CHAPTER 2
OVERARCHING QUESTIONS

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INTRODUCTION

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BOX 2.1 Required Knowledge and Learning Objectives

Required knowledge: History of International Law

Learning objectives: Understanding why the overarching questions chosen to be treated as such in this textbook play a pivotal role across different approaches and subject areas.

BOX 2.2 Interactive Exercises

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

Figure 2.1 QR code referring to interactive exercises.

A. INTRODUCTION

This book – in this sense a typical representative of the textbook genre – mostly treats questions pertaining to international law within separate 'boxes', labelled either

1 https://openrewi.org/en-projects-project-public-international-law-nature-and-purpose-of-international-law/

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according to a specific approach, method, or subject area pertaining to 'general international law' or to 'specialised fields'. These boxes, of course, are not entirely self-contained. As the many cross-references between chapters throughout this book illustrate, different approaches to international law and different subject areas overlap significantly. This is true well beyond the overarching questions we have chosen to treat in this chapter. The overarching questions presented in this chapter, however, escape these boxes altogether. This short introductory section explains why the questions of international law and violence, consent, enforcement, and self-determination require being placed outside the brackets of other chapters devoted to specific approaches or subject areas and provides a glimpse into the following chapters dealing with these questions in more detail.

B. OVERARCHING QUESTIONS

The first question spanning multiple subject areas, which is crucial for any treatment of international law, is the question of international law and violence. International law as a discipline often portrays itself as working towards the good of humanity as a whole – particularly when it comes to eliminating violence.[2] Many students become interested in international law precisely because they think international law is a tool that serves to make the world a better place. The section on international law and violence,[3] without trying to disillusion students who may approach international law with this disposition, complicates this narrative. It offers a detailed account of how international law does seek to prevent violence but also of how international law accepts and regulates certain forms of violence. It further introduces avenues for critical reflection about the complex relationship between violence and international law.

The second question with an overarching character, which warrants separate treatment, is the question pertaining to consent in the international legal order.[4] Consent is traditionally considered to be the basis of international law as a whole, the ultimate source of validity of every international legal rule.[5] The chapter devoted to consent presents this classical narrative and introduces some of the theoretical problems that arise when trying to conceptualise consent as the expression of the 'free will' of States, explores connections between consent and anarchy, delves into different types of consent in international law, and highlights the relationship between consent and colonialism.

Intricately linked to the idea of international law as a consent-based legal order is the third overarching question, namely the question of enforcement.[6] In the absence

2 See e.g. Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (3rd edn, Brill 2020); Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL 513.

3 See Lloydd, § 2.1, in this textbook.

4 See González Hauck, § 2.2, in this textbook.

5 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 [21].

6 See Quiroga-Villamarín, § 2.3, in this textbook.

of a centralised government, international law lacks the enforcement mechanisms of many other legal systems. From this stems a question that has been haunting internal law for centuries: is international law really law? International legal theorists have devoted significant intellectual energy to finding convincing answers to this question. The section on enforcement highlights how European legal scholars have tried to provide answers through a concern for the systematicity and interconnectedness of international legal rules while scholars from the US have focused on a more informal conception of 'process'. It thus introduces the most influential accounts of why international law is deemed to count as law, without losing sight of what is left outside of this framing.

Finally, the fourth overarching question concerns self-determination.[7] The previous chapter on the history of international law has portrayed international law not only as an instrument of colonial and imperialist domination but also as a tool for resistance. The main avenue through which resistance has been pursued within international law is through self-determination. The chapter on self-determination locates this notion within wider theoretical debates about recognition, statehood, political communities, and sovereignty in international legal theory and practice. It draws on the key international instruments and rulings that define its legal scope and application and discusses its inherent conceptual and legal tensions. Among the different contexts in which self-determination has played a key role, the section highlights self-determination against colonial domination, against alien subjugation, domination, or exploitation, as well as internal or democratic self-determination, remedial self-determination, and indigenous and minority self-determination.

C. CONCLUSION

The following sections on international law and violence, on consent, enforcement, and self-determination, concern questions that shape international law across subject areas. They pertain to the central characteristics of international law as a legal order. As students embarking on a journey of learning about international law, you can reassess your previously held assumptions about international law and keep whatever further reflections the following sections will inspire in mind as you unpack the individual 'boxes' in the rest of this book.

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7 See Bak McKenna, § 2.4, in this textbook.

§ 2.1 INTERNATIONAL LAW AND VIOLENCE

MARNIE LLOYDD

BOX 2.1.1 Required Knowledge and Learning Objectives

Required knowledge: None

Learning objectives: Acknowledging that international law seeks to prevent violence but also accepts and regulates certain forms of violence; introducing avenues for critical reflection about the complex relationship between violence and international law.

A. INTRODUCTION

A key aim of the international legal system is to protect future generations from the 'scourge of war'.[8] International law therefore requires States to settle their international disputes by peaceful means and outlaws aggression between them.[9] Other rules place significant restraints on how wars may be fought; for example, not allowing civilians or hospitals to be targeted, to reduce war's humanitarian consequences. Many students become interested in international law precisely because it is seen as an aspirational vehicle for 'making the world a better place'.

Much has been achieved in suppressing the right to make war and restricting the means and methods of warfare.[10] Still, aspirations for a peaceful and just world have not (yet) been achieved. Partly, armed violence occurs in violation of international legal norms – the illegal invasion of a sovereign State, a terrorist attack on a market square, attacks against a particular ethnic group. However, armed violence is also undertaken in compliance with international law. Specifically, self-defence and collective security measures adopted by the UN Security Council (UNSC) are accepted within the system as a way to counter insecurity. Thus, there are important exceptions to the general norm against using force.[11] International law is not pacifist and its functioning as intended involves violence. Reflecting this, the preamble of the UN Charter sets out that 'armed force shall not be used, save in the common interest'.

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8 *Charter of the United Nations,* 1945, 1 UNTS XVI (UN Charter) preamble.

9 UN Charter, arts 2(3), 2(4). See also art 1(1). See also UNGA Res 3314 (XXIX) (14 December 1974), Annex: Definition of Aggression; Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) (ICC Statute) art 8*bis*.

10 See, for instance, Marc Weller, 'Use of Force' in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *Oxford Handbook of International Organisations* (OUP 2016) 625.

11 See Svicevic, § 13, in this textbook.

It may seem paradoxical that peace and security are sought through war and violence. Because violence can be oppressive but also potentially emancipatory, '[p]lacing limits around violence remains . . . one of the hardest challenges of the human condition'.[12] So, who gets to decide what is in the 'common interest' and how armed violence might be used 'in the right way and for the right reasons'?[13] In their application of international law, different thinkers, actors, and traditions will have different readings of a situation and different legal, political, and moral judgements and arguments as to the values and interests to be prioritised. These priorities can change over time and context. The relevant norms and exceptions, and their application, are neither neutral or inevitable nor technical and universally agreed, but highly political and contested.[14]

B. WHAT IS MEANT BY 'VIOLENCE'?

Exploring the relationship(s) between international law and violence is a potentially wide-ranging endeavour since there is no reason the term 'violence', and even more so 'harm', must be limited to armed force and its direct physical and psychological consequences. For example, the humanitarian consequences of armed conflict can also include knock-on effects such as displacement and the breakdown of essential infrastructure and services leading to increased sickness and death.[15] Importantly, violence could also be thought of as structural, a less visible part of many people's everyday experiences of discrimination leading to injustice, exploitation or exclusion, economic or political inequalities, or activities that degrade the environment.[16] Moreover, such issues can contribute to conflict and outbreaks of violence.

Nevertheless, this chapter focuses on organised physical violence during armed conflict and discusses international law related to the use of force and the UN Charter (i.e. rules on starting or joining hostilities) and regulating those hostilities once they are underway (known as the law of armed conflict or international humanitarian law [IHL]).[17]

Within that narrower focus, the term 'violence' is not defined in international law but does appear in certain international instruments, most commonly related to acts

12 Hugo Slim, *Killing Civilians: Method, Madness and Morality in War* (Hurst 2007) 295.

13 See discussion in Helen Dexter, 'Peace and Violence' in Paul D Williams and Matt McDonald, *Security Studies: An Introduction* (Vol 1, 3rd edn, Routledge 2018) 209.

14 Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011) 212; MS Wallace, *Security without Weapons: Rethinking Violence, Nonviolent Action, and Civilian Protection* (Routledge 2017) 12–13; Noelle Crossley, 'Is R2P Still Controversial? Continuity and Change in the Debate on 'Humanitarian Intervention' (2018) 31(5) Cambridge Review of International Affairs 415, 428.

15 ICRC, *War in Cities: Preventing and Addressing the Humanitarian Consequences for Civilians* (ICRC 2023) 55.

16 Johan Galtung, 'Violence, Peace and Peace Research' (1969) 6(3) Journal of Peace Research 167. See also Hilary Charlesworth's discussion of 'international law of everyday life' compared to responding always to crises: 'International Law: A Discipline of Crisis' (2002) 65(3) Modern Law Review 377, 391–392. Note also the risk of violence as a concept becoming so broad as to become unworkable discussed in Dexter (n 13) 211. For a Marxist understanding of violence, see Bagchi, § 3.4.C., in this textbook.

17 See Dienelt and Ullah, § 14, in this textbook.

committed against individuals, including violence against women or children, and sexual and gender-based violence.[18] Otherwise, acts of violence are often described through offences such as murder, extermination, torture, enforced disappearance, and bodily or mental harm, or through terms that have been defined or have developed specific meanings, such as 'attack', 'armed attack', and 'aggression'.[19] Other language is broader, such as 'the scourge of war', 'use of force', 'armed force', and 'threat to international peace and security', referred to in the United Nations Charter.[20]

If 'violence' is hard to define, 'war', 'peace', and 'security' can be even more difficult. 'Peace' sometimes refers to the absence of war, and sometimes to a more expansive idea including also the achievement of social justice.[21] 'Security' often refers to State security but, like 'peace', has more recently also been thought of within the broader idea of 'human security'.[22] Reflecting this, the UN Charter preamble expresses concern not only with international peace and security but human rights and social justice.

C. DISCUSSION: A COMPLEX AND CONTESTED RELATIONSHIP BETWEEN VIOLENCE AND INTERNATIONAL LAW

I. THE EXAMPLE OF THE MILITARY INTERVENTION IN LIBYA 2011

In February 2011, anti-government demonstrations started in the north-eastern city of Benghazi before spreading to other parts of Libya. Libya's leader, Colonel Muammar al-Qadhafi, responded with military force against dissenters. Helped by some defections from the military, anti-government forces managed to take control of certain areas of

18 See e.g. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950) arts 3, 12, 18; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950) art 12; Convention (III) relative to the Treatment of Prisoners of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950) arts 13, 93; Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950) art 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978) (AP I) arts 17, 51, 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978) arts 1(2), 4(2)(a) and 13(2); ICC Statute arts 7(1)(g), 8(2)(d), 8(2)(f), 36(8)(b), 42(9), 54(1)(b); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 19(1).

19 See AP I art 49; UN Charter art 51; UNGA Res 3314 (XXIX) (14 December 1974), Annex: Definition of Aggression.

20 UN Charter preamble, arts 2(4), 42.

21 Referred to as 'negative' and 'positive' peace: Galtung (n 16). For a good summary, see Dexter (n 13).

22 Fen Osler Hampson, 'Human Security' in Paul D Williams and Matt McDonald (eds), *Security Studies: An Introduction* (2nd edn, Routledge 2014).

eastern Libya. The situation escalated into an armed conflict between opposition forces and forces loyal to the al-Qadhafi regime.[23]

The UNSC quickly demanded an end to the violence, referred the situation to the International Criminal Court, and imposed an arms embargo and other sanctions on members of the Libyan regime.[24]

With the hostilities approaching the opposition stronghold, Benghazi, which the regime had reportedly threatened to attack with 'no mercy',[25] the UN Secretary-General expressed concern about the endangering of civilians should an assault on Benghazi occur.[26] Adopting Resolution 1973 on 17 March 2011, the UNSC reaffirmed its 'strong commitment to the sovereignty, independence, territorial integrity and national unity' of Libya. It also imposed a no-fly zone and authorised States 'to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack' in Libya.[27] 'All necessary measures' is a phrase used by the UNSC to include military force.

NATO member States rapidly initiated military operations on 19 March 2011. In addition to actions to protect civilians from the advancing Libyan government forces and to enforce the no-fly zone, those air operations subsequently directly supported the opposition forces. Intervention operations continued until October 2011, by which time al-Qadhafi had been killed, and a majority of States recognised the opposition National Transitional Council as Libya's new interim government.

The years following the intervention proved difficult with deteriorating security and reignition of civil war between different Libyan factions in 2014, as well as a growing ISIS presence.[28] Following a 2020 ceasefire agreement, political instability, human rights abuses, and other violations have continued.[29]

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23 For a timeline, see 'Timeline of the Libyan Crisis/War (2011)' in Dag Henriksen and Ann Karin Larssen (eds), *Political Rationale and International Consequences of the War in Libya* (OUP 2016).

24 UNSC Res 1970 (26 February 2011).

25 M Golovina and P Worsnip, 'UN Okays Military Action on Libya; Gaddafi Warns' (*Reuters*, 18 March 2011) <www.reuters.com/article/libya/wrapup-2-un-okays-military-action-on-libya-gaddafi-warns-idUSLDE72H00K20110318> accessed 20 June 2023.

26 'Assault on Benghazi Would Endanger Masses of Libyan Civilians, Ban Warns' (*UN News*, 16 March 2011) <https://news.un.org/en/story/2011/03/369182> accessed 20 June 2023.

27 UNSC Res 1973 (17 March 2011) preamble, [4], [6].

28 K Knipp, 'Ten Years After NATO Intervention, Libya Remains Unstable' (*DeutscheWelle*, 18 March 2021) <www.dw.com/en/libya-still-plagued-by-conflict-10-years-after-nato-intervention/a-56921306> accessed 20 June 2023; AL Jacobz, 'Libya 10 Years After the NATO Intervention: U.N. Report Explains Challenges' (*Arab Gulf States Institute in Washington*, 24 March 2021) <https://agsiw.org/libya-10-years-after-the-nato-intervention-u-n-report-explains-challenges/> accessed 20 June 2023; Soufan Center, 'IntelBrief: Ten Years After NATO's Intervention in Libya, a Transitional Government Takes Control' (*Soufan Center*, 26 March 2021) <https://thesoufancenter.org/intelbrief-2021-march-26/> accessed 20 June 2023.

29 International Crisis Group, 'U.N. Plan to Reunite Libya: Four Obstacles' (*International Crisis Group*, 4 May 2023) <www.crisisgroup.org/middle-east-north-africa/north-africa/libya/un-plan-reunite-libya-four-obstacles> accessed 20 June 2023; Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/83 (3 March 2023).

II. CONTESTED NATURE OF ACHIEVING PEACE OR PROTECTION OF CIVILIANS THROUGH MILITARY FORCE

Does the Libya 2011 example provoke any particular gut reaction from you?

Some commentators applauded that the UNSC had been able to react promptly to a humanitarian crisis, and that States were willing to take action.[30] This reflects how the promotion of fundamental freedoms and human rights, and the growing notion that mass atrocities within a State could threaten international peace and security, have strengthened the moral authority of arguments justifying armed responses to such threats as being in the common interest.[31] This more expansionist view has, in turn, impacted on what might be described as a more restrictive and universal holding to norms respecting sovereignty and non-intervention. Indeed, Resolution 1973 was the first time that the UNSC had recognised and put into action the so-called responsibility to protect (R2P), which authorised military force as an exception to the general prohibition on the use of force between States for the purpose of protecting individuals at risk where the State in question was not meeting that responsibility.[32] Accepting it might be an imperfect and rather 'blunt instrument' but perhaps the best we have in a bad situation,[33] and/or that learning from previous experiences might help ensure future operations do more good than harm,[34] many accept such interventions as the lesser evil because they are conducted in the hope of averting even greater suffering.[35] Regarding Libya, for example, reports indicated that NATO bombing killed 72 civilians but averted a potentially far larger massacre in Benghazi.[36]

Other commentators have expressed concern about the implementation and/or consequences of the intervention. Amongst criticisms is that the NATO

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30 See e.g. Thomas G Weiss, 'Libya, R2P, and the United Nations' in Dag Henriksen and Ann Karin Larssen (eds), *Political Rationale and International Consequences of the War in Libya* (OUP 2016) 228; Sally Khalifa Isaac, 'NATO's Intervention in Libya: Assessment and Implications' (2012) IEMed Mediterranean Yearbook 121–123.

31 Anne Orford, 'Moral Internationalism and the Responsibility to Protect' (2013) 24 EJIL 83, 98. See also Pierre Thielbörger, 'The Status and Future of International Law after the Libya Intervention' (2012) 4(1) Goettingen Journal of International Law 11; Jessica Whyte, 'The "Dangerous Concept of the Just War": Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions' (2018) 9(3) Humanity 313, 330–331; Sigmund Simonsen, 'The Intervention in Libya in a Legal Perspective: R2P and International Law' in Dag Henriksen and Ann Karin Larssen (eds), *Political Rationale and International Consequences of the War in Libya* (OUP 2016) 245, 249–251; Russell Buchan and Nicholas Tsagourias, *Regulating the Use of Force in International Law: Stability and Change* (Edward Elgar 2021) 213.

32 *2005 World Summit Outcome,* GA Res 60/1, UN Doc A/RES/60/1 (24 October 2005, adopted 16 September 2005) [138]–[139].

33 Alex J Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) Ethics & International Affairs 1, 7.

34 See Taylor B Seybolt, *Humanitarian Military Intervention: The Conditions for Success and Failure* (OUP 2008).

35 See e.g. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton University Press 2005); but contrast also Eyal Weizman, *The Least of All Possible Evils: A Short History of Humanitarian Violence* (Verso 2017) 6.

36 Wallace (n 14) 1 citing Human Rights Watch 2012. But see also discussion in Alan J Kuperman, 'A Model Humanitarian Intervention?: Reassessing NATO's Libya Campaign' (2013) 38(1) International Security 105, 121–123.

intervention exceeded the UNSC's authorisation in Resolution 1973 by actively supporting regime change, arguably turning the lawful intervention into an unlawful one.[37] This might be compared with the earlier situation in Kosovo where NATO controversially undertook an air campaign against Yugoslavia in 1999 without UNSC authorisation, with the operation subsequently being labelled as 'illegal' since it was unauthorised but 'legitimate' under the circumstances.[38] Relatedly, while not opposed to R2P, some commentators have examined whether in the particular case of Libya, required legal and ethical thresholds to justify intervention such as last resort, sufficiently serious situation, or purpose, were met.[39] The instability and civil war in the years following the Libya intervention, as well as an argument that NATO operations gave cover to violations committed by anti-regime forces, also led to critiques about ill judgement, the intervention worsening the situation, or, at least, that the international community inadequately supported Libya post-conflict.[40] Those same reasons contributed to arguments that the 'disaster' of Libya made it unlikely that similar humanitarian actions would be adopted in the future.[41]

Arguments about 'mission creep' were also made by those voicing a broader wariness of military operations undertaken for humanitarian and protective purposes. There is concern, including for many developing States, about seemingly expanding powers of such 'muscular humanitarianism'[42] and the risks of exploitation by militarily powerful States.[43] Commentators have noted the discretion and

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37 Patrick CR Terry, 'The Libya Intervention (2011): Neither Lawful, Nor Successful' (2015) 48(2) Comparative and International Law Journal of Southern Africa 162; Geir Ulfstein and Hege Føsund Christiansen, 'The Legality of the NATO Bombing in Libya' (2013) 62(1) ICLQ 159; Benedetta Berti, 'Forcible Intervention in Libya: Revamping the "Politics of Human Protection"?' (2014) 26(1) Global Change, Peace & Security 21, 37. In contrast, arguing the operations did not exceed the mandate, Chris De Cock, 'Operation Unified Protector and the Protection of Civilians in Libya' in MN Schmitt and L Arimatsu (eds), *Yearbook of International Humanitarian Law* (Vol 14, TMC Asser Press 2011) 213; 'Libya Letter by Obama, Cameron and Sarkozy: Full Text' (*BBC News*, 15 April 2011) <www.bbc.com/news/world-africa-13090646> accessed 20 June 2023.

38 Independent International Commission on Kosovo, 'The Kosovo Report' (Oxford, 23 October 2000) 4 <http://www.kosovocommission.org> accessed 20 June 2023.

39 See e.g. James Pattison, 'The Ethics of Humanitarian Intervention in Libya' (2011) 25(3) Ethics & International Affairs 271; Simonsen (n 31) 254–259; Berti (n 37).

40 Wallace (n 14) 1; Kuperman (n 36) 125–133. See also generally, Alex J Bellamy, 'The Responsibility to Protect' in Paul D Williams and Matt McDonald (eds), *Security Studies: An Introduction* (2nd edn, Routledge 2014) 422, 432–433.

41 Terry (n 37) 181; Ulfstein and Christiansen (n 37) 169–171. For other discussion regarding Libya and Syria, see Simonsen (n 31) 262–265; Spencer Zifcak, 'The Responsibility to Protect After Libya and Syria' (2012) 13(1) MJIL 59.

42 Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of New Interventionism' (1999) 10 EJIL 679.

43 Iain Scobbie, 'War' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Edward Elgar 2019) 900, 912: '[secure] some States' freedom of action [while eroding] the prohibition of the use of force in the territory of another State' (citations omitted). See also Thilo Marauhn, 'How Many Deaths Can Article 2(4) UN Charter Die?' in Lothar Brock and Hendrik Simon (eds), *The Justification of War and International Order* (OUP 2021) 449; Rajan Menon, *The Conceit of Humanitarian Intervention* (OUP 2016); Terry (n 37).

selectivity in responses to situations considered crises.[44] For some, claims that norms justifying military action are universal ring rather hollow given the 'lopsided global arrangements in which some forms of suffering are recognized while a great many more are not'.[45] This has led to accusations of Western leadership using international law 'to target its enemies while protecting its friends'.[46] As David Kennedy has expressed, one

> must imagine that claims to make war in the name of right will rarely sound sincere or seem persuasive to those who believe the truth lies elsewhere – who oppose the war, are disgusted by the tactic, or simply expect themselves to be maimed or killed.[47]

Relatedly, critical scholarship has pointed out how race, gender, and class continue to be implicated in the legal justifications made for intervention, replicating historical experiences of domination of the so-called Global South in the application of international law, including to curb emancipatory struggles.[48] While not always ruling out the need for military action in exceptional circumstances involving intentional attacks against civilians, some call for prudence and an overwhelming consensus of the international community before the resort to force.[49]

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44 See e.g. Pattison (n 39) 276; Martti Koskenniemi, '"The Lady Doth Protest Too Much" Kosovo, and the Turn to Ethics in International Law' (2002) 65(2) MLR 159, 172–173; Christine M Chinkin, 'A "Good" or "Bad" War?' (1999) 93(4) AJIL 841, 847. Regarding the deaths of some people being more 'grievable', and worth saving or defending, than others, see Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004); Judith Butler, *Frames of War: When Is Life Grievable?* (Verso 2009). On the role of international law in these hierarchies, Thomas Gregory, 'Potential Lives, Impossible Deaths' (2012) 14(3) International Feminist Journal of Politics 327. But see also a contrasting discussion of selectivity/inconsistency in Alex J Bellamy, 'The Responsibility to Protect Turns Ten' (2015) 29(2) Ethics & International Affairs 161, 171–175.

45 Darryl Li, '"Afghan Arabs", Real and Imagined' (2011) 260 Middle East Report 2, 7.

46 Anne Orford, 'What Kind of Law Is This? Libya and International Law' (*London Review of Books*, 29 March 2011) <https://www.lrb.co.uk/blog/2011/march/what-kind-of-law-is-this> accessed 6 December 2023.

47 David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 177.

48 See e.g. Katherine Fallah and Ntina Tzouvala 'Deploying Race, Employing Force: "African Mercenaries" and the 2011 NATO Intervention in Libya' (2021) 67(6) UCLA Law Review 1580; Anne-Charlotte Martineau, 'Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force' (2016) 29 LJIL 95; Parvathi Menon, 'We're (Not) Talkin' Bout a Revolution: Anti-Colonial Struggles and Their (Un)justifications (*Völkerrechtsblog*, 1 June 2021) <https://voelkerrechtsblog.org/were-not-talkin-bout-a-revolution-anti-colonial-struggles-and-their-unjustifications/> accessed 20 June 2023. See also regarding IHL and the right to wage war, Claire Vergerio, *War, States and International Order* (CUP 2022) 259–261. See also Ananthavinayagan and Theilen, § 21.8, in this textbook.

49 See e.g. BS Chimni, 'Justification and Critique: Humanitarianism and Imperialism Over Time' in Lothar Brock and Hendrik Simon (eds), *The Justification of War and International Order* (OUP 2021) 471, 485 and 487; Kuperman (n 36) 136. See also Koskenniemi (n 44) 174, discussing that if there is no longer room for neutral formalism because of a turn to ethics in legal argumentation, and while ethics is also politics, it might provide space at least for a good or better politics if it could involve a 'culture of restraint, a commitment to listening to others' (emphasis omitted).

Finally, approaches based in pacifism or non-violence have long accompanied the development of international law and are seeing renewed interest.[50] For some, what is important is that the means used to counter ills such as insecurity or terrorism are 'consistent with the changes we wish to bring about'.[51] On a practical level, some researchers argue that violent methods have been overused and have largely failed (e.g. to counter terror) while non-violent strategies have proven more successful.[52] Even those supporting R2P have reinforced the importance of preventing violence in preference to military responses once a crisis breaks out.[53]

Once in those crises, the dilemma often appears as one between action and inaction, where 'doing something' tends to be understood as a military response. Reflecting this, pacifist or non-violent philosophies have been labelled as overly idealistic and morally challenging, that remaining neutral or non-active implicates the acceptance of violence and might reinforce the dominant order.[54] Yet, nonviolent approaches do not equate with doing nothing and might still persuade or even be coercive.[55] Similarly, there is a vast range of different ways military operations to protect civilians could be undertaken.[56] Limiting the options to either intervening militarily or standing idly by arguably blinkers us to other possible responses, as well as to a situation's historical and political context; for example, understanding better how the earlier involvement of other States and international institutions might have contributed to the situation at hand.[57] Some thus believe pacifist and non-violent

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50 Wallace (n 14); Richard Jackson, 'The Challenges of Pacifism and Nonviolence in the Twenty-First Century' (2023) 1 Journal of Pacifism and Nonviolence 28, 30; Alexandre Christoyannopoulos, 'Pacifism and Nonviolence: Discerning the Contours of an Emerging Multidisciplinary Research Agenda' (2023) 1 Journal of Pacifism and Nonviolence 1; Helen Dexter, 'Pacifism and the Problem of Protecting Others' (2019) 56 International Politics 243; Jeremy Moses, 'Anarchy, Pacifism and Realism: Building a Path to a Non-Violent International Law' (2018) 6(2) Critical Studies on Security 221.

51 S Lindahl, 'A CTS Model of Counterterrorism' (2017) 10(3) Critical Studies on Terrorism 523, 528–29. See also Wallace (n 14) 13, 25–27, arguing that the problem of disagreement about the ends requires us to derive legitimacy from the means we employ; Hannah Arendt, *On Violence* (Harcourt Brace Jovanovich 1970) 4: 'the end is in danger of being overwhelmed by the means which it justifies and which are needed to reach it'.

52 See e.g. Richard Jackson 'CTS, Counterterrorism and Non-Violence' (2017) 10(2) Critical Studies on Terrorism 357; MJ Stephan and E Chenoweth, 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2008) 33(1) International Security 7–44; Wallace (n 14) ch 2.

53 Bellamy (n 33) 427–429, 434–435.

54 Christoyannopoulos (n 50) 11; J Ashley Foster, 'Writing Was Her Fighting: Three Guineas as a Pacifist Response to Total War' in Kathryn Stelmach Artuso (ed), *Critical Insights: Virginia Woolf and 20th Century Women Writers* (Salem Press 2014) 59; Richard Jackson, 'Pacifism: The Anatomy of a Subjugated Knowledge' (2018) 6(2) Critical Studies on Security 160, 167.

55 Jackson (n 54) 166; Wallace (n 14).

56 Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) 25(3) Ethics & International Affairs 255, 261.

57 Gina Heathcote, *The Law on the Use of Force: A Feminist Analysis* (Taylor & Francis 2011) 4, 29; Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003) 15; Sundhya Pahuja, '"Don't Just Do Something, Stand There!" Humanitarian Intervention and the Drowning Stranger' (2005) 5 Human Rights & Human Welfare 51, 52–53.

approaches can open up spaces for alternative discussions, destabilising assumptions about militarism, and might have potential for being more global and inclusive than the current international system.[58]

III. CONTESTED NATURE OF CIVILIAN CASUALTIES DURING THE PROTECTION OF CIVILIANS

In Libya in 2011, civilians in several areas became very unsafe because of the fighting and many were killed or injured. This harm was reportedly caused by all parties.[59]

Once an armed conflict starts, IHL places limits on the means and methods of waging war to protect those not participating (e.g. civilians) and no longer participating (e.g. wounded or captured combatants). Reflecting the non-pacifist nature of the international legal system, IHL does not prohibit violence outright, even violence affecting civilians. Rather, trade-offs formulated within IHL accept that wars will happen but place restraints on warring parties, balancing humanitarian protections with military necessity.[60] Concretely, although IHL prohibits direct and indiscriminate attacks against civilians, it accepts certain incidental harm, known colloquially as 'collateral damage' (during proportionate attacks on military objectives undertaken with sufficient precautions to avoid civilian harm).[61] Imagine, for example, an air strike targeting enemy forces which also kills a nearby civilian. This means that a civilian casualty in Libya in 2011 might or might not be a result of a violation of IHL depending on the circumstances. IHL is far less protective than the rules otherwise regulating force, such as during law enforcement operations by the police.[62]

IHL advocates argue in support of the vital restraints IHL places on warring parties and point out how beneficial increased compliance would be in protecting people during war; moreover, that IHL also does much good that goes unnoticed.[63]

Other commentators appear less enamoured with IHL. On the abstract level, one might accept some harm to bystanders as unavoidable and part of the 'lesser evil'. Yet,

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58 Jackson (n 54) 169; Neta C Crawford, 'The Critical Challenge of Pacifism and Nonviolent Resistance Then and Now' (2023) 1 Journal of Pacifism and Nonviolence 140; Karen C Sokol, 'East Meets West in Civil Disobedience Theory and Beyond' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2015* (OUP 2016) 125; Wallace (n 14) 253–254 regarding paying attention to the enemy other's moral frameworks.

59 Report of the International Commission of Inquiry on Libya, A/HRC/19/68, 8 March 2012, [87]–[89].

60 See e.g. ICRC, 'The Principles of Humanity and Necessity' (March 2023) <www.icrc.org/sites/default/files/wysiwyg/war-and-law/02_humanity_and_necessity-0.pdf> accessed 20 June 2023. See also Uday Singh Mehta, 'Gandhi and the Common Logic of War and Peace' (2010) 30(1) Raritan 134, 147 on IHL providing moral constraint but accepting the logic braiding together war, peace, and politics.

61 See Dienelt and Ullah, § 14, in this textbook.

62 See ICRC, *Violence and the Use of Force* (ICRC July 2011).

63 Helen Durham, 'Atrocities in Conflict Mean We Need the Geneva Conventions More Than Ever' (*The Guardian*, 5 April 2016) <www.theguardian.com/global-development/2016/apr/05/atrocities-in-conflict-mean-we-need-the-geneva-conventions-more-than-ever> accessed 20 June 2023.

many people would be unwilling to accept this if they were directly affected, and in practice, not all populations are subject to the same risks. Moreover, in the moment, it presumably matters little to a family whether the bombs they are fleeing were launched compliantly or not; and, in practice, investigations into such civilian harm allegations often struggle to pronounce definitively whether an attack was proportionate or not, or even to determine who is a civilian.[64] IHL's acceptance that civilians can be lawfully (albeit incidentally) killed, even during operations intended to protect them, can therefore create an underlying uneasiness.

As such, some commentators consider IHL to have been formulated to privilege military necessity over humanitarian considerations.[65] Experience also shows that conflict parties have at times argued, especially related to counterterrorism, that existing rules were insufficient or inapplicable to the response needed for an exceptional threat.[66] This is seen to risk a gradual loosening of the rules,[67] particularly where an operation is for a 'good cause' and the underlying 'fault' for the violence is perceived to lie with the 'terrorists' or other 'bad guys'.[68] Despite a stated purpose of protecting civilians, the aim might actually be to defeat the enemy, with increased risks for civilians.[69]

Stepping further back, when IHL was first codified in the 19th century, some hoped that rules restraining the means and methods of warfare could progressively lead to greater restrictions and ultimately the elimination of war. Others feared that such rules would operate to shift focus to the legal technicalities, postponing calls in peace activism for the abolition of war.[70] More recent UN 'Women, Peace, and Security' initiatives, which endorsed greater institutional participation of women in peace-building and were perhaps hoped by women's networks to progressively transform militarism, have arguably resulted in a similar muffling of important feminist peace activism and critiques

64 Christiane Wilke, 'Civilians, Combatants, and Histories of International Law' (*Critical Legal Thinking*, 28 July 2014) <https://criticallegalthinking.com/2014/07/28/civilians-combatants-histories-international-law/> accessed 20 June 2023.

65 Chris AF Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35(1) HILJ 49, 65, 68; Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26(1) EJIL 109, 113.

66 Michael Glennon, 'Forging a Third Way to Fight; "Bush Doctrine" for Combating Terrorism Straddles Divide Between Crime and War' (*Legal Times*, 24 September 2001) 68, discussed in Frédéric Mégret, '"War"? Legal Semantics and the Move to Violence' (2002) 13(2) EJIL 361, 386.

67 Amanda Alexander, 'The Ethics of Violence: Recent Literature on the Creation of the Contemporary Regime of Law and War' (2021) Journal of Genocide Research 1, 13.

68 See e.g. ICRC (n 15) 45–47.

69 Ibid 47.

70 André Durand, 'Gustave Moynier and the Peace Societies' (1996) IRRC 314; Samuel Moyn, 'From Antiwar to Antitorture Politics' in Sarat and others (eds), *Law and War* (Stanford University Press 2014) 154; Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Strauss and Giroux 2021); David Kennedy, *Of Law and War* (Princeton University Press 2006); Marnie Lloydd, '"A Few Not Too Troublesome Restrictions": Humanitarianism, Solidarity, Anti-Militarism, Peace' (*Critical Legal Thinking*, 22 November 2022) <https://criticallegalthinking.com/2022/11/22/a-few-not-too-troublesome-restrictions-humanitarianism-solidarity-anti-militarism-peace/> accessed 20 June 2023; Dianne Otto, 'Rethinking "Peace" in International Law and Politics from a Queer Feminist Perspective' (2020) 126 Feminist Review 19, 27–30.

of militarism.[71] Relatedly, some argue that the denunciation of certain forms of violence as particularly problematic, such as the prosecution of war crimes, creates a boundary which normalises other forms of violence.[72]

To conclude, while the formulation of IHL fits within the logic of the current international legal system, and the humanitarian consequences of armed conflict would undoubtedly be less disastrous if warring parties complied more faithfully with IHL, more critical arguments that IHL might ultimately facilitate and legitimate rather than successfully restrain violence also hold some weight.[73] Eyal Weizman describes how some violence occurs with the 'terrible force of the law' rather than in violation of it.[74]

IV. INTERNATIONAL LAW *OR* VIOLENCE, INTERNATIONAL LAW *AND* VIOLENCE, INTERNATIONAL LAW *AS* VIOLENCE?

The preceding discussion suggests that it becomes overly simplistic to say that law and war are of two different worlds – that in war, law falls silent or that the presence of violence alerts us to law's failings.[75] More accurately, while different instances of violence may indeed be of a different nature or purpose, we can recognise the complex relationship(s) between international law and violence. They are not of two different worlds rubbing up against each other but are already 'an old couple'.[76]

In practice, international law and violence are certainly interconnected since legal argumentation has become a key part of warfighting, often referred to as 'lawfare'.[77] Concerning legal theory, scholars argue that if we could reach that utopia where peace and security were maintained, the law would lose its driving force; that violence helps establish or construct the law by giving it meaning and social relevance.[78] Part of the social relevance of violence to the law relates to an assumption that we cannot (yet) have both security and non-violence. Security and violence are understood as a natural and never-ending dilemma that needs to be reconciled by finding an appropriate balance,

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71 Dianne Otto, 'Women, Peace, and Security: A Critical Analysis of the Security Council's Vision' in Fionnuala Ní Aoláin and others (eds), *The Oxford Handbook of Gender and Conflict* (OUP 2018); Sheri Gibbings, 'Governing Women, Governing Security: Governmentality, Gender Mainstreaming and Women's Activism at the UN' (LLM Thesis, York University, Toronto 2004), 67–68.

72 Alexander (n 67) 2; Heathcote (n 57) 22.

73 See also Kennedy (n 47) 181.

74 Eyal Weizman, 'Legislative Attack' (2010) 27(6) *Theory, Culture & Society* 11, 12.

75 Kennedy (n 47) 158. See also Austin Sarat and Thomas Kearns, *Law's Violence* (University of Michigan Press 1995) 2.

76 Vanja Hamzić, 'International Law as Violence: Competing Absences of the Other' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complication, Risks* (Taylor & Francis 2017) 77.

77 See e.g. Kennedy (n 47); Lawrence Douglas and others 'Law and War: An Introduction' in Sarat and others (eds), *Law and War* (Stanford University Press 2014) 3–4.

78 Hamzić (n 76) 77; Ntina Tzouvala, 'Eye in the Sky: Drones, the (Human) Ticking-Time Bomb Scenario and Law's Inhumanity' (*Critical Legal Thinking*, 19 April 2016) <https://criticallegalthinking.com/2016/04/19/eye-sky-drones-human-ticking-time-bomb-scenario-laws-inhumanity/> accessed 20 June 2023.

such that certain forms of violence remain a necessary evil.[79] Law works to define the boundaries/balance of what is perceived to be needed. Austin Sarat's statement about law more generally seems to apply also to international law: law 'is always violent but never only violent; always oriented towards justice but never fully just'.[80]

D. CONCLUSION

Key instruments of international law, such as the UN Charter or the Geneva Conventions 1949, are commonly seen as significant milestones marking progressive achievement towards the 'abandonment of the use of force' and full disarmament.[81] As such, the basic design of collective security might be seen as the only 'stable workhorse' available, its imperfect functioning being primarily due to a lack of genuine willingness of States,[82] as well as to the realist view that certain actors need to be allowed to retain their arms in order to enforce the disarmament and defend themselves or others.[83]

Other thinkers appear less willing to sit in the 'not yet' of peace and justice, and view international law as having a more contested, even conspiratory, role in violence. Consider, for example, Dianne Otto's question about 'how law helps to reproduce the inevitability of the deadly, anthropocentric, imperial, neoliberal military-industrial-complex' and 'whether there remain any remnants of opportunity in law' with which one might yet work if one wanted to imagine alternative notions of peace.[84] In that dire description, current international law no longer appears as an aspirational vehicle for making the world a better place. Rather, the logic, practice, and demonstrated interests of the entire system are being critiqued and challenged.

The point is not only how challenging these questions are, but rather the resulting plurality of views on violence and international law. Different thinkers and actors will have different readings of a situation of violence, and different legal, political, and moral judgements and arguments in their application of international law. International legal argument might appear neutral or universal – for example, when an actor or institution claims to be acting objectively in the interests of humanity or for the common good – but the arguments being relied upon will be based on certain underlying assumptions about the world, about international law, and about particular authorities being able to make those determinations.[85] The values being prioritised are not necessarily held in common, and can also change over time and in different political contexts, or in hindsight. Describing international law as a conversation, David Kennedy says

79 See also Mehta (n 60).

80 Austin Sarat, 'Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction' in Austin Sarat (ed), *Violence, and the Possibility of Justice* (Princeton University Press 2001) 13.

81 Atlantic Charter between the United States and the United Kingdom 1941, final provision.

82 Weller (n 10) 642–643.

83 Ibid 629.

84 Otto (n 70) 21.

85 Jan Klabbers, *International Law* (CUP 2013), 3–4; Orford (n 14) 193.

> [i]nternational law reminds us to pay attention to opinion elsewhere in the world, to think about consistency over time, to remember that what we do today may come back to haunt us . . . international law only rarely offers a definitive judgment on who is right.[86]

Regarding not only armed violence but most issues of interest to international law, international lawyers should, then, look closely and empathetically at the particular context, but also consciously and continually step back to reflect critically about the bigger picture.[87] Rather than only working out what, in one's opinion, the law says, it becomes important to pay attention to narratives being used about any instance of violence, by whom, to serve what purpose, and with what political consequence. Moreover, who gets to decide? Critical reflection can also include considerations of 'when, how, and at the behest of whom those rules have emerged and developed'.[88]

This final section, therefore, proposes questions which may help foster exploration of students' individual legal, political, and moral positions around the complex and enduring relationships between violence and international law.

- What language is being used in political or public dialogue to describe the violence or the parties involved? By whom? For what purpose?
- What values are being expressed by a particular actor's position? Is it being described as objective, universal, or in the common interest?
- If the one who can define or decide what is legitimate and what is not is the one with true power,[89] who is deciding in the situation at hand?
- Do the acts of violence reproduce any power dynamics that made those acts possible in the first place? In your view, '[i]s violence necessary at times, and if so, does it, or can it, put an end to further violence' in the context at hand?[90]
- In what ways has compliance with the law protected people from harm? Or put them at risk of harm?
- In which situations could a non-violent option have been chosen, or in what situations were non-violent responses rejected or made impossible? What future paths do those decisions possibly close off? What might have been the imaginable results of other possible paths not taken or actively rejected?
- Is 'war talk' used to frame a crisis, threat, or problem (e.g. war on drugs, fight against climate change)? To what effect?[91]

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86 David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004), 273.

87 Anne Orford, 'The Politics of Collective Security' (1996) 17(2) MJIL 373, 407–409.

88 Helen M Kinsella and Giovanni Mantilla, 'Contestation Before Compliance: History, Politics, and Power in International Humanitarian Law' (2020) 64(3) ISQ 649, 653.

89 Richard Devetak, 'Post-Structuralism' in Burchill and others (eds), *Theories of International Relations* (5th edn, Bloomsbury 2013) 194 citing Derrida.

90 See discussion in Aisha Karim and Bruce B Lawrence, *On Violence: A Reader* (Duke University Press 2007) 78 citing Fanon.

91 Eliana Cusato, 'Beyond War Narratives: Laying Bare the Structural Violence of the Pandemic' in Makane Moïse Mbengue and Jean D'Aspremont (eds), *Crisis Narratives in International Law* (Brill 2022) 109.

BOX 2.1.2 Further Readings and Further Resources

Further Readings

- A Alexander, 'The Ethics of Violence: Recent Literature on the Creation of the Contemporary Regime of Law and War' (2021) Journal of Genocide Research 1
- H Dexter, 'Peace and Violence' in Paul D Williams and Matt McDonald (eds), *Security Studies: An Introduction* (3rd edn, Routledge 2018)
- D Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012)
- M Koskenniemi, ' "The Lady Doth Protest Too Much" Kosovo, and the Turn to Ethics in International Law' (2002) 65(2) MLR 159
- A Martineau, 'Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force' (2016) 29 LJIL 95

Further Resources

- Gavin Hood, 'Eye in the Sky' (Entertainment One 2015) (Film)
- Olivier Sarbil, *Mosul* (PBS/Frontline 2017) (Documentary Series)
- Brad Evans and others, *Portraits of Violence: An Illustrated History of Radical Thinking* (New Internationalist 2017)

§ § §

§ 2.2 CONSENT

SUÉ GONZÁLEZ HAUCK

BOX 2.2.1 Required Knowledge and Learning Objectives

Required knowledge: History of International Law; Overarching Questions

Learning objectives: Understanding key components of the notion of consent and assessing the central role it plays in the international legal system.

A. INTRODUCTION

Perhaps no other notion is as central to understanding international law as the notion of consent. It is the bedrock of classical doctrinal accounts of international law. This chapter familiarises students with the notion of consent, introducing the classical notion as expressed by the Permanent Court of International Justice. It hints at some of the difficulties that come with the classical conception of consent in international law, discusses the connection between consent and anarchy, introduces different types of consent that are prevalent in international law, explores the relationship between consent and colonialism, and, finally, sketches some of the limits on State consent in the international legal system.

B. THE CENTRALITY OF CONSENT IN INTERNATIONAL LAW

The degree to which consent is taken to structure the international legal system depends on whether and to what degree one subscribes to voluntarist theories of validity of international legal rules. The famous *Lotus* case is the often-cited point of anchoring for such voluntarist conceptions of international law. The relevant passage from the *Lotus* dictum reads:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[92]

Consent is thus supposed to be the expression of the 'free will' of a sovereign State and the source of obligations under international law. The principle of consent is reflected in

92 *Lotus (France v Turkey)* PCIJ Rep Series A No 10, 18.

the way international law is formed. This is most obvious in the cases of treaties, which are, in principle, only binding on a State if this State has expressed its consent to be bound by the respective treaty (cf. articles 11–17 VCLT).[93] Consent is also an essential part of international dispute resolution. Under article 36 of the Statute of the International Court of Justice (ICJ),[94] States can accept the ICJ's jurisdiction either by signing the ICJ Statute or by making a special declaration recognising the ICJ's jurisdiction in a particular case. This means that a State can only be brought before the ICJ if it has consented to the ICJ's jurisdiction either generally or specifically in a particular case.

Two main issues arise regarding the voluntarist conception of the role of consent in international rule-making. First, given that States are legal entities who cannot form and express a 'free will' in the same way an individual person can, the question of whether and how one can attribute a free will to a State and which expressions of such an attributed will count as expressions of State consent remains one of the enigmas at the heart of international law.[95] Second, the prevailing formalised conception of consent, which flows from the idea of sovereign equality among States, does not consider material inequalities. A formally 'free' expression of consent may reveal to be the result of coercion once one considers the material circumstances. Not all forms of coercion have the effect of rendering an expression of consent void under international law – especially not economic coercion.[96]

It is commonplace among international lawyers to juxtapose an extreme version of a voluntarist conception of international law, in which consent and only consent is supposed to be the source of obligations under international law, and a conception of international law based on community values. According to Martti Koskenniemi, this contrast between consent and justice is one of the many ways in which international legal arguments permanently oscillate between 'concreteness' and 'normativity'.[97]

C. CONSENT, CONSENSUS, AND ANARCHY

The importance of consent in international law stems from the fact that there is no centralised international government. The absence of government or hierarchical rule in the sense of a centralised authority able to make and enforce laws can be defined as anarchy.[98] In the absence of formal hierarchical rule and thus under

93 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

94 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

95 Cf. Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in International Law* (CUP 2010) 26–37; 61–69.

96 Cf. Mohamed S Helal, 'On Coercion in International Law' (2019) 52 NYU JILP 1.

97 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue with a new Epilogue, CUP 2006) 65.

98 Hedley Bull, *The Anarchical Society* (3rd edn, Palgrave Macmillan 2002) 44; Kenneth Waltz, *Theory of International Politics* (McGraw-Hill 1979) 88, 102; Helen Milner, 'The Assumption of Anarchy in International Relations Theory: A Critique' (1991) 17 Review of International Studies 67, 70–74.

conditions of formal equality, the subjects of international law (i.e. mainly States) can only be bound by a rule of international law if they have given their consent. This mirrors the ideal of consensual decision-making and unanimity, which communal anarchist theories embrace.[99] However, these theories were developed with smaller communities of individuals in mind, not with a global community of States. The difference between the community-oriented idea of anarchy and the prevailing international notion of anarchy is reflected in the difference between group-oriented notions of consensus and unanimity in contrast to individualist, voluntarist notions of consent.

D. TYPES OF CONSENT IN INTERNATIONAL LAW

Stephen Neff distinguishes three kinds of consent: 'outcome consent', 'rule consent', and 'regime consent'.[100] Outcome consent refers to a specific situation and it transforms the outcome of this situation. An act that would otherwise be unlawful is transformed into a lawful act because the State affected by this act has given its consent. Rule consent refers to the voluntary acceptance of a specific rule of international law. This kind of consent is at the basis of classical positivist and voluntarist conceptions of international law sources and of international law's validity. Regime consent refers not to a specific rule but, more generally, to be bound by the rules created within a specific system (e.g. an international organisation). In the terminology introduced by HLA Hart, rule consent can be characterised as consent to primary rules (i.e. rules involving substantive obligations), while regime consent refers to secondary rules (i.e. rules about rule-making).[101] Arguments involving a generalised kind of consent to the whole of international law have played a key role in the era of formal decolonisation (i.e. mainly in the 1960s and 1970s). The 'newly independent States' that were created as a result of this formal decolonisation argued that they had not consented to previously existing international legal rules and could therefore start with a clean slate. The counterargument, which prevailed, was based on a form of regime consent: international lawyers from the Global North argued that the newly independent States had given a generalised consent to the international legal system by attaining independence as States.[102] This argument, of course, seems rather cynical given the fact that the form of the State was the only form through which formerly colonised peoples were able to gain independence.[103]

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99 See Andrew Fiala, 'Anarchism' (*The Stanford Encylopedia of Philosophy*, Winter 2021) <https://plato.stanford.edu/archives/win2021/entries/anarchism/> accessed 26 August 2023.

100 Stephen Neff, 'Consent' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 128–129.

101 Ibid 130–131.

102 DP O'Connell, 'The Role of International Law' (1966) 95 Daedalus 627, 628.

103 Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) 44 et seq; Cf. Sué González Hauck, 'It's the System, Stupid!: Systematicity as a Conceptual Weapon' (*Völkerrechtsblog*, 29 December 2020) <doi:10.17176/20210107-181817-0>.

E. CONSENT AND COLONIALISM

The role of generalised regime consent in the formal decolonisation era has not been the only connection between consent and colonialism in the development of international law. State consent obtained its status as the ultimate source of international legal obligations in the 19th century, as international law was established as a 'scientific' discipline and as legal positivists purportedly broke ties with the natural law tradition.[104] The 19th century was also the time during which European States formalised their colonial endeavours. Consent as a foundational principle of international law was supposed to flow from State sovereignty. Consequently – but not incidentally – there was no place in 19th-century positivist accounts of international law for consent of people and communities that were not organised in the form of European States.[105]

On the other hand, colonial powers used a formalised notion of consent to legitimise their claim to colonial domination. European States did not recognise indigenous polities in the Americas, Africa, and Australia as sovereign entities with the power to contribute to international law-making and with the protection that the principle of non-intervention and other corollaries of sovereignty provide. They did, however, recognise indigenous authorities and their capacity to enter into legally binding obligations when it came to formally ceding title to land. This practice entirely neglected the coercive circumstances that accompanied formal declarations of consent.[106] Contemporary international legal rules take into account indigenous people's rights by requiring their free, prior, and informed consent regarding policies and projects that directly affect them.[107]

F. LIMITS ON STATE CONSENT UNDER CONTEMPORARY POSITIVE INTERNATIONAL LAW

The most important limits on State consent under contemporary positive law flow from article 53 VCLT and article 103 of the UN Charter. Both of these norms establish a hierarchy of rules, limiting States' ability to enter into and uphold agreements that conflict either with *jus cogens* or with the UN Charter.[108] *Jus cogens*, or a peremptory norm of general international law, is, according to article 53 VCLT,

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104 Amnon Lev, 'The Transformation of International Law in the 19th Century' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011).

105 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 34; James Anaya, *Indigenous Peoples in International Law* (OUP 2000) 19 et seq.

106 Mieke van der Linden, *The Acquisition of Africa (1870–1914): The Nature of International Law* (Brill Nijhoff 2017); Anaya (n 105) 17.

107 See Viswanath, § 7.2.D.IV., in this textbook.

108 Cf. Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413; Karen Knop, 'Introduction to the Symposium on Prosper Weil, "Towards Relative Normativity in International Law?"' (2020) 114 AJIL Unbound 67.

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

This means that States cannot modify *jus cogens* through other treaties or through customary law. Examples of jus cogens include the prohibition of genocide, crimes against humanity, slavery, and torture, and the principle of non-refoulement. Article 103 of the United Nations Charter is another key aspect of limits to State consent in international law. This article provides that in the event of a conflict between the obligations of a State under the Charter and its obligations under another international agreement, the obligations under the Charter shall take precedence.

G. CONCLUSION

In the absence of a centralised international government and, therefore, what many scholars call 'anarchy' on the international plane, consent is the main source of validity of international legal rules. It can be expressed as 'outcome consent', 'rule consent', or 'regime consent'. However, the notion of consent is not as straightforward as it may seem. The fiction of attributing a 'will' to an abstract entity like a State comes with its difficulties, as does the fact that consent completely disregards material inequalities and thus forms of coercion that may hamper true consent. This is best illustrated in the way in which consent as a notion was selectively employed to legitimise colonial appropriation and domination. Contemporary international law tries to mitigate this, especially in the field of the rights of indigenous peoples, which includes the right to free, prior, and informed consent. Finally, the limits on State consent that arise from peremptory rules of international law and from the system established through the UN Charter show that consent, if it ever was, is no longer the sole pillar on which the house of international law rests.

BOX 2.2.2 Further Readings

Further Readings

- S Neff, 'Consent' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019)
- P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413
- K Knop, 'Introduction to the Symposium on Prosper Weil, "Towards Relative Normativity in International Law?" ' (2020) 114 AJIL Unbound 67

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§ 2.3 ENFORCEMENT

DANIEL RICARDO QUIROGA-VILLAMARÍN

BOX 2.3.1 Required Knowledge and Learning Objectives

Required knowledge: International Law and Violence

Learning objectives: Evaluating the reasons why certain legal scholars have considered international law to be 'incomplete'; examining how different schools of international legal thought have problematised this 'incompleteness' critique and reframed the problem of compliance – or lack thereof – of international law; understanding the divergence in North Atlantic international legal thought between a European concern for 'system' and a US focus on 'process' – without losing sight of what is left outside of this framing.

A. INTRODUCTION

Could international law be neither 'international' nor even 'law'? Such 'institutional anxieties' have long haunted our profession.[109] In this chapter, I provide an introduction to the second anxiety by reviewing different ways our discipline has engaged with questions related to the enforcement – or lack thereof – of international legal categories.[110]

B. FACING THE AUSTINIAN CHALLENGE

Since 1832, international law has been haunted by the English legal theorist John Austin.[111] In his influential lectures, titled 'The Providence of Jurisprudence Determined',[112] Austin claimed that 'international law' was but a contradiction in terms. As committed positivist theorist who distinguished between 'laws strictly so called' and 'morality' (as only the former fell within the purview of 'the science of jurisprudence'), Austin saw international law as an imprecise misnomer.[113] Perhaps one could talk of a science of 'positive international morality' – but were there such things as international 'positive laws'?[114] Given that Austin understood a law to be a general command

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

110 On the first anxiety, see Anthea Roberts, *Is International Law International?* (OUP 2017).

111 Antony Anghie, 'Towards a Postcolonial International Law' in Prabhakar Singh and Benoît Mayer (eds), *Critical International Law* (OUP 2014) 124–125.

112 John Austin, *The Province of Jurisprudence Determined* (John Murray 1832).

113 Ibid 132. See also Etkin and Green, § 3.1, in this textbook.

114 Ibid.

delivered by a sovereign authority,[115] he was sceptical that there could really be 'law' in the non-hierarchical structures of inter-polity relations. Without supranational enforcement, there can be no international law 'strictly so called'.

International lawyers have strived to face this 'Austinian challenge'.[116] Considering that Austin himself experienced 'self-distrust' throughout his intellectual career,[117] it is perhaps ironic that his writings ultimately transferred some of these 'institutional anxieties' to the international legal profession.[118] Some scholars have embraced its alleged 'incompleteness', often by defending the international legal order as a 'primitive' but functional system.[119] Others have resisted the analogy between domestic and international law.[120] In 1995, Franck claimed that international law had entered its 'post-ontological era', a time when '[i]ts lawyers need no longer defend [its] very existence'.[121] However, as he was quick to concede,[122] this early optimism – so typical of the post–Cold War North Atlantic faith in liberal legalism[123] – could do with some Austinian scepticism, as questions of non-compliance still haunt the discipline.[124] For better or worse, we have been unable to fully exorcise Austin's spectre. In what follows, I review how different schools of international legal thought have attempted, even if unsuccessfully, to do so.[125]

C. 'DIFFERENT WAYS OF THINKING' ABOUT COMPLIANCE[126]

Despite Austin's challenge, it seems that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time', as Henkin once speculated.[127] Over time, European and US traditions have tended to diverge in

115 Ibid 18.

116 Ignacio De La Rasilla Del Moral, 'The Shifting Origins of International Law' (2015) 28 LJIL 419, 425.

117 HLA Hart, 'Introduction' in *The Province of Jurisprudence Determined: and, The Uses of the Study of Jurisprudence* (Hackett 1998) viii.

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

119 Yoram Dinstein, 'International Law as a Primitive Legal System' (1986) 19 NYUJILP 1.

120 Ian Hurd, 'The International Rule of Law and the Domestic Analogy' (2015) 4 GlobCon 365.

121 Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995) 6.

122 Thomas Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 AJIL 88, 91.

123 Daniel Ricardo Quiroga-Villamarín, 'From Speaking Truth to Power to Speaking Power's Truth: Transnational Judicial Activism in an Increasingly Illiberal World' in Lena Riemer and others (eds), *Cynical International Law? Abuse and Circumvention in Public International and European Law* (Springer 2020) 11–133.

124 Michael Bothe, 'Compliance in International Law' (*Oxford Bibliographies*, 2020) <https://oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0213.xml>

125 Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 MichJIntlL 345.

126 With apologies to Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016).

127 Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Council on Foreign Relations 1968) 42.

how to make sense of this fact. I focus on these rather parochial schools not because of their analytical precision, but because they became dominant through force or persuasion in 'almost all' countries throughout the 20th century.[128] In a global textbook that aspires to reach an international audience I chose to focus on these traditions *not in spite of but because of* their imperial significance.

I. INTERNATIONAL LAW AS A *SYSTEM*: EUROPEAN APPROACHES

European traditions emphasised the *systematicity* of international law, arguing that norms did not operate on the basis of single regulations but were linked in a dense arrangement 'within a hierarchy, composing together a coherent logical order'.[129] Building on this 'Germanic' focus,[130] they defended international law – albeit with melancholy about the deficiencies of this international system compared to the 'mature' domestic State.[131] 'Like a Phoenix', different iterations of this argument have surfaced in 20th-century mainstream international legal thought,[132] with echoes found in later debates regarding fragmentation,[133] or Global Constitutionalism.[134]

An example of this can be found in the 'Grotian tradition'. While the 19th century has been read as one marked by the rise of 'positive' law,[135] natural law commitments have remained strong in the international legal profession well into the present day.[136] In his 1946 article defending (and perhaps 'inventing') this tradition,[137] Lauterpacht argues that a 'Grotian' approach placed 'the value of human will as an agency shaping the destiny of men [*sic*]' at the forefront of the goals of international law[138] and subjected 'the totality of international relations to the rule of law'.[139] A 'Grotian' rejoinder to Austin argues that one cannot understand how international law is enforced without paying attention to these higher values, for they explain why 'members of good societies agree to live in peace and expect mutual benefits' from mutual cooperation.[140] Recognising that law

128 Anghie, 'Towards a Postcolonial International Law' (n 111) 127.

129 Eyal Benvenisti, 'The Conception of International Law as a Legal System' (2008) 50 GYIL 393.

130 Martti Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline' (2011) 15 Redescriptions 45.

131 Daniel Ricardo Quiroga-Villamarín, 'Black Flowers of Civilization: Violence, Colonial Institutions, and the Law in Coetzee's Waiting for the Barbarians' (2020) 2 The Graduate Press 37.

132 Bianchi (n 126) 39–43.

133 Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553.

134 Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 Indiana Journal of Global Legal Studies 397; Bianchi (n 126) 44–71.

135 Stephen Neff, *Justice among Nations: A History of International Law* (Harvard University Press 2014) 215; Mónica García-Salmones-Rovira, *The Project of Positivism in International Law* (OUP 2013).

136 Stephen Hall, 'The Persistent Specter: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 EJIL 269.

137 Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (CUP 2012) 1–14.

138 Hersch Lauterpacht, 'The Grotian Tradition of International Law' (1946) 23 BYBIL 1, 5.

139 Ibid 19.

140 Martti Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian "Tradition"' (2019) 30 EJIL 17.

and morality are separate spheres of knowledge, the Grotian argues that one cannot fully expunge the 'human sense of justice' from the (international) legal system.[141] This does not mean one should expect the international legal order to be upheld in every occasion. It can find itself questioned and challenged, but however long the arc of the moral universe might be, it ultimately bends towards justice.[142] Gaps in enforcement are but a signal of international law's incompleteness.

Other perspectives responded to Austin from within legal positivism. Given that the most famous positivist authors, Kelsen and Hart, are further discussed in this volume, I will only highlight the crucial role of 'primitiveness' in their approaches to enforcement.[143] Hart, a former student of Austin, noted in *The Concept of Law* that international law was marked by its 'absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions'[144] – earning him 'few friends' in our discipline.[145] Hart considered that international law's lack of 'secondary rules' (meta-norms governing the making or breaking of primary obligations, including those that create consequences for non-compliance), undermined international law's systematicity. Moreover, Hart noted that '[o]ne of the most persistent sources of perplexity about the obligatory character of international has been the difficulty felt in accepting or explaining the fact that a state which is sovereign may also be bound by . . . international law'.[146] European legal thought took Hart's seemingly unsolvable conundrum to 'square the circle' of compliance. In the famous *S.S. Wimbledon* case of 1923, the PCIJ concluded that the 'the right of entering into international engagements is an attribute of state sovereignty' – even if such agreement entails 'an abandonment' of sovereignty.[147]

Kelsen also lamented the 'primitiveness' of the international order.[148] In his 1953 Hague Academy lectures, he concluded that 'primitive juridical communities' are those in which sanctions are yet to be centralised[149] – a condition that, alas, also holds true for the 'international community'.[150] This didn't undermine international law's claim to be a system, but it entailed that it was one with 'decentralised' enforcement mechanisms, often requiring parties to seek justice through their own measures.[151] Like his Grotian contemporaries, Kelsen defended international law's incompleteness and eagerly

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141 Janne Nijman, 'Grotius' 'Rule of Law' and the Human Sense of Justice: An Afterword to Martti Koskenniemi's Foreword' (2019) 30 EJIL 1105.

142 With apologies to Samuel Moyn, 'Dignity's Due' (*The Nation*, 16 October 2013) <www.thenation.com/article/archive/dignitys-due/> accessed 25 August 2023.

143 Etkin and Green, § 3.1, in this textbook.

144 HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 214.

145 David Lefkowitz, 'What Makes a Social Order Primitive? In Defense of Hart's Take on International Law' (2017) 23 Legal Theory 258.

146 Hart, *The Concept of Law* (n 144). 220.

147 PCIJ, *Case of the S.S. 'Wimbledon'* (17 August 1923) 25.

148 Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 90–93.

149 Hans Kelsen, *Théorie Du Droit International Public* (1994) 84 RdC 71.

150 Ibid 11.

151 Charles Leben, 'Hans Kelsen and the Advancement of International Law' (1998) 9 EJIL 287, 289–292.

anticipated its maturation through the establishment of permanent and supranational institutions – courts and tribunals chief among them. Both positivist and natural-law–inflected traditions in Europe saw the Austinian challenge as an incentive to work towards the 'completion' of the international legal system. In their view, international law – however 'primitive' – was never only 'a random collection' of norms but perhaps a system (flawed, but improvable and ultimately lovable) in its own terms.[152]

II. INTERNATIONAL LAW AS A *PROCESS*: US PERSPECTIVES

US legal thought took another path. Instead of focusing on international law's systematicity, this tradition foregrounded the *processes* of international law-making, enforcement, and non-compliance. Inspired by legal realist thought,[153] Unitedstateseans downplayed the importance of legal concepts, studying instead how actors used international legal remedies to enforce rights.[154] The best example of this movement can be found in two 1968 student casebooks: *International Legal Process* by Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld,[155] and *Transnational Legal Problems* by Detlev Vagts and Henry Steiner.[156] These two books show the decisive influence of a realist concern for process over substance that would be characteristic of this turn. In certain circles, this approach would still place certain 'human values' or 'legitimacy' at the forefront, especially in the so-called New Haven School[157] and in the later Manhattan School.[158] In any case, US engagement with the empirical methods of the social sciences – especially to measure compliance – did mark an important difference with European traditions.[159]

This concern for process has been influential, especially when it comes to enforcement. A surge of interventions have called for its renewal: from 'New International Legal Process'[160] to a 'new New Haven School'[161] or a 'New Realist Approach'.[162] A good

152 ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law (2006) UN Doc A/61/10, para 251.

153 For an overview, see Justin Desautels-Stein, *The Jurisprudence of Style: A Structuralist History of American Pragmatism and Liberal Legal Thought* (CUP 2018); John Henry Schlegel, *American Legal Realism and Empirical Social Science* (University of North Carolina Press 2011); AL Escorihuela, 'Alf Ross: Towards a Realist Critique and Reconstruction of International Law' (2003) 14 EJIL 703.

154 Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2006).

155 Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld, *International Legal Process: Materials for an Introductory Course* (Little, Brown 1968).

156 Detlev Vagts and Henry Steiner, *Transnational Legal Problems; Materials and Text* (Foundation Press 1968).

157 Michael Reisman, Siegfried Wiessner, and Andrew Willard, 'The New Haven School: A Brief Introduction' (2007) 32 YJIL 575; Bianchi, *International Law Theories* (n 126) 91–109.

158 Samuel Moyn, 'The International Law That Is America: Reflections on the Last Chapter of the Gentle Civilizer of Nations' (2013) 27 TempInt'l & CompLJ 399, 403–405.

159 Tom Ginsburg, Daniel Abebe, and Adam Chilton, 'The Social Science Approach to International Law' (2021) 22 Chicago JIL 1. See also Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (OUP 2013); Steininger and Paige, § 4.2, in this textbook.

160 Mary Ellen O'Connell, 'New International Legal Process' (1999) 93 AJIL 334.

161 Harold Hongju Koh, 'Is There a 'New' New Haven School of International Law?' (2007) 106 YJIL 2599.

162 Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) 28 LJIL 189.

example is the tide of interest in 'Transnational Law'[163] – a term first coined by Jessup in 1956 to theorise the interstices of public/private and domestic/international that has since taken 'many lives'.[164] This focus on 'problems and process' – to paraphrase the title of Rosalyn Higgins' famous monograph from 1994[165] – has now been widely accepted. In contemporary scholarship, the imprint of this US foregrounding of 'process' shines brightly in Global Administrative Law,[166] inquiries into 'informal' law-making,[167] and International Law and Economics.[168]

D. CONCLUSION

For better or worse, international legal thought is also haunted by dichotomies.[169] Most legal theories ground their approach in an intrinsic difference between categories like public/private, normativity/morality, domestic/international, and law-making/law-breaking – often with terrible consequences, as feminist legal critique has convincingly argued.[170] Sadly, this chapter is also organised around a series of binaries including US/European and system/process. I do not offer them as fixed categories but rather as tentative guideposts that might orientate a newcomer to the vast literature on enforcement in international law. At the same time, we cannot forget that other ways of seeing international law might be excluded from this framing – and that will be developed further in this volume, in relation to feminist and queer, postcolonial and decolonial, and Marxist voices.[171] The real challenge ahead for 21st-century international legal thought is to finally exorcise the ghosts of ages past – including the Austinian challenge's discoloured wraith.

Instead of focusing on the binary disobedience/compliance, these other voices have highlighted the 'world-making' function of international law,[172] for our discipline is not an external patina which is applied unevenly to the real, but rather a frame that

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163 Philip Jessup, *Transnational Law* (Yale University Press 1956).

164 Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (CUP 2020).

165 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994).

166 See Benedict Kingsbury, Nico Krisch, and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 LCP 15.

167 Joost Pauwelyn, Ramses Wessel, and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 EJIL 733. See also Kunz, Lima, and Castelar Campos, § 6.4, in this textbook.

168 Jack Goldsmith and Eric Posner, *The Limits of International Law* (OUP 2007). See also Steininger and Paige, § 4.2, in this textbook.

169 Jean d'Aspremont, *After Meaning: The Sovereignty of Forms in International Law* (Edward Elgar 2021) 8–9.

170 Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 AJIL 613, 625–634. See also Kahl and Paige, § 3.3, in this textbook.

171 See González Hauck, § 3.2; Kahl and Paige, § 3.3; and Bagchi, § 3.4, in this textbook.

172 Negar Mansouri, 'International Organizations and World Making Practices: Some Notes on Method' (2022) 19 IOLR 528, among others.

allows us to open the window and *see* a 'world of nation states' – where questions of compliance can be meaningfully posed and answered.[173] But it is never too late to start questioning our ways of seeing international (dis)order.[174]

BOX 2.3.2 Further Readings

Further Readings

- A Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (OUP 2016)
- R Higgins, *Problems and Process: International Law and How We Use It* (OUP 2001)
- R Goodman and D Jinks, *Socializing States: Promoting Human Rights Through International Law* (OUP 2013)
- D Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2006)
- A Thompson, 'Coercive Enforcement of International Law' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2012) 502

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173 David Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream' (2006) 31 NYU Review of Law & Social Change 641, 650.

174 Negar Mansouri and Daniel Ricardo Quiroga-Villamarín (eds), *Ways of Seeing International Organisations: New Perspectives for International Institutional Law* (CUP forthcoming 2024).

§ 2.4 SELF-DETERMINATION

MIRIAM BAK MCKENNA

BOX 2.4.1 Required Knowledge and Learning Objectives

Required knowledge: History of International Law

Learning objectives: Understanding the history, philosophy, and practical implications of self-determination in international law.

A. INTRODUCTION

Self-determination is among the most politicised principles of the post-WWII international legal system. This section provides a brief overview of the history, conceptual underpinnings, and diverse meanings ascribed to self-determination in the international legal system, along with the tensions and controversies that have accompanied its circulation as a legal idea.

Incorporated as a principle in the UN Charter, and as a right in the ICCPR and ICESCR, self-determination has been elevated to the status of *erga omnes* (Latin: 'among all'),[175] or even *jus cogens* (peremptory norms of international law)[176] and has been recognised by the ICJ as constituting one of international law's 'essential principles'.[177] Yet, there exists little consensus on its precise definition or scope as a legal rule or principle.

While its linguistic sources can be traced to German Enlightenment figures and the international socialist movement, as a conceptual idea it holds deep resonance across cultures.[178] Self-determination was popularised in the inter-war period by figures such as Woodrow Wilson and Vladimir Lenin as a collectivist notion linked to ideologies of

175 See Judge Weeramantry, Dissenting Opinion, *Case Concerning East Timor (Portugal v. Australia)* [1995] ICJ Rep 142, 172–3; Judge Higgins, Separate Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep [379]; Judge Kooijmans, Separate Opinion, *Ibid* [404]; Judge Al Khasawneh, Separate Opinion, *Ibid* [13]; Judge Elaraby, Separate Opinion, *Ibid* [3.4]; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) at 3, 1–34, 15–23, 17–78; Benedict Kingsbury, 'Restructuring Self-Determination: A Relational Approach' in P Aikio and M Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-determination* (Åbo Akademi University 2000) 19, 22.

176 In support see Judge Ammoun, Separate Opinion, *Barcelona Traction, Second Phase* (Merits) [1970] ICJ Rep 304; Casssese *Ibid* 140; Ian Brownlie, *Principles of Public International Law* (4th edn, Clarendon Press 1990) at 513. On *erga omnes* and *jus cogens* rules, see Eggett, Introduction to § 6, in this textbook.

177 *Case Concerning East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 4, 102 [29].

178 Eric D Weitz, 'Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right' (2015) 120 The American Historical Review 462–496.

national unification and liberation. In the post-war period, anticolonial thinkers and activists mobilised self-determination as the legal basis for the emancipation of peoples from colonial rule. Even though the applicability and practical implications of self-determination outside of the colonial context has been subject to continuing debate, self-determination remains the catchcry of movements around the globe demanding greater autonomy in shaping their own future.

B. CONCEPTUAL AND LEGAL TENSION

In its broadest legal sense, self-determination denotes the right of all peoples 'to freely determine their political status and freely pursue their economic, social and cultural development' (ICCPR article 1(1)).[179] Due to, or perhaps in spite of, its relationship to freedom, there lies a paradoxical tension at its core: 'self-determination both *legitimates* and *challenges* sovereign authority'.[180]

The concept of sovereignty is perhaps the most widely articulated form of self-determination in international law, providing a sphere free from external threat and interference in which peoples may freely determine the ways in which they wish to govern themselves. The legitimacy of States is largely dependent upon their embodiment of self-determination, as they provide a setting in which groups and individuals give expression to their values, culture, and sense of themselves.[181] However, self-determination simultaneously provides a normative platform for people to alter how they are governed, thereby pitting the validity of current political arrangements against the validity of possible alternatives.[182]

The destabilising potential of self-determination has been balanced by the demand that any exercise of self-determination respect territorial integrity and the retention of present international and internal boundaries. The right of colonial peoples to freely choose their political status is therefore restrained by the application of the principle of *uti possidetis* (Latin: 'as [you] possess under law'), which requires the retention of existing colonial boundaries[183] despite the fact that these were drawn largely 'with little consideration for factors of geography, ethnicity, economic convenience or reasonable means of communication'.[184] *Uti possidetis* has also

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179 See also UNGA Res 1514 (1960) GAOR 15th Session Supp 16; UNGA Res 2625 (1970) GAOR 25th Session Supp 28; the *Helsinki Final Act*, 14 ILM (1975); *Vienna Declaration and Programme of Action*, 32 ILM (1993).

180 Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 ICLQ 241, 245.

181 Andrew Hurrell, 'The Making and Unmaking of Boundaries in International Law' in A Buchanan and M Moore (eds), *States, Nations and Borders: The Ethics of Making Boundaries* (CUP 2003) 283.

182 Patrick Macklem, 'Distributing Sovereignty: Indian Nations and Equality of Peoples' (1992–1993) 45 Stanford Law Review 1311, 1346–1347.

183 *Frontier Dispute (Burkina Faso v Mali)* (Judgment) [1986] ICJ Rep 554.

184 *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Separate Opinion of Judge Ajibola) [1994] ICJ Rep 6 [8].

been applied outside of the colonial context, for example during the breakup of Yugoslavia.[185] The international community has been reluctant to allow self-determination to ground or endorse claims of separation and secession. The result, as Karen Knop points out, is that 'some states in international law represent the exercise of self-determination by a people, others do not. Some peoples have their own State, others do not'.[186]

C. DEFINING PEOPLE

Self-determination is structured around the notion of the 'people' as the legitimate bearer of the right. As Sir Ivor Jennings archly noted, self-determination at first glance offers a reasonable proposition: let the people decide their own fate. The problem is that 'the people cannot decide until someone decides who are the people'.[187] The main difficulty is that there is rarely a perfect overlap between those who find themselves territorially bounded and those who identify themselves members of the 'self'. In the context of modern statehood, this is the 'Janus face of the modern nation'.[188] The tension between the conception of the self-determining State entity and other competing claims to 'selfhood' has been the primary source of conflict in the practical application of self-determination.

The two dominant interpretations to the term 'peoples' emerging from self-determination discourse largely correspond to that of *ethnos* (i.e. an imaginary community of descent or affiliation such as the nation) and *demos* (i.e. a politically defined community). The latter holds that a 'people' entitled to self-determination is the whole of a population within the generally accepted boundaries of an independent State or a territory of a classical colonial type. The difficulty, as James Anaya asserts, is in the underlying view that *only* such units of human aggregation – the *whole* of the people of a State or colonial territory – are beneficiaries of self-determination.[189] 'This approach', Anaya notes, 'renders the norm inapplicable to the vast number of contemporary claims of sub-state groups that represent many of the world's most pressing problems in the post-colonial age'.[190]

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185 Allain Pellet, 'Note sur la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie' (1991) 37 Ann fr dr int 329 at 337; Allain Pellet, 'L'Activité de la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie' (1992) 38 Ann fr dr int 220; Allain Pellet, 'L'Activité de la Commission d'arbitrage de la Conférence internationale pour l'ancienne Yougoslavie' (1993) 39 Ann fr dr int 286.

186 Karen Knop, 'Statehood: Territory, People, Government' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 107.

187 Sir Ivor Jennings, *The Approach to Self-Government* (CUP 1956) 55–56.

188 Jürgen Habermas, 'A Genealogical Analysis of the Cognitive Content of Morality' in *The Inclusion of the Other: Studies in Political Theory* (MIT Press 1998).

189 James Anaya, 'Self-Determination as a Collective Right Under Contemporary International Law' in Pekka Aikio and Martin Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Åbo Akademi University 2000) 10.

190 Ibid.

D. FORMS OF SELF-DETERMINATION

I. GENERAL NORM

Having been included in the Atlantic Charter, the joint declaration of allied post-war aims, and its demands for the restoration of sovereignty and self-government, self-determination was invoked as one of the founding principles of the UN Charter in articles 1 and 55, linked to developing 'friendly relations among nations' and promoting the 'equal rights . . . of peoples'.[191] While not implying a legal right per se, the reference to self-determination in the UN Charter is widely understood as bolstering the territorial and sovereign sanctity of the State against foreign incursions, as well as guaranteeing a people's 'choice of a political, economic, social and cultural system, and the formulation of foreign policy', as affirmed by the ICJ in its *Nicaragua* decision.[192] In its 2004 *Wall* opinion, concerning the construction by Israel of a wall in occupied Palestinian territory, the ICJ affirmed that self-determination had acquired the status of a legal right under international law, placing States under an obligation to 'refrain from any forcible action which deprives peoples . . . of their right to self-determination', as well as 'to promote the realization of [self-determination] and to respect it'.[193]

II. COLONIAL SELF-DETERMINATION

With many colonial powers reluctant to relinquish their colonial holdings, references to self-determination are conspicuously absent from the UN Charter chapters relating to both the non-self-governing territories and the trusteeships. In subsequent decades, however, anti-colonialists successfully transformed self-determination into a legal and normative platform for decolonisation. Drawing a direct line between colonialism and the violation of not only human rights and human dignity, but the broader aims of the international system contained in the UN Charter, anti-colonialists laid the foundations for a legal challenge to empire. Following its inclusion in the final statement of the Bandung Conference of Afro-Asian Countries in 1955, self-determination was successfully incorporated into the landmark Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV)) in 1960 by the General Assembly.[194] Calling for an immediate end to all forms of colonial rule, the resolution granted colonial peoples a legal right to independence or to adopt any other status they freely chose. The ICJ later affirmed the colonial right to self-determination in its *Namibia*,[195]

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191 Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP 1995) 37.

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

193 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [88].

194 UNGA Res 1514 (1960) GAOR 15th Session Supp 16.

195 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16.

Western Sahara,[196] and *East Timor*[197] decisions. With no formal definition of colony, however, the right was restricted in practice to territories geographically separate and culturally and ethnically distinct from the administering power, excluding settler colonies and their indigenous peoples from the ambit of the right.[198]

III. ALIEN SUBJUGATION, DOMINATION, OR EXPLOITATION

Following the height of the decolonisation era, the right of self-determination was broadened to include cases in which a people is subject to 'alien subjugation, domination or exploitation'.[199] The situations in Afghanistan, Lebanon, Uganda, Cambodia, Grenada, Palestine, South Africa, Southern Rhodesia, and Central America dominated UN debates in which self-determination was raised in terms of foreign domination. Concerns over neo-colonial and Cold War intervention also saw self-determination cast as a corollary of non-interference, sovereign equality, and economic sovereignty. The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States[200] solidified a sovereignty-based notion of self-determination as a buffer against interference and 'foreign pressure', while economic self-determination featured prominently in demands for a New International Economic Order by States from the Global South in the 1970s. The right to economic self-determination was strengthened by the inclusion of the right to permanent sovereignty over natural resources in common article 1(2) of the ICCPR and ICESCR, which declared 'all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice'. Within the text of the Friendly Relations Declaration from 1970, an authoritative restatement of the UN Charter principles, a clear line emerged that the promotion and implementation of self-determination and equal rights were among the most important measures to ensure universal peace.

IV. INTERNAL OR DEMOCRATIC SELF-DETERMINATION

While absent from the Universal Declaration of Human Rights (UDHR), the right to self-determination features prominently in several human rights instruments, most notably common article 1 of the ICCPR and ICESCR and the African Charter on Human and Peoples Rights. Political participation, democratic government, free and fair elections, and public accountability are increasingly referred to as falling within the rubric of 'internal' self-determination, which is said to create international standards regarding the form and function of a State's internal political order.[201] During the

196 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

197 *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 142.

198 UNGA Res 1541 (1960) GAOR 15th Session Supp 16.

199 See *Friendly Relations Declaration*, GA Res 2625 (1970) GAOR 25th Session Supp 28.

200 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States.

201 For example, Resolution 1995/60 on 'ways and means of overcoming obstacles to the establishment of a democratic society and requirements for the maintenance of democracy', UN Commission on Human Rights ESCOR Supp 4, UN Doc. E/CN.4/1995/60 (1995), preamble.

immediate post–Cold War period, many States along with prominent jurists such as Thomas Franck and Antonio Cassese sought to link self-determination to a right of democratic governance.[202] Discussions over self-determination's link to 'legitimate' forms of internal political functioning and democratic governance are also enmeshed in debates over the resurgence in concepts such as trusteeship, protectorate, and international administration and the rise of post-conflict reconstruction missions.[203]

V. REMEDIAL SELF-DETERMINATION

In cases where States failed to uphold these protections, the possibility has been raised that a right of 'remedial' self-determination or secession could exist. This is based on a reading of the so-called safeguard clause contained in the Friendly Relations Declaration, which extends the right of territorial integrity to governments '*representing the whole people* belonging to the territory *without distinction* as to race, creed or colour'. Similar arguments of exceptionality in cases in which a group suffers systematic and gross violations of human rights have been raised in the Aaland Islands decisions, concerning a Swedish-speaking minority in Finland,[204] the Supreme Court of Canada in *Re Secession of Quebec*, responding to Quebec's request for secession,[205] and by some States in their submissions to the ICJ's Advisory Opinion regarding Kosovo's unilateral declaration of independence from Serbia in 2008.[206] However, while the recognition of Kosovo's independence by over 100 States raises the possibility that a new category of 'remedial secession' may exist, no right of secession has yet been recognised under international law.

VI. INDIGENOUS AND MINORITY SELF-DETERMINATION

Self-determination is also increasingly viewed as encapsulating a wide spectrum of rights for sub-State groups aimed at protecting their culture, identity, and self-governing capacity. Rights of ethnic and national minorities, while traditionally falling within human rights frameworks, were linked to the broad principle of self-determination. This was prominently seen in the aftermath of the breakups of the USSR and Yugoslavia, where the retention of existing boundaries necessitated an accommodation of cultural and ethnic claims by minorities.

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202 See Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46.

203 See Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (OUP 2008).

204 *Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion Upon the Legal Aspects of the Aaland Islands Question*, League of Nations Official Journal, Special Supplement No 3 (October 1920); *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc B7 [C] 21/68/106 (April 1921).

205 *Re Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*, [1998] 1 16 1 DLR (4) 385.

206 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)* [2010] ICJ Rep 423.

Indigenous rights have become increasingly articulated within the framework of self-determination, as an important restorative step towards redressing stolen sovereignty by granting decision-making over their traditional lands and natural resources.[207] The International Labour Organization's Convention 169 of 1989 was crucial milestone in this regard, employing for the first time the term 'peoples' in referring to indigenous groups, and laying out the entitlements of self-governance in relation to matters connected with their lands, beliefs, and economic and cultural development.[208] Indigenous self-determination was bolstered in 2006 with the adoption of the UN Declaration on the Rights of Indigenous Peoples, which affirmed the right to self-determination,[209] linking it to self-government and autonomy 'in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.[210]

Appeals to indigenous self-determination are thus taking place against the backdrop of broader debates surrounding the Statist paradigm of international law, with autonomy rights and devolutionary arrangements directed towards the goal of renegotiating sovereignty. Self-determination also continues to figure prominently in independence claims by numerous groups, including in Palestine, Catalonia, and Kurdistan, and by groups seeking greater control over issues affecting them. Self-determination is also increasingly being linked to redressing the ongoing legacy of colonialism,[211] seen most prominently in the successful challenge to the UK's occupation of the Chagos Islands by Mauritius in a 2019 ICJ Advisory Opinion.[212]

E. CONCLUSION

Self-determination may be one of the most unsettled norms in international law, yet it is also one of the most resonant. Despite its shifting legal content, normatively it provides the cornerstone for an international system which appeals to the equality and worth of the multitude of social, cultural and political identities which exist across the globe, providing a powerful platform for change. As Upendra Baxi surmises, self-determination 'insists that every human person has a right to a *voice* . . . the right to bear witness to violation, a right to immunity against *disarticulation* by concentrations of economic, social, and political formations . . . thus opening up sites of resistance'.[213]

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207 See James Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988); Benedict Kingsbury, 'Claims by Non-State Groups in International Law' (1992) 25(1) Cornell Int'l LJ 48; Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1991).

208 Article 7 of ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (adopted on 27 June 1989). Prior to this, ILO Convention 107 from 1957 used the term 'populations'.

209 UNGA Res 61/295 (2007) GAOR 61st Session Supp 49, para 3.

210 Ibid article 4.

211 Marc Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff 2009) 19.

212 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.

213 Upendra Baxi, *The Future of Human Rights* (OUP 2002) 36.

BOX 2.4.2 Further Readings and Further Resources

Further Readings

- A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995)
- K Knop, *Diversity and Self-Determination in International Law* (CUP 2002)
- MB McKenna, *Reckoning With Empire: Self-Determination in International Law* (Brill 2023)
- A Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (Princeton University Press 2020)
- T Sparks, *Self-Determination in the International Legal System: Whose Claim, to What Right?* (Hart 2023)

Further Resources

- Olivier Magis, 'Another Paradise' (2019) (Film) <www.truestory.film/another-paradise> accessed 25 August 2023
- Maya Newell, 'In My Blood It Runs' (2019) (Film) <www.imdb.com/title/tt8192948/> accessed 25 August 2023

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