1] For a useful collection of essays, see Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012).
[2] G. R. Berridge, *Diplomacy: Theory and Practice* (London: Prentice Hall, 1995).

to think of their empires as single entities, with the consequence that law was largely conceptualized as internal.[3]

Possibly the most relevant reason why the seventeenth century stands out is that in the year 1648, the Peace of Westphalia was concluded to mark the end of the Thirty Years War. In Münster and Osnabrück, two cities in today's Germany, the secular power of the pope, the leader of the Roman Catholic Church, came to a definitive end. It was agreed to confirm an earlier arrangement emanating from the 1555 Peace of Augsburg, to the effect that Europe would be divided into a number of territorial units, and that each of these units could decide for itself which religion to adopt: *cuius regio eius religio*. No outside interference was permitted, the result being the creation of sovereign states and, therewith, the birth of the modern state system.[4]

It was perhaps no coincidence that it was precisely the state that came out of the Middle Ages as the dominant form of political organization. Other entities (city states, feudal entities, or a league of trading posts such as the Hanseatic League) lost out, for, unlike states, they lacked full territorial control and, more important still, they lacked the capacity to guarantee commitments. What made the state dominant was that it had the authority to live up to its commitments, precisely by controlling territory.[5]

The second important event in the seventeenth century, as far as the development of international law is concerned, was the publication in 1625 of Hugo Grotius' *On the Law of War and Peace*. Grotius was already established as a leading intellectual,[6] and had been influential (much to the benefit of the Dutch East India Company, the Dutch vehicle for colonial exploitation) in shaping international law so as to uphold the freedom of the seas. This guaranteed free shipping for the Dutch fleet, and made it impossible for other countries, such as Spain, Portugal, and England, to claim authority over the high seas legitimately. And this, in turn, proved highly beneficial to Dutch trading interests. Indeed, as one commentator notes, among Grotius' innovations is his notion that all peoples have a right to trade; consequently, trading routes, such as the seas, ought to be free as well.[7] And all this, in turn, allowed Amsterdam to become the centre of global finance and paved the way for the Dutch Golden Century.

It is sometimes suggested that Grotius is the 'founding father' of international law, but such a claim is untenable. For one thing, international law was not invented by a single person, but grew out of the interactions of states and the commentaries of learned observers. Second, if there were a single creator, then there are a few other serious contenders.

[3] For an argument to this effect (albeit much more subtle), see J. M. A. Lenssen, 'Vroeg-Middeleeuws volkenrecht: Van Romeins Rijk tot Investituurstrijd', in A. C. G. M. Eyffinger (ed.), *Compendium Volkenrechtsgeschiedenis* (Deventer: Kluwer, 1989), 10–36.

[4] The connections between the Peace of Augsburg and the Peace of Westphalia are emphasized in C. G. Roelofsen, 'De periode 1450–1713', in Eyffinger, *Compendium*, 56–125, at 89–90. See also D. P. O'Connell, 'Territorial Claims in the Grotian Period', in C. H. Alexandrowicz (ed.), *Studies in the History of the Law of Nations* (Dordrecht: Springer, 1970), 1–15.

[5] The point is well made in Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton University Press, 1994). See also Chapter 4 below.

[6] A fine biography in Dutch is Henk Nellen, *Hugo de Groot: Een leven in strijd om de vrede 1583–1645* (Amsterdam: Balans, 2007).

[7] Timothy Brook, *Vermeer's Hat* (London: Profile, 2008), at 67–8.

Two of those are the Spanish theologians Suarez and Vitoria, who preceded Grotius by a few decades. Vitoria in particular was highly instrumental in devising the moral justification for the creation of a legal system that would facilitate the spread of global capitalism.[8] Likewise a serious contender for paternity, a little over a century after Grotius, the Swiss Emeric de Vattel was the first (arguably) to have written a comprehensive manual on international law, to be used by the chancelleries of the world.[9]

However, this is not to deny Grotius' relevance. Grotius' significance resides in two circumstances. First, he forms a bridge between the classic naturalist way of looking at law and later positivist theorizing. Natural law thinking typically suggests that law is not made but found; it exists somehow in nature – it is often thought to be ordained by God – and can be recognized by the proper method of analysis or by those of the right faith. Positivism, by contrast, wary of the subjectivity inherent in such an approach, typically suggests that law is not given, but man-made; law is whatever states decide or agree that it is. Grotius' work encompassed elements of both viewpoints.

Second, Grotius may well have been the first to present a synthetic, comprehensive vision of international law.[10] *On the Law of War and Peace* addresses, as its title suggests, not only the law of armed conflict and aggression, but also such matters as the binding force of treaties. That is not necessarily to say, as is sometimes asserted, that Grotius developed the idea of an interconnected international community with its own legal system; instead, more modestly, he may well have been the first to lay down a specific set of binding international obligations, mostly inspired by the desire to lay down the limits to proper statecraft.[11]

## COLONIALISM

It is no exaggeration to state that international law has been closely connected with imperialism and colonialism.[12] The emergence of early modern international law is comprehensible in the light of the struggle between European powers for influence elsewhere in the world. It has already been mentioned how Grotius contributed to the freedom of the seas, a freedom that stood his Dutch employers in good stead, as freedom of the seas allowed freedom of discovery and freedom to trade. These freedoms presupposed, however, that certain rules were considered to be in place in order to regulate relations with 'the natives' in continents such as the Americas and Asia.

[8] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution', (2011) 61 *University of Toronto Law Journal*, 1–36.
[9] As asserted by Marie-Hélène Renaut, *Histoire du droit international public* (Paris: Ellipses, 2007), at 114.
[10] Cornelis van Vollenhoven, *De drie treden van het volkenrecht* (The Hague: Martinus Nijhoff, 1918).
[11] Martti Koskenniemi, 'International Law and raison d'état: Rethinking the Prehistory of International Law', in Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press, 2010), 297–339.
[12] Recent studies exploring the colonialist legacy of international law include Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001), and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

Among these rules was the rule that territories found overseas were to be regarded as not having been subject to sovereignty – as territory belonging to no one (*terra nullius*). In other words, stumbling on territory in Asia or the Americas, the European powers could proclaim that those territories belonged to them; the original inhabitants were, by and large, ignored. This required quite a balancing act, because these same original inhabitants were of the utmost importance when it came to making trading deals; the peoples of the Americas and Asia were, after all, deemed capable of concluding contracts with the Europeans, even contracts that would allow the Europeans exclusive trading rights in valuable commodities such as pepper or nutmeg. Hence an ambivalent picture emerges. For purposes of establishing sovereignty, the local population was often ignored, but, for commercial purposes, their consent was deemed vital, at least as an argument to convince competing European powers.

Much of the globe became the playground of the European powers, and at some point the non-European world (the New World, in a highly Eurocentric term) was literally divided between two of them. In 1493, the pope issued a papal bull (*Inter Caetera*) drawing a line through the Atlantic Ocean. Most of the territory to the west (with the exception of Brazil) was said to belong to Spain, while Portugal claimed some of the territories to the east. This was confirmed a year later in the Treaty of Tordesillas. With both countries further expanding east and west, they met again in the Pacific Ocean, which resulted in the Treaty of Saragossa, concluded in 1529 and effectively sealing the division of the world.[13]

Later, towards the end of the sixteenth century, England and Holland emerged as maritime powers, breaking the trading monopolies of the Portuguese in the Indian Ocean and thus also bringing the Spanish-Portuguese domination to an end. The Dutch, in 1602, created the Verenigde Oost-Indische Compagnie (United East India Company, VOC in abbreviated form),[14] and assigned it a trading monopoly. One important ramification was that the VOC came to exercise delegated governmental authority; it could acquire and administer territory, declare war and conclude treaties, and seize foreign ships. In 1603 this provoked an incident with Portugal, when the Dutch seized the Portuguese vessel *Santa Catharina*. In order to legitimate this act, the VOC asked Grotius to write on its behalf, which he duly did. In *Mare Liberum*, originally written as part of a larger work on prize law (*De Jure Praedae*) but separately published in 1609, Grotius argued that the high seas were not *terra nullius* (as the Spanish and Portuguese had implicitly presumed), but rather *terra communis*: common property, and thus not susceptible to occupation and sovereignty.

This in turn led to English protests, as the English insisted on exclusive rights to the high seas around the British Isles, therewith effectively advocating the idea that states could generate maritime zones. Negotiations between the English and the Dutch ensued (with Grotius a prominent member of the Dutch delegation), but to little avail. It was only in the mid-seventeenth century that the Dutch came round – without formally acknowledging as much – to the British position: John Selden's *Mare Clausum*, presented in 1635,

[13] Roelofsen, 'De periode 1450–1713', at 69.
[14] The English, incidentally, also had an East India Company, though this was less generously endowed with delegated state powers.

was finally grudgingly accepted. In fact, this signified that the British had become too strong to resist and that the balance of power had shifted; Spain and Portugal no longer reigned supreme, and Holland's position, too, was dwindling.

International law also played a marked role when it came to slavery, first by allowing and organizing it, and, later, in the course of the nineteenth century, by gradually arriving at a prohibition.[15] The abolition, curiously perhaps, was followed by the colonization of Africa. Whereas earlier Africa had been used as a vast reservoir of slave labour but without being colonized, once slavery and the slave trade had been legally abolished,[16] the European powers saw fit to conquer the continent in what has become known as the scramble for Africa.[17] In particular the French and English sublimated their animosities by occupying large tracts of land, with Germany, Portugal, and Belgium playing smaller roles. This is not to say that the latter were somehow less exploitative or more benign; in particular Belgium's reign in Congo (or rather, King Leopold's personal reign in Congo[18]) emptied the country of many of its riches.

Ironically perhaps, international law is also still trying to come to terms with the effects of decolonization. In the late nineteenth century the international community of states still effectively covered merely several handfuls of states, and the fifty states setting up the United Nations in 1945 were deemed to represent the 'vast majority of the members of the international community', in the words of the International Court of Justice (ICJ).[19] The subsequent emergence of newly independent states in various waves, mostly during the 1950s and 1960s, gave rise not only to questions of succession,[20] but also to questions of representation and substantive justice, as was recognized early on by some astute observers.[21]

## INTERNATIONAL LAW AND THE GLOBAL ECONOMY

If colonialism was about trade and economic gain, which to some degree it was, this already suggests that, to a large extent, international law is in one way or another connected to the economy.[22] Sometimes this is obvious: institutions such as the World Trade Organization (WTO) or the International Monetary Fund (IMF) have been explicitly established to

[15] See e.g. Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press, 2012).
[16] The slave trade still exists (despite its legal prohibition), and is currently often referred to as human trafficking.
[17] For a fine study in Dutch see H. L. Wesseling, *Verdeel en heers: De deling van Afrika 1880–1914* (Amsterdam: Bert Bakker, 1991).
[18] Leopold II has the dubious honour of probably being the only king in history whose personal property (i.e. what is now the Democratic Republic of the Congo) was annexed by the parliament of the country of which he was king because of his monstrous behaviour: he was called a 'greedy, grasping, avaricious, cynical, bloodthirsty old goat' by Mark Twain. See Simon Sebag Montefiore, *Monsters: History's Most Evil Men and Women* (London: Quercus, 2008), at 214.
[19] *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] ICJ Rep. 174, at 185.
[20] Matthew Craven, *The Decolonization of International Law* (Oxford University Press, 2007).
[21] Among the first was B. V. A. Röling, *International Law in an Expanded World* (Amsterdam: Djambatan, 1960).
[22] See generally also Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003).

regulate aspects of economic life, and the various commodity arrangements so popular during the 1960s and 1970s to regulate markets in products such as coffee or cocoa sprang from more or less the same impulse to regulate economic life.

Less obviously perhaps, such phenomena as territorial rights or maritime demarcation owe much to economic concerns as well. Grotius had already advocated free trading routes, not so much out of a love of freedom (although that may have played a role as well), but also because freedom of the seas and free trade would bring enormous economic benefits – at least for the Dutch.

For much of the second part of the twentieth century, the cases that would reach the ICJ tended to be those involving the precise limits of territorial ownership, either on land or, more commonly, at sea. And they often found their cause in the discovery of oil and natural gas deposits; whereas states were not all that interested in establishing the precise boundaries of their jurisdictions earlier, they became a lot keener when they realized that they might be sitting on huge oil reserves.

This also marks the impotence of international law, though, at least on occasion; faced with the possibility of economic profit, states have been less than fully obedient to the classic non-intervention principle. As it could be economically beneficial to have friendly governments in place in states boasting oil reserves, so Western states made sure to help to put such friendly governments in place. In what is a sad recurrence in twentieth-century history, the British and the Americans have been instrumental in toppling various Iranian regimes; the French have played a dismal role in western Africa; and one might argue that the 1990 war between Iraq and Kuwait owed much to the United Kingdom again – the original boundary treaty at issue had been concluded in the 1930s by the British (ruling Kuwait) with themselves (effectively ruling Iraq as a mandate territory under auspices of the League of Nations).

In short, much (though not all) of international law is related to the economy; international law is, in part, the legal system regulating the global economy, in much the same way as it has been observed that domestic legal systems and law school curricula (at least in the Western world) from the late nineteenth century onwards were set up so as to facilitate the capitalist economy.

The rule of law, as the great German sociologist Max Weber observed, served to create legal and economic certainty – its precise content was long considered less relevant.[23] Giving effect to the idea of the rule of law, central topics to be studied in law schools were contract, property, civil procedure, torts and criminal law.[24] Something similar applies to international law, which, as T. E. Holland had already noted in the late nineteenth century, was effectively private law applied to public actors.[25] The central topics in international law emerging at the end of the nineteenth century included the law of treaties (still often deemed to be contract law writ large), the law of responsibility (modelled on tort law), acquisition of territory (the equivalent of property) and dispute settlement (which mimics

[23] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. G. Roth and C. Wittich (Berkeley, CA: University of California Press, 1978).
[24] Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy', (1982) 32 *Journal of Legal Education*, 591–615, at 597.
[25] T. E. Holland, *The Elements of Jurisprudence*, 13th edn (Oxford: Clarendon Press, 1924), at 393–4.

civil procedure). Only criminal law remained missing, a situation often ascribed to the circumstance that international law does not emanate from a single sovereign authority. In a world of sovereign equals without overarching authority, so the argument goes, it is difficult to think of criminal law to begin with.

Over recent decades, however, international law has also come to embrace a version of criminal law, albeit with a twist; in international criminal law, the central actors are not states, but individuals.[26] This helps to perpetuate the idea that the legal order remains based on sovereign states; states cannot be imprisoned, but there is no obstacle to sending individuals acting in the name of the state to prison.

## THE INTERNATIONAL LEGAL SYSTEM

The absence of a single overarching authority is perhaps the most noteworthy characteristic of international law. Indeed, for those who insist that law is only really law if and when it emanates from a single sovereign, international law cannot really be law. At best, as the nineteenth-century positivist thinker John Austin put it, international law can be seen as 'positive morality': it is more or less binding on states, but as a matter of morality, not as a matter of law.[27] While Austin's conclusion followed from the way in which he defined law and not so much from anything inherent in international law itself, and more recent theorists do not hesitate to refer to international law as 'law' proper, none the less Austin's point has struck a chord. How, indeed, does international law function if it has no sovereign authority? How are its rules made, in the absence of a legislator, and, perhaps even more puzzlingly, how can the system work in the absence, by and large, of a police force, a department of justice, a set of prosecutors and all the other characteristics we usually associate with legal systems? That is a relevant question because, the occasional headline news notwithstanding, international law seems to work reasonably well. Louis Henkin once put it memorably when he wrote that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[28]

Various explanations can be offered for this state of affairs. One is that since states themselves make international law, they have little incentive to break it; it makes little sense to create a rule on Monday, only to ignore it on Tuesday or next Monday. Of course, circumstances may change, and if that happens states may be tempted to breach their obligations, but in the normal course of events this is not lightly to be presumed.

Related to this is the explanation of bureaucratic inertia. A civil servant who routinely implements an international legal norm five days a week will not all of a sudden tell herself that she should stop doing so. The implementation and application of law is very much a matter of habit and routine, and this is no different in international law. In other words, unless something dramatic happens (a new treaty, a new court ruling, a new government

[26] Chapter 12 below.
[27] John Austin, *The Province of Jurisprudence Determined*, ed. W. Rumble (Cambridge University Press, 1995 [1832]), e.g. at 124.
[28] Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn (New York: Columbia University Press, 1979), at 47 (emphasis omitted).

perhaps), states will continue to do what they are used to doing and this typically helps to strengthen international law. In addition, lawyers play a prominent role at foreign ministries and other government departments; it has been suggested (but this may be wishful thinking . . .) that their legal training instils in them a respect for the law and the professional reflex to accept its authority.

An important role is also played in international law by considerations of reciprocity.[29] If states A and B are at war, and A starts to mistreat B's citizens by violating the Convention on Prisoners of War, then B will be highly tempted to mistreat A's citizens as well, and may also start to violate that convention. Much the same applies in other branches of the law: if X opens Y's diplomatic mail, Y may do the same with X's diplomatic mail. Not all international law rests on this specific form of reciprocity, of course. It would be self-defeating to apply the same logic in cases of environmental damage, for instance ('If you pollute your rivers, then I shall pollute mine') or in respect of human rights ('If you torture your citizens, I shall torture mine'),[30] but that is not to deny that reciprocity can act as a powerful force in international law.

Another suggested explanation focuses on the role of legitimacy. A rule that is generally perceived as useful and that has been created in the proper manner may be seen as legitimate and thereby exercise a 'compliance pull'. States need not be reminded that they should adhere to such a rule; instead, they would want to adhere to it – it would be the right thing to do.[31]

Other considerations which may help to explain why international law is reasonably well complied with include the idea that states are few in number and are attached to their territories; they cannot escape from each other, and it is decidedly costly to be a pariah state. While bank robbers can flee from the law by escaping to another country (preferably one without extradition agreements[32]), states have no such option. They have to interact with each other, and when doing so, it helps to have a good reputation – no one wants to do business with a state that routinely violates its commitments. In social science parlance, there is a social sanction in place, which helps to stimulate law-abiding behaviour, as it is ultimately beneficial to be a member of the international community in good standing.[33]

This final point already suggests that international law is not completely devoid of sanctions. There is, admittedly, no international police force, and no international prison

[29] The seminal piece is Stanley Hoffmann, 'International Law and International Systems', in Klaus Knorr and Sydney Verba (eds.), *The International System: Theoretical Essays* (Princeton University Press, 1961), 205–37.

[30] The political scientist Robert Keohane helpfully distinguishes between specific and diffuse reciprocity: the latter would apply to common interests. Robert O. Keohane, 'Reciprocity in International Relations', reproduced in his *International Institutions and State Power: Essays in International Relations Theory* (Boulder, CO: Westview Press, 1989), 132–57.

[31] See generally, and in considerably more detail, Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990). Franck similarly posited that a perception of the fairness of a rule may inspire law-abiding behaviour: Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

[32] Note how this already suggests the significance of international law . . .

[33] Abraham Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

where states can be locked up, but the social sanction of becoming a pariah state may be quite strong. In addition, international law does have some mechanisms to deal with violations, even if not all of these can properly be called 'sanctions', and here, too, reciprocity plays a prominent role.[34]

A practically relevant method of expressing dismay with another state's actions is the so-called retorsion. These are measures taken within the limits of the law and send the message that a state is not best pleased with another's actions. Typical examples would include recalling the ambassador 'for consultation',[35] or the breaking off of diplomatic relations altogether. Such activities send strong political messages, but do so without involving any breach of international obligations; the sanction is, so to speak, purely political. This is not the case with what used to be called reprisals, nowadays most often referred to by the more sterile term 'countermeasures'. These are characterized by their own illegality, but this illegality is rendered lawful if they are done in response to an earlier wrongful act committed by the other side.

An important related mechanism is well known from domestic contract law; if A violates a treaty, then B may do the same: *inadimplenti non est adimplendum*. The principle came before the Permanent Court of International Justice (PCIJ) in 1937, in a case between Belgium and the Netherlands concerning the regime relating to a river running through both countries. Belgium alleged that the Netherlands had violated a treaty commitment, and while the Court's majority rejected this claim, none the less Judge Anzilotti disagreed, and held in a dissenting opinion that Belgium would in turn have been entitled to do the same. He found the principle of *inadimplenti non est adimplendum* to be 'so just, so equitable, so universally recognized, that it must be applied in international relations also'.[36]

Other measures include self-defence and collective security action (including sanctions targeting individuals); and since the 1990s international law has even been in a position, on occasion, to imprison individuals who have committed war crimes and related acts; those convicted by the Yugoslavia and Rwanda tribunals can testify to this, even though it took the International Criminal Court (ICC) (in existence since 2002) a decade to decide its first substantive case. All this is better discussed elsewhere in this book, but it goes to show that the popular notion that international law is a system without sanctions is, at best, only partly true.

## INTERNATIONAL LEGAL THEORIES

If Henkin was right when he suggested that states almost always adhered to almost all their obligations, then the question of whether international law is actually 'binding' would hardly appear relevant. What matters, one might say, is that international law seems to work; whether it does so because it is somehow binding, or for some other reason, is in

[34] This will be discussed further in Chapter 9 below.
[35] Thus, in April 2012, the Netherlands recalled its ambassador to Surinam (a former Dutch colony) after Surinam had adopted legislation providing an amnesty to individuals associated with gross human rights violations committed in the early 1980s.
[36] *Diversion of Water from the Meuse*, [1937] Publ. PCIJ, Series A/B, no. 70, at 50.