

# Akehurst's Modern Introduction to International Law

*Eighth Edition*

Alexander Orakhelashvili

# Contents

<i>Preface</i>	<i>xvi</i>
<i>Table of cases</i>	<i>xvii</i>
<i>Table of treaties and declarations</i>	<i>xxx</i>
<b>1 Introduction</b>	<b>1</b>
1.1 Defining international law	1
1.2 International law as law	4
1.3 Characteristics of international law	8
1.4 The theory of sovereignty and obligation	10
1.5 New developments in theory	12
1.6 The study of international law	15
1.7 Conclusion	16
<b>2 History</b>	<b>17</b>
2.1 Ancient period	17
2.2 Middle Ages to the Peace of Westphalia	17
2.3 Nineteenth century: balance of powers and the Congress System	18
2.4 Colonisation and relations between European and non-European powers	20
2.5 The Western hemisphere	22
2.6 Developments after the First World War	23
2.7 The League of Nations and its failure	24
2.8 Development after the Second World War	25
2.9 Decolonisation and change in the composition of the international community	26
2.10 Attitudes of Third World States towards international law	26
2.11 Rule of law, multilateral institutions and unilateralism	27
2.12 Conclusion	29
<b>3 Sources of international law</b>	<b>31</b>
3.1 General concept	31
3.2 Treaties	32
3.3 Custom	33
3.3.1 Basic elements	33
3.3.2 The range of relevant acts and practice	36
(a) What States say and what States do	36
(b) Positive acts and omissions	37

(c)	Action within the domestic legal sphere	37
(d)	The element of generality	38
(e)	The element of repetition	39
(f)	'Instant' customary law	40
3.3.3.	The psychological element in the formation of customary law ( <i>opinio juris</i> )	40
3.3.4.	Multilateral evidences of customary law	42
3.4	General principles of law	45
3.5	Judicial decisions	46
3.6	Learned writers	48
3.7	'Soft' law	48
3.8	Equity	49
3.9	The hierarchy of norms and sources	50
3.10	<i>Jus cogens</i>	52
3.11	Codification and progressive development of international law	55
<b>4</b>	<b>International law and municipal law</b>	<b>57</b>
4.1	Basic distinctions	57
4.2	Dualist and monist theories	57
4.3	The attitude of international law to municipal law	58
4.4	The attitude of national legal systems to international law	59
4.4.1	Treaties	60
4.4.2	General (customary) international law	65
4.5	Public international law and private international law	68
4.6	Act of State, justiciability	69
4.7	Conclusion	71
<b>5</b>	<b>Creation and recognition of States</b>	<b>72</b>
5.1	States	72
5.2	Factual elements of statehood	73
5.2.1	Territory	73
5.2.2	Population	75
5.2.3	Government	75
5.3	Independence	77
5.3.1	General concept	77
5.3.2	Attainment of independence	77
5.3.3	Alienation of independence	80
5.4	Territorial units within States (especially federal States)	82
5.5	Legal requirements for statehood	83
5.5.1	Secession, separation, dissolution	83
5.5.2	Public order limits on State creation	85
5.5.3	The primacy of entitlement over effectiveness	86
5.6	Identity and continuity of States	89
5.6.1	General concept	89
5.6.2	Germany	90
5.6.3	Vietnam	91

5.6.4	China and Taiwan	92
5.6.5	North and South Korea	94
5.6.6	SFRY and its successors	95
5.6.7	Evaluation	96
5.7	Recognition of States and governments in international law	97
5.7.1	The basic concept	97
5.7.2	Recognition of States	97
5.7.3	Policies of not recognising and the duty not to recognise	100
5.7.4	Conditional recognition	100
5.7.5	Legal effects of recognition in international law	101
5.7.6	Legal effects of recognition in domestic law	102
5.7.7	Recognition of governments	103
5.7.8	<i>De jure</i> and <i>de facto</i> recognition	106
5.8	Conclusion	110
<b>6</b>	<b>Legal personality of non-State entities</b>	<b>111</b>
6.1	The essence of legal personality	111
6.2	International organisations	111
6.2.1	Basis for legal personality	111
6.2.2	Scope of legal powers and functionality	113
6.2.3	The notion of 'supranationality'	115
6.3	Non-governmental organisations (NGOs)	116
6.4	Belligerents, insurgents and national liberation movements	117
6.5	National liberation movements	118
6.6	Other relevant entities	118
6.7	Individuals and companies	118
6.8	Conclusion	120
<b>7</b>	<b>Territory</b>	<b>122</b>
7.1	Introduction	122
7.2	Territorial relations not conferring or altering the title	122
7.3	Principles regulating the determination of territorial sovereignty	125
7.3.1	Immemorial possession	125
7.3.2	<i>Uti possidetis juris</i>	126
7.3.3	Claims of territorial unity and contiguity	127
7.4	Modes of acquisition of territory	128
7.4.1	Title to territory: basic concept	128
7.4.2	Cession and treaty titles	130
7.4.3	Occupation	134
7.4.4	Effective display of State authority	137
7.4.5	Prescription	140
7.4.6	Acquiescence, recognition and estoppel	141
7.4.7	Dereliction and waiver	143
7.4.8	Polar regions and Antarctica	144
7.4.9	Operations of nature	144
7.4.10	Adjudication	145
7.4.11	Conquest	146

7.5	Evidence (maps in particular)	147
7.6	Critical date	148
7.7	Intertemporal law	149
7.8	Servitudes, rights with regard to foreign territory; internationalisation of territory	150
7.9	Boundaries	152
7.10	Rivers	154
7.11	Forms and ways of joint utilisation of transboundary watercourses	154
7.12	Conclusion	156
<b>8</b>	<b>The law of the sea</b>	<b>157</b>
8.1	Development of the law of the sea	157
8.2	The nature of rules and regimes under UNCLOS	159
8.3	Land factors and sea factors	161
8.4	Internal waters	166
8.5	Territorial sea	167
8.5.1	Rights of the coastal State	167
8.5.2	The right of innocent passage	168
8.5.3	The width of the territorial sea	170
8.5.4	The line from which the territorial sea is measured	172
8.6	The contiguous zone	173
8.7	Exclusive fishery zones and exclusive economic zones	173
8.8	The continental shelf: development of the basic concept	175
8.9	Maritime boundaries	176
8.9.1	Normative framework	176
8.9.2	Basis for, and nature of, the entitlement to a maritime space	178
8.9.3	Single delimitation of the continental shelf and Exclusive Economic Zone	181
8.9.4	Content and elements of equitable delimitation	182
8.9.5	Land territory in contested maritime areas	188
8.9.6	Continental shelf beyond 200 nautical miles	189
8.9.7	Evaluation	190
8.10	The high seas	190
8.10.1	The calculus of the rights of States	190
8.10.2	Interference with ships on the high seas	192
8.11	Enclosed or semi-enclosed seas	195
8.12	The deep seabed	195
<b>9</b>	<b>Air space and outer space</b>	<b>198</b>
9.1	Air space	198
9.1.1	Access to and overflight through national air space	198
9.1.2	Regulation of flights	202
9.2	Outer space	204
9.2.1	Basic rules and instruments	204
9.2.2	Assertion and development of State rights	206
9.2.3	Treaty mechanisms of State cooperation	209
9.3	The 'common heritage of mankind' principle	210

<b>10 State jurisdiction</b>	<b>213</b>
10.1 Concept of jurisdiction	213
10.2 The essence of jurisdiction of national courts	216
10.2.1 General characteristics	216
10.2.2 Territorial principle and extra-territoriality	218
10.2.3 The nationality principle	220
10.2.4 Protective principle	220
10.2.5 Effects jurisdiction	221
10.2.6 Universality principle	221
10.2.7 Universal civil jurisdiction of national courts over human rights violations	225
10.3 Extradition	227
<b>11 Immunity from jurisdiction</b>	<b>230</b>
11.1 Basic concepts	230
11.2 Sovereign (or State) immunity: scope and sources of law	230
11.3 State immunity and hierarchy of norms	236
11.4 Entities and persons entitled to immunity	238
11.4.1 State and its subdivisions	238
11.4.2 Property interest and indirect impleading	239
11.4.3 State officials: immunity <i>ratione materiae</i>	240
11.4.4 State officials: immunity <i>ratione personae</i>	241
11.5 Immunity from execution	242
11.6 Diplomatic relations and diplomatic immunity	243
11.6.1 Conduct of diplomatic relations	243
11.6.2 Immunity from the jurisdiction of courts	244
11.6.3 Other privileges and immunities	246
11.7 Consular relations and consular immunity	247
11.8 Immunities of international organisations	248
11.9 Waiver of immunity	249
<b>12 Law of treaties</b>	<b>251</b>
12.1 The concept of a treaty	251
12.2 Conclusion and entry into force of treaties	254
12.2.1 Drafting of a treaty	254
12.2.2 Consent to be bound by a treaty	255
12.2.3 Entry into force; rights and obligations before entry into force	257
12.2.4 Registration	258
12.3 Reservations	258
12.4 Application of treaties ( <i>ratione loci, temporis, personae</i> )	264
12.4.1 Territorial scope	264
12.4.2 Temporal scope	264
12.4.3 Treaties and third States	264
12.5 The interpretation of treaties	265
12.6 Application of successive treaties relating to the same subject matter	266
12.7 Invalidity and termination of treaties	267
12.7.1 Various grounds of invalidity	267

12.7.2	Provisions of municipal law regarding competence to conclude treaties	267
12.7.3	Termination of treaties	269
12.7.4	The consequences of invalidity and termination of treaties	273
12.8	Outbreak of war or hostilities	274
<b>13</b>	<b>State responsibility</b>	<b>276</b>
13.1	Introductory themes	276
13.1.1	The work of the International Law Commission	276
13.1.2	Basic concepts of responsibility and liability	277
13.1.3	General law of responsibility and 'self-contained regimes'	279
13.1.4	The doctrine of 'abuse of rights'	279
13.2	Basis and attribution of responsibility	281
13.3	Responsibility of a State owing to its presence in, or control of, another State's territory	285
13.4	Action directed or controlled by the State	286
13.5	Aid and assistance	288
13.6	Circumstances precluding wrongfulness	290
13.7	Consequences of an internationally wrongful act	293
13.8	Countermeasures	296
13.9	Responsibility of international organisations	296
<b>14</b>	<b>State succession</b>	<b>299</b>
14.1	Attempts at codification	299
14.2	The contested basic concept of State succession	300
14.3	Differentials shaping or affecting State succession	302
14.3.1	Identity and continuity of States	302
14.3.2	Legality of territorial changes	304
14.3.3	Notification and date of succession	305
14.4	Succession versus voluntary transmission of international obligations	306
14.5	Succession to treaties	308
14.5.1	The principle of 'moving treaty boundaries'	308
14.5.2	Dissolution and unification of States	309
14.6	Automatic succession: human rights treaties	312
14.7	Membership in international organisations	313
14.8	International claims	317
14.9	Nationality	318
14.10	'Acquired rights' and private property	319
14.11	Public property	320
14.12	Contractual rights	321
14.13	Debts	322
14.14	Status of and rights over territory	323
14.15	Conclusion	326
<b>15</b>	<b>Protected persons and entities: nationality and individual rights</b>	<b>327</b>
15.1	The essence of individual rights	327

15.2	Nationality	328
15.2.1	The concept of nationality	328
15.2.2	The initial State prerogative and its limits	329
15.2.3	The ways of acquisition and conferral of nationality	331
15.2.4	Loss of nationality	332
15.2.5	Dual or multiple nationality	333
15.2.6	International law limitations on the deprivation of nationality	334
15.2.7	Contestation of nationality decisions in relations between States	335
15.2.8	Statelessness	337
15.3	Rights of aliens	338
15.4	Treatment of foreign investment	339
15.4.1	Admission of foreign investments	339
15.4.2	The doctrine of 'acquired rights'	340
15.4.3	International minimum standard	341
15.4.4	MFN and national treatment	343
15.4.5	Expropriation and standard of compensation	344
15.4.6	Disguised expropriation	345
15.4.7	Standard of compensation	347
15.4.8	Expropriation of contractual rights	348
15.4.9	'Fair and equitable treatment'	348
15.4.10	'Full protection and security'	350
<b>16</b>	<b>Protected persons and entities: human rights, group rights and self-determination</b>	<b>351</b>
16.1	Human rights: the basic concept	351
16.2	The United Nations Charter Framework	352
16.3	General overview of human rights treaty regimes	354
16.4	Categories and 'generations' of human rights	356
16.5	General obligations under human rights treaties	358
16.6	Extra-territorial applicability of human rights treaties	359
16.7	Absolute and relative rights	361
16.8	Emergency derogations	362
16.9	The doctrine of equivalent protection	364
16.10	Overlapping and complementary protection: refugee rights and human rights	365
16.11	Group rights and non-discrimination	367
16.11.1	Essence of a 'group'	367
16.11.2	Non-discrimination	368
16.12	Minorities and indigenous peoples	369
16.12.1	Minorities	369
16.12.2	Indigenous peoples	371
16.13	Self-determination	373
16.13.1	Entities entitled to self-determination	373
16.13.2	Colonial and non-colonial contexts	375
16.13.3	General law and unilateral claim or concession	376

16.13.4	Legal entitlement and processes of political transition	377
16.13.5	'Internal' and 'external' self-determination	379
16.13.6	Disruptions to the exercise of the right to self-determination	379
16.13.7	Permanent sovereignty over natural resources	380
<b>17</b>	<b>Protection of the environment</b>	<b>382</b>
17.1	The scope and nature of international environmental law	382
17.2	The nature of rules and regimes	383
17.3	Bilateralism and community interest	384
17.4	Basic features of principal treaty instruments on environmental protection	385
17.4.1	General overview	385
17.4.2	The Convention on Climate Change	387
17.4.3	The 1972 Biodiversity Convention	389
17.4.4	Pollution of the seas	390
17.4.5	Hazardous waste	390
17.4.6	Other treaty regimes	391
17.5	Customary law and general principles	393
17.5.1	General principles of State conduct and liability	393
17.5.2	General duty of prevention	394
17.5.3	Sustainable development	397
17.5.4	Precautionary principle	398
17.5.5	'Polluter-pays'	399
17.5.6	Environmental Impact Assessment (EIA)	400
17.6	Interaction of environmental law with other areas of international law	401
17.7	Conclusions	406
<b>18</b>	<b>International economic relations</b>	<b>407</b>
18.1	Mapping the area	407
18.2	The meaning of free trade	410
18.3	The World Trade Organization and international trade system: general framework	413
18.4	The GATT and other trade agreements on goods	414
18.4.1	The overall framework of trade agreements	414
18.4.2	Specific provisions on free trade and market protection	415
18.4.3	Non-violation complaints	418
18.5	The Agreement on Services (GATS)	418
18.6	The Agreement on Intellectual Property Rights (TRIPS)	419
18.7	Exceptions and waivers in the WTO system	420
18.7.1	The nature and relevance of waivers	420
18.7.2	Exceptions invocable by States-parties	421
18.8	The Bretton Woods system and international economic organisations	424
18.8.1	The International Monetary Fund (IMF): institutional background	424

18.8.2	Reduced relevance of legal requirements	426
18.2.3	The Fund's supervision of members' compliance with its Articles of Agreement	427
18.2.4	The World Bank	431
<b>19</b>	<b>International criminal justice</b>	<b>433</b>
19.1	Individual criminal responsibility: the basic concept	433
19.2	National prosecution	434
19.3	Prosecution before <i>ad hoc</i> and special international tribunals	437
19.3.1	Nuremberg and Tokyo Tribunals	437
19.3.2	The International Criminal Tribunals for the Former Yugoslavia and Rwanda	438
19.3.3	Special Tribunal for Sierra Leone	442
19.3.4	Special Tribunal for Lebanon	443
19.4	International Criminal Court	444
19.4.1	Establishment and jurisdiction	444
19.4.2	Admissibility of cases and complementarity	445
19.5	Immunity of State officials before international criminal tribunals	446
19.6	Conclusion	449
<b>20</b>	<b>Use of force</b>	<b>450</b>
20.1	Lawful and unlawful wars: developments before 1945	450
20.2	The prohibition of the use of force in the United Nations Charter	452
20.2.1	General scope	452
20.2.2	Territorial claims and disputes	454
20.2.3	Armed protection of nationals abroad	454
20.2.4	Armed reprisals	455
20.3	Self-defence	456
20.3.1	Basic scope of the right	456
20.3.2	Self-defence against attacks on ships and aircraft	458
20.3.3	Attacks carried out by non-State actors	459
20.3.4	Necessity and proportionality	462
20.3.5	Collective self-defence	463
20.4	Civil wars	464
20.5	Intervention by invitation	465
20.6	'Humanitarian intervention'	468
20.7	Conclusion	470
<b>21</b>	<b>Laws applicable to war and armed conflict</b>	<b>471</b>
21.1	Sources and development of humanitarian law	471
21.2	Concept of war and armed conflict	473
21.3	Applicability of IHL	475
21.3.1	General aspects	475
21.3.2	Laws of war and aggressor discrimination	476
21.3.3	Interaction of humanitarian law with human rights norms	476
21.4	Classification of conflicts, civil wars	477
21.5	Wars of national liberation	483

21.6	Belligerent rights	484
21.7	Combatants and protected persons	486
21.8	Lawful and unlawful means of waging war	489
21.9	The principle of distinction	493
21.10	Nuclear weapons	494
21.11	Belligerent occupation	497
21.12	The law of neutrality and economic uses of maritime warfare	499
21.13	Reprisals	502
<b>22</b>	<b>The United Nations and peace and security</b>	<b>504</b>
22.1	Structure and normative foundations	504
22.2	Membership	506
22.3	The Security Council	507
22.4	The General Assembly	510
22.5	Overlapping competence of the Security Council and the General Assembly	510
22.6	Pacific settlement of disputes under the United Nations Charter (Chapter VI)	512
22.7	Collective security and enforcement action (Chapter VII)	512
22.7.1	Statutory basis and requirements	512
22.7.2	Rhodesia and South Africa	515
22.7.3	The invasion of Kuwait by Iraq	517
22.7.4	The Kurdish crisis	518
22.7.5	Somalia	519
22.7.6	Rwanda	521
22.7.7	Haiti	522
22.7.8	Former Yugoslavia	523
22.7.9	Libya	526
22.7.10	Post-conflict governance	526
22.7.11	The scope and impact of economic sanctions	527
22.7.12	Targeted sanctions and interference with individuals' rights	528
22.7.13	Piracy and migrant smuggling	529
22.8	UN peacekeeping	529
22.8.1	The basic concept and its evolution within the UN Charter framework	529
22.8.2	The first United Nations Emergency Force in the Middle East (UNEF)	531
22.8.3	The United Nations Force in the Congo (ONUC)	532
22.8.4	The United Nations Force in Cyprus (UNFICYP)	533
22.8.5	Subsequent forces in the Middle East	534
22.9	Conclusion	536
<b>23</b>	<b>Settlement of disputes</b>	<b>537</b>
23.1	General background	537
23.2	Diplomatic methods of dispute settlement	538
23.2.1	Negotiations	538
23.2.2	Good offices and mediation	539

23.2.3	Fact-finding and inquiry	539
23.2.4	Conciliation	540
23.3	The International Court of Justice	541
23.3.1	Composition and procedure	541
23.3.2	Jurisdiction in contentious cases	542
23.3.3	Jurisdiction under the Optional Clause	545
23.3.4	The absent third party doctrine (The Monetary Gold Principle)	547
23.3.5	Provisional measures	548
23.3.6	Advisory opinions	551
23.4	Arbitration	551
23.5	Special tribunals	552
23.5.1	The Iran–United States Claims Tribunal	552
23.5.2	Adjudication within the WTO System	554
23.5.3	Dispute settlement under human rights treaties	555
23.5.4	Settlement of disputes under the Law of the Sea Convention	555
23.6	Admissibility of claims	556
23.6.1	Nationality of claims	556
23.6.2	Exhaustion of local remedies	559
23.7	Applicable law	563
23.8	Binding force, interpretation and revision of judgments	565
	<b>Index</b>	<b>567</b>