
Twentieth Century Internationalism in Law

Ole Spiermann*

Abstract

The 20th century saw the transformation of international law into a legal discipline concerned with the practical application of law. It was fuelled by a manifold variety of treaties, procedures and institutions. Still, international lawyers persisted in conceiving and judging their discipline against a background coloured by national legal traditions. International lawyers did not overcome the optimistic and evolutionary tradition based on the assumption that international law is but an ever closer approximation of national legal systems; nor did lawyers escape the flip side of this tradition, i.e., doubt and insecurity about international law and its basis. Rather than facilitating international law as a practical discipline, a superficial understanding of internationalism reinforced fetishisms of the discipline's theoretical past, not least the axiom that states only are proper subjects of international law. To a degree, international law has expanded at the price of becoming less separate from national law and national legal traditions.

1 Introduction

It would have been hard to imagine a 20th century in which international law had not evolved and expanded, yet the century turned out to be rather more eventful, to use a neutral term, than could have been prophesied at its beginning. Following incomprehensible tragedies inflicted by Man upon its own kind, international law was left bereft of lofty aspirations; but suffering and decay also came to colour the background against which new treaties, new procedures, and new institutions emerged as civilization gained ground anew. Civilizing impetus joined forces with rather more mundane causes of treaty-making, such as increase in trans-border

* Professor in international law at the University of Copenhagen. This article is based on an inaugural lecture delivered before the University of Copenhagen on 20 Jan. 2006. Email: Ole.Spiermann@jur.ku.dk

activities, technological innovation, greater appetite for regulation worldwide, and mere coincidence.

I propose to discuss internationalism in law through a selection of *avant-garde* examples from the 20th century. I choose this topic because it seems to me that our approach to the international, as distinct from the national, needs refinement. The 20th century served to stress that, at its most fundamental level, international law is concerned not merely with relations between states, but more generally with issues affecting the interests of a plurality of states. Thus, in the 20th century international law was opening up to accommodate relations between states and non-state actors, including individuals. In theory, this development proved controversial, if not incomprehensible, to the point that states were apparently denied the possibility of concluding treaties under which non-state actors would have rights or obligations. Even though theoretical fetishisms may be thought to have been purged in recent decades, little guidance is offered to practitioners faced with applying international law to non-state actors. The upshot of the argument is that in the 20th century international law expanded at the price of separateness. Relations involving non-state actors (other than international organizations) were in part addressed through the prism of state sovereignty and national legal traditions, even when taken over by international law. In national legal systems, relations between state and, for example, individual are often conceived as being hierarchical or vertical in kind; these are relations between sovereign and subject. A key question of 20th century internationalism in law came to be whether relations between states and individuals were taken to be vertical, as in national legal systems, or horizontal, that is between equal subjects of law comparable to inter-state relations. All too often lawyers have ended up with the first, vertical conception, thereby giving too much room for state sovereignty in newish spheres of internationalism (by means of, for example, restrictive treaty interpretation or self-restraint in supervising treaty application).

The six examples in Sections 5 to 10 demonstrate how the outer limits of internationalism were delimited and conceived at the time. For the purpose of this discussion, some further introductory observations, historical and conceptual in kind, are briefly set forth in Sections 2 to 4.

2 Twentieth Century

In political terms, the 20th century brought about a gradual transfer of power from Europe, ‘a forest of symbols’,¹ to what had until then been the peripheries, in particular the United States. In the first half of the century, influential ideas about international law were promoted by American statesmen in European cities such as The Hague and Paris. The names of Elihu Root, Woodrow Wilson, and Francis B. Kellogg come to mind, among others. Many of those ideas – a permanent court of international justice,

¹ P. Allott, *The Health of Nations: Society and Law beyond the State* (2002), at 183.

a general association of nations, and renunciation of war – were taken further when establishing the United Nations Organization in the aftermath of the Second World War, the key defining event of the century. Principles of individual criminal responsibility were articulated by the International Military Tribunal at Nuremberg, the establishment of which had been preceded by clashes between traditions and policies. Even in the waning moments of the Second World War the United States Government had been sunk in controversy over what to do with the major war criminals of the European Axis. The British Government was disposed, on balance, to subject enemy leaders to a quick despatch before a firing squad, whereas the proposal of the Soviet Government to have a trial blended in with the dark shadows of the Great Terror's show trials. The road to Nuremberg was cleared only once President Roosevelt had been succeeded by Henry S. Truman, once a county judge.

While in the second half of the century the West and the East fought out the Cold War yet another former periphery, the South, fathered a breed of new, albeit vulnerable, states in the process of decolonization sanctioned by legal principle, i.e., the right of peoples to self-determination. It contributed to an increase in the membership of the United Nations from 51 to 192.² In Europe, the legacy of the Second World War rested also in the European Convention on Human Rights with its supervisory mechanism, notably the European Court of Human Rights, and the European Communities, the first international organization to be rooted in the rule of law under the auspices of the European Court of Justice. The Cold War ended without the remaining international political structures and their legal bases having suffered ignominy to the point of futility. But on a smaller scale, many a European (and also many others) found the time ripe for new ideas of internationalism to be introduced in Washington, DC, with the International Criminal Court and a so-called war on terrorism as prominent recent venues for clashes between moralism and *Realpolitik*.

In the same 20th century, a craving for literate battles anchored in jurisprudence, if not philosophy, gave way for international law as a legal discipline concerned with the practical application of law to specific cases. The significance of the transformation from theory to practice is thrown into relief by the High Court of Admiralty's classic dictum depicting Hugo Grotius and his influence: '[a] pedantic man in his closet dictates the law of nations; everybody quotes, and nobody minds him'.³ After all, when in the late 19th century a Cambridge professor preparing his lectures on international law for publication received an invitation for further studies of Grotius in a friend's

² Although the UN had been brought into being by 'the vast majority of the members of the international community', according to *Reparation for Injuries suffered in the Service of the United Nations* [1949] ICJ Rep 174, at 185, more States were outside the organization in 1945 than is now the case; at present the only State not a member of the UN would seem to be the Vatican City: see J. Crawford, *The Creation of States in International Law* (2nd edn., 2006), at 727–739 (Montenegro to be added subsequent to publication).

³ *The Renard*, 165 ER 51 at 52 (1778). The High Court continued: '[t]he usage is plainly as arbitrary as it is uncertain; and who shall decide, when doctors disagree? Bynkershoek, as it is natural to every writer or speaker who comes after another, is delighted to contradict Grotius'.

library, it provoked the remark, ‘Ha! More books you want me to read’.⁴ That was even though Sir Henry Maine, the professor in question, held Grotius and also Vattel in some esteem. As for ‘the residue’, he found that ‘it must be confessed that some were superficial, some learned and pedantic, some were wanting in clearness of thought and expression, some were little sensitive to the modifications of moral judgment produced by growing humanity, and some were simply reactionary’.⁵ In 1911, another Cambridge professor, Lassa Oppenheim, coined the term ‘*Buchrecht*’,⁶ and in 1920 it was found appropriate among the sources of international law to be applied by the ground-breaking Permanent Court of International Justice to have ‘the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’.⁷ Thanks not least to subsequent work of international courts and tribunals as well as the proliferation of treaty law in the most diverse fields, the 20th century saw international lawyers reinventing themselves as lawyers in the pedestrian sense (although with some notable theorists not willing to see *Buch* and *Recht* parting company).⁸ Thereby, international lawyers’ influence would seem to have been increased. In the words of Jennings writing in 1996, ‘international legal scholars have an influence probably unparalleled since the jurisconsults of classical Roman law’.⁹

3 Understanding International Law?

In law as elsewhere, we can know and yet not understand.¹⁰

Many lawyers seem to know that international law maintains a somewhat uneasy relationship with bindingness. But in order to understand, one would have to bear in mind that international law represents an expansion of the rule of law beyond the confines of national law to, in the first place, what is traditionally phrased relations between states. The true problem is not whether international law is binding, but whether relations between states – and other issues taken to affect the interests of a

⁴ G. Feaver, *From Status to Contract: A Biography of Sir Henry Maine 1822–1888* (1969), at 260.

⁵ H.S. Maine, *International Law* (1888), at 1–2, 13–14, 16, 52–53, 110 and 215.

⁶ Cf. L. Oppenheim, *Die Zukunft des Völkerrecht* (1911), at 11; ‘*Buchrecht*’ was translated into ‘book-law’ in the English edition: L. Oppenheim, *The Future of International Law* (1921), at 5.

⁷ Art. 38(1)(4) of the Statute of the Permanent Court of International Justice.

⁸ That the impact of *Buchrecht* diminished in doctoral theses of Danish provenance, albeit slowly and only in the course of time, may be demonstrated by comparing M. Sørensen, *Les sources du droit international: Etude sur la jurisprudence de la Cour permanente de Justice internationale* (1946), C.A. Nørgaard, *The Position of the Individual in International Law* (1962) and I. Foighel, *Nationalization and Compensation* (1964). With regard to the influence exercised by the towering figure of Alf Ross see Spiermann, ‘A National Lawyer Takes Stock: Professor Ross’ Textbook And Other Forays Into International Law’, 14 *EJIL* (2003) 675.

⁹ Jennings, ‘International Lawyers and the Progressive Development of International Law’, in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996), at 413, 413.

¹⁰ See also Williams, ‘International Law and the Controversy concerning the word Law’, 22 *British Yearbk Int’l L* (1945) 146. A different view was advocated in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983), at 22, n. 1.

plurality of states – may be subject to law at all. Relations between states are located outside the conceived confines of national law for the simple reason that each national legal system is linked to a particular state – the theory of state sovereignty – and, therefore, inapt to govern issues involving other sovereign and independent states. Once an issue has been defined as involving the interests of a plurality of states, for whichever reason, tradition or otherwise, national law no longer recommends itself, even to national lawyers. Whether law is excluded from certain areas of life may be a philosophical conundrum of considerable intellectual depth. Suffice it to say that the positioning of international law on the periphery of law adds an idealistic, if not missionary, flavour to international lawyering, even today. And that, more significantly, lawyers confronted with specific cases generally recognize the need for, as well as the possibility of, law also in situations related to the interests of more than one state. Reconciling sovereignty of a state with the binding character of international law has been agreeable, or at least more agreeable than a Hobbesian vision of the state subjecting other sovereign states to its national legal system in contradiction with their sovereignty (and independence). In this light, bindingness presents itself as the lesser of two evils.

Lawyers know that international law is a legal system separate from national law. But international law is not a legal system in the sense that national law is a legal system. Rather, international law is the only legal discipline treated as a separate legal system,¹¹ as distinct from a branch of national legal systems. It would hardly make sense to refer issues to international law on the ground of national law being inadequate if, in turn, international law were treated as part and parcel of national law. On that view, international law would have dissolved into so many ‘*äußere Staatsrechte*’,¹² or foreign relations laws, of so many states. Nevertheless, the *raison d’être* of international law is a need felt by national lawyers for residual and complementary law governing what is outside the confines of national law. One might say that the accepted inadequacies of national law determine which questions need to be addressed in international law; separateness of international law is achieved by answering these questions independently of national law. Leaving aside treaties, issues affecting the interests of a plurality of states and thus internationalism has been roughly synonymous with inter-state relations, a circumstance that has informed traditional opposition against non-state actors as subjects of international law. Even today international law is necessarily fragmented and not fully conversant with notions of system and order developed with a view to national legal systems. The intellectual remedying of this arguably unhappy

¹¹ In principle, international law could also be seen as a number of uncoordinated legal systems, all of which are separate from national legal systems: ‘the system of international law consists of erratic parts and elements which are differently structured so that one can hardly speak of a homogeneous nature of international law. This system is full of universal, regional or even bilateral systems, subsystems and subsystems of different levels of legal integration’: Hafner, ‘Risks ensuing from Fragmentation of International Law’, in *Report of the International Law Commission: Fifty-second session*, UN Doc. A/55/10 (2000), at 321.

¹² G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (Cambridge edn., 1991), at 281 and 366–371.

state of affairs has achieved some degree of urgency as more and more treaty systems are erected in possible conflict with one another.

International lawyers know that international law is not a panacea for global problems confronting the world at any particular time. There are problems of such magnitude or complexity that no state can solve them unilaterally, in its national legal system. A sensible observer may take the view that collective action is needed in relation to climate change, pandemics, terrorism, arms transfers, etc. Treaties may provide the legal basis for such action, but all too often the fruits of diplomatic effort and negotiations are anything but comforting to avowed internationalists or, for that matter, sensible observers, a disillusion only to be reinforced by general international law. In the absence of treaty undertakings, international law is a law of conflict and coexistence, as opposed to cooperation and agreement. It complements national law by accommodating issues affecting the conflicting interests of a plurality of states in an attempt to achieve coexistence and avoid one state being subjected to another and its national law. By comparison, inability of states to further their own interests at home, in their own legal systems, does not in itself give rise to international law (so long as inability is not due to other states intervening). Admittedly, certain aspects of certain global problems may come within, say, the principle of good neighbourliness, an archetype of general international law (so-called customary international law, or the international law of coexistence), according to which a state is under an obligation not to allow its territory to be used for acts contrary to the rights of other states.¹³ But with this caveat, and however vast and momentous the global problems from the perspective of universality, treaty-making is required for international law to give effect to shared interests that states are unable to further in their respective national legal systems. In its deep structure, international law is neither the constitution of an international community nor a tailor-made instrument of global governance, almost whatever those terms mean.

4 Benthamite Notion of the International

A rather more prosaic term, i.e. 'international', was coined by Jeremy Bentham in the spectacular year 1789 amidst developments that served to ground (national) law in the axiom of all individuals being born equal.¹⁴ Bentham drew distinctions between three classes of legal relationships not confined to a single state:

- transactions between individuals belonging to different states: these were governed by national law;
- transactions between a sovereign of one state and a private member of another state: also governed by national law; and

¹³ *Island of Palmas Case*, 2 RIAA (1928) 829, at 839, *Trail Smelter Case*, 3 RIAA (1941) 1938, at 1965, *Corfu Channel Case* [1949] ICJ Rep 4, at 22, *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, at para. 29, and *Gabcikovo-Nagymaros Project* [1997] ICJ Rep 7, at paras 53, 112, and 140.

¹⁴ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (2nd edn., 1823), at 326. The first edition appeared in 1789.

- mutual transactions between sovereigns: this was the 'branch of jurisprudence which may be properly and exclusively termed international' and for which national law was inapt.

The 20th century witnessed an expansion of internationalism beyond the latter class and a consequent erosion of Bentham's distinctions. This was not solely, or even primarily, by judicial fiat, yet practical application of international law served to underline the consequences and difficulties of expansion. International law was evidently concerned not solely with relations between states, but with issues affecting the interests of states that, to a degree, involved 'subjects' of international law other than states. As the 20th century was drawing to a close, international lawyers would necessarily regard this as trite learning, yet the same lawyers persisted in surprising numbers in conceiving internationalism in a narrow, Benthamite way equivalent to the third class of relations between sovereign states.

Which relations are to be governed by international law depend in part on what it means to be a subject of international law, a roguish notion developed by the *Buchrecht* to exclude individuals and others from internationalism. Existence of rights and obligations must be distinguished from their enforcement, as the International Court of Justice stated in its path-breaking opinion from 1949 about the United Nations: '[w]hat it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims'.¹⁵ Designating each and every person and entity which may incur or invoke responsibility under international law as subjects of international law certainly provides a better understanding of internationalism than does the conceptual straitjacket of the *Buchrecht*. The presence of a supervisory body is not a condition for international legal rights, or the correlative obligations, whether imposed on states or other subjects of international law.¹⁶ Considering this to be a travesty of law, and international lawyers to be 'sorry comforters',¹⁷ and one is paying too much regard to ideals of national legal systems, and too little to international law being an expansion of law beyond the confines of national law. Precisely because residual and complementary, neither cynics nor idealists are likely to be truly enlightened by judging international law against ideals of national legal systems (nor against possibly shared notions of system or order).

¹⁵ *Reparation for Injuries suffered in the Service of the United Nations* [1949] ICJ Rep 174, at 179. It was a definition relied upon in preparing the ICSID Convention: see ICSID, *History of the ICSID Convention – Documents Concerning the Origin and the Formulation of the Convention* (1968), ii, at 738 and 971.

¹⁶ Legal personality ties up with secondary rules on responsibility, how it is incurred (obligations) and invoked (rights), as opposed to 'tertiary' rules on dispute settlement: see, e.g., *Amoco International Finance Corporation v. Iran*, 83 Int'l LR (1987) 501, at para. 103 and *Fisheries Jurisdiction (Spain v. Canada)* [1998] ICJ Rep 432, at para. 56 and also, as regards Art. 2 of the Articles on Responsibility of States for Internationally Wrongful Acts, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 84.

¹⁷ Kant, "Zum ewigen Frieden: Ein philosophischer Entwurf", in I. Kant, *Political Writings* (Cambridge edn., 1991), at 93, 103 ('leidige Tröster').

The discussion that follows consists of six *avant-garde* examples of delimiting the outer limits of internationalism in law, all of which involve judicial contributions stemming from the resolution of specific disputes in the 20th century. The discussion will serve to underline the words of Justice Robert H. Jackson, United States prosecutor at Nuremberg, that '[c]ourts try cases, but cases also try courts'.¹⁸

5 Private International Law

The first example is the most notable retreat of internationalism in the 20th century, or perhaps just before. This is the example of private international law, or the conflict of laws; an area of law concerned with cases between private parties containing foreign or trans-border elements. It is widely assumed that in the event of foreign elements being present the proper law to be applied to the facts of a case might ultimately be that of a national legal system other than that of the forum state. Lawyers of today know that referral of cases to a national legal system, the choice of law, is governed by the national law of the forum (the *lex fori*), as opposed to international law. But it is an open question whether we understand why. In the very least, understanding would take a traditional, Benthamite conception of internationalism, one that is narrow but also capable of assuring separateness.

Historically, private international law, and in particular choice of law, went hand in hand with jurisdiction and delimitation of the powers of a state *vis-à-vis* other states. Jurisdiction forms a classical topic of international law, also an archetype of general international law (the international law of coexistence): To what extent should a state tolerate that other states extend their national law, possibly accompanied by adjudicative and enforcement mechanisms, to matters with which the first-mentioned state is concerned? May a state claim exclusive jurisdiction, at least *prima facie*, over matters within its territory? Problems of choice of law emerge when translating the question of competence into a question of substantive law: To what extent should a state tolerate that courts of other states apply local law to matters with which the first-mentioned state is concerned? May a state insist that such matters are resolved in accordance with its national law even in foreign courts?

Still in the 19th century, choice of law was treated together with jurisdiction as issues belonging to what would today be termed public international law. Von Savigny referred to 'an international common law of nations [*einer völkerrechtlichen Gemeinschaft*] having intercourse with one another',¹⁹ but various labels and categorizations were in play reflecting in part the national legal training of the contributors. In Ernst Rabel's words, '[t]hese authors wrote on conflicts law in a common atmosphere, among brethren of the same creed, envisaging its application in all countries'.²⁰

¹⁸ Jackson, 'Address', 39 *Proceedings of the Annual Meeting of the American Society of International Law* (1945) 10, at 15.

¹⁹ F.C. von Savigny, *A Treatise on the Conflict of Laws* (trans., 2nd edn., 1869), at 70.

²⁰ E. Rabel, *The Conflict of Laws: A Comparative Study* (2nd edn. by U. Drobnig, 1958), i, at 8.

The 'internationalist' school according to which private international law was part and parcel of public international law still claimed many followers in early 20th century theory. Practice was different. In the late 19th century, it was generally found to be difficult to reconcile the theoretical notion of private international law as part of international law proper with the practical divergences in case law and statutory regulation adopted in different national legal systems.²¹ One could evidently say the same about jurisdiction, as demonstrated by the division of the Permanent Court of International Justice in *The Lotus*, decided in 1927, and the conflicting readings ever since of the less than clear *motifs*.²² So why did internationalism retreat from private international law while still covering jurisdiction (albeit the degree of coverage has been subject to debate)?

In this respect, it was of some importance that questions of jurisdiction could not always be translated into questions of choice of law. Courts and other state organs were not normally expected to choose another state's public law, and – outside the vaguely defined category of public law – foreign law could be ruled out on the ground of being contrary to the equally open-ended category of public policy (*ordre public*) of the forum. In other words, with public law or *ordre public* surfacing in a case, choice of law became less of an alternative to jurisdiction. And it was exactly these cases in which separation of state powers was found to be imminent because most closely related to state interests. Conversely, those other cases in which jurisdiction could be translated into choice of law were, in a sense, on the periphery of internationalism. And from the periphery it was possible, in the light of divergences and obscurities, to envisage a retreat of internationalism to the effect that private international law came to be seen as a discipline under national law, as opposed to international law. Thus, in 1929, the Permanent Court held:

Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several states and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between states. But apart from this, it has to be considered that these rules form part of municipal law.²³

Lawyers would never have come round to private international law in the first place had it not been for its historical association with internationalism and the universal acceptance prior to its retreat from internationalism of positive rules of choice of law. Graveson asked his students 'to recognise that much of private international law has

²¹ Also, diplomatic interventions by States in this field were lacking: see Aubry, 'De la notion de territorialité en droit international privé', 28 *Clunet* (1901) 643, at 651.

²² *Case of the SS Lotus*, PCIJ Series A No. 10 (1927); see O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2005), at 247–263.

²³ *Case concerning the Payment of Various Serbian Loans issued in France*, PCIJ Series A No. 20 (1929), at 41.

its parentage and origin in public international law and that, for better or worse, it cannot escape the consequences of that common origin'.²⁴ Otherwise, one will not be able to understand private international law. In essence, private international law remains 'a national law with an international method'.²⁵ Basically trivial questions of interpretation of choice of law rules have been treated as universal problems transcending national legal systems under names such as *renvoi*, categorization and the incidental question. Choice of law is impeded by a sense of internationalism, and in considering whether to exercise self-restraint interests of other states as well as their national legal systems are not automatically neglected.

In 1899, Franz Kahn asserted that every state is under a duty to have rules of private international law and that it would be a breach of public international law if the *lex fori* were to be applied in all circumstances.²⁶ This was a possible solution to the problem of squaring the circle, providing private international law with a basis in public international law without challenging diversity. But it only paid lip-service to international law. The mainstream rationale provided in the 20th century was rather simpler: As private international law is concerned with relations between individuals, it is necessarily different from (public) international law and thus belonging to national law.²⁷ It goes without saying that one would only define private international law in terms of individual interests on the assumption that, as an issue, it no longer affects the interests of a plurality of states. Nevertheless, it is noteworthy that, in this context, internationalism was cast in a Benthamite light, being restricted to relations between states. That being changed and private international law might serve as a vehicle for furthering internationalism. In particular, partly due to harmonization by way of treaties, particularly in Europe, a return to internationalism can perhaps not be ruled out.

6 Individual Treaty Rights in Embryo

The second example is taken from the inter-war period and raises the question whether a richly elaborated system of treaty law could but provide embryonically for individual rights and open internationalism to relations involving non-state actors.

²⁴ Graveson, 'Comparative Aspects of the General Principles of Private International Law', 109 *Recueil des Cours* (1963) 7, at 13.

²⁵ Kahn, 'Über Inhalt, Natur und Methode des internationalen Privatrechts', 40 *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts* (1899) 1, at 87 as quoted in J.H. Beale, *A Treatise on the Conflict of Laws* (1935), iii, at 1962 (mistakenly referring to 18). See also D. Anzilotti, *Studi critici di diritto internazionale privato* (1898), at 117–130 and D. Anzilotti, *Il diritto internazionale nei giudizi interni* (1905), at 122–158.

²⁶ F. Kahn, *Abhandlungen zum internationalen Privatrecht* (1928), i, at 286–287, referring to the resolution reproduced in 1 *Annuaire de l'Institut de droit international* (1877) at 123–124.

²⁷ E.g., de La Pradelle, 'De la délimitation du Droit International Public et du Droit International Privé', 1 *Nouvelle revue de droit international privé* (1934) 9, at 19, Ago, 'Règles générales des conflits des lois', 58 *Recueil des Cours* (1936) 247, at 278–294 and 301, H. Batiffol and P. Lagarde, *Traité de droit international privé* (8th edn., 1993), i, at 12–13 and J.G. Collier, *Conflict of Laws* (3rd edn., 2001), at 5.

End was brought to the First World War by multilateral treaties remarkable in their range. The League of Nations was established and became the employer of numerous civil servants who had rights and obligations under the relevant treaties and secondary instruments.²⁸ The map of Europe was redrawn to reflect, in part, notions of self-determination, in turn combined with schemes for the protection of minorities to which was added just a touch of supervisory machinery. In addition to the claims for reparations to be paid to victorious governments, mixed arbitral tribunals were established to hear claims brought by private persons against Germany and other defeated powers. Importantly, individuals could institute proceedings without the necessity of first obtaining the representation of their own government, as had been required in the context of most prior claims commissions.²⁹

The Permanent Court of International Justice touched upon the subject of individual rights in two advisory opinions concerning the Polish Minorities Treaty, which Article 93 of the Versailles Treaty had made a condition for recognizing Poland as an independent state within an enlarged territory. According to the Permanent Court, '[t]he main object of the Minorities Treaty is to assure respect for the rights of Minorities and to prevent discrimination against them by any act whatsoever of the Polish state'.³⁰ Also, specific provisions on acquisition of nationality were, naturally, 'of supreme importance to persons of non-Polish origin who are entitled to avail themselves of the provisions in question in order to become Polish nationals'.³¹

Passing mention should be made of Danube river commissions that, in the words of Alf Ross, exercised a 'common supreme authority' directly over individuals. On the strength of the dogma that individuals could not be subjects of international law, whatever governments had laid down in treaty, Ross and others referred to the Commission as 'the organ of a special "River state"'.³² In contrast, when in 1927 advising on the competence of the Commission, the Permanent Court indicated that personality in international law was not necessarily confined to states and state-like entities:

When in one and the same area there are two independent authorities, the only way in which it is possible to differentiate between their respective jurisdictions is by defining the functions allotted to them. As the European Commission is not a State, but an international institution

²⁸ For discussion see, among others, M.B. Akehurst, *The Law governing Employment in International Organizations* (1967), at 249–263 and C.F. Amerasinghe, *The Law of the International Civil Service* (2nd edn., 1994), at 3–25.

²⁹ This is not to imply that the Mixed Arbitral Tribunals applied international law only, which they did not. The appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal decided upon by the Permanent Court turned on Hungarian law, including legal personality under Hungarian Law; thus, the oft-quoted dictum that 'it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself' had no direct bearing on international law, cf. *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University v. The State of Czechoslovakia)*, PCIJ Series A/B No. 61 (1933), at 231.

³⁰ *Questions relating to Settlers of German Origin in Poland*, PCIJ Series B No. 6 (1923), at 25.

³¹ *Questions concerning the Acquisition of Polish Nationality*, PCIJ Series B No. 7 (1923), at 16.

³² A. Ross, *A Textbook in International Law* (1947), at 30 and also 22, 176, and 225, referring to R. Knubben, *Die Subjekte des Völkerrechts* (1928), at 415–416. The river state was evidently a fiction, but not a fiction that could claim statehood under international law.

with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.³³

A further example was provided by a proceeding brought by Belgium under the Optional Clause following China's denunciation of a treaty of friendship, commerce, and navigation of 2 November 1865. For the first time, the Permanent Court indicated provisional measures, and those measures were directed at securing individual rights of Belgian nationals.³⁴ The background of the proceeding was coloured by China's policy to recover sovereign rights and liberate itself from the yoke of unequal treaties. Ultimately, an agreed settlement was achieved.

Opposition against individual rights was felt only in 1928 as it formed the very essence of a dispute brought before the Permanent Court. The dispute was between Poland and Danzig, the Free City established pursuant to Article 100 of the Versailles Treaty, and concerned a so-called '*Beamtenabkommen*'. This was a treaty between Poland and Danzig for the regulation of conditions of work for officials employed by the Polish Railways Administration in Danzig. The particular question before the Permanent Court was whether the treaty could be relied upon before Danzig courts. Presided over at the time by Dionisio Anzilotti, the distinguished professor and judge, the Permanent Court pronounced that a treaty 'cannot, as such, create direct rights and obligations for private individuals'.³⁵ But actually the Permanent Court accepted individual personality through the back door thanks to a two-fold argument: that 'it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts'; and that before an international tribunal a state may not rely on its 'non-fulfilment of an obligation imposed upon her by an international engagement'.³⁶ The Court concluded that the 'wording and general tenor of the *Beamtenabkommen* show that its provisions are directly applicable as between the officials and the Administration'.³⁷

Also in 1928, in a case involving provisions on minority protection contained in the 1922 German–Polish Convention concerning Upper Silesia, the Permanent Court pronounced that a person belonging to a minority 'is entitled to claim the advantages arising under the provisions which the Treaty comprises with regard to the protection of minorities'.³⁸ The same year, a Polish national brought an action against Poland before the Arbitral Tribunal of Upper Silesia, which had been established in 1922

³³ *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, PCIJ Series A No. 14 (1927), at 64; see also the description of powers and practices: *ibid.*, at 42–46 and 48–53.

³⁴ *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium*, PCIJ Series A No. 8 (1927), at 6–8.

³⁵ *Jurisdiction of the Courts of Danzig*, PCIJ Series B No. 15 (1928), at 18.

³⁶ *Ibid.*, at 18 and 26–27 and see D. Anzilotti, *Cours de droit international* (1929), at 407–408.

³⁷ *Jurisdiction of the Courts of Danzig*, *supra* note 35, at 18.

³⁸ *Rights of Minorities in Upper Silesia (Minority Schools)*, PCIJ Series A No. 15 (1928), at 32.

under the same Convention. The Convention provided that the Tribunal was competent to adjudicate on questions of indemnity in respect of a '*plainte de l'ayant droit*' (a justified claim). The Polish Government took objection to the Tribunal having jurisdiction. It relied on what was dubbed a general principle of international law, namely that an individual could not invoke an international authority against his own state, and also on '*der allgemeinen Theorie*' (the general theory) that individuals could not be subjects of international law.³⁹ The Tribunal rejected this contention. 'The Convention', it held, 'conferred in unequivocal terms jurisdiction upon the Tribunal irrespective of the nationality of the claimants, and, the terms of the Convention being clear, it was unnecessary to add to it a limitation which did not appear from its wording.'⁴⁰ Accordingly, the Polish national had a right of action before the Tribunal where the national could invoke his rights pursuant to the Upper Silesia Convention.⁴¹

The hints and suggestions contained in these and other decisions concerning individual rights were overwhelmed by the tide of *Buchrecht* against drawing consequences of treaty practice which engulfed international lawyers at the time. However, with the establishment of the first real permanent court of justice at international level, a course had been set steering away from the *Buchrecht* and ultimately making it less uncomplicated to argue that it is for legal dogma rather than the contracting parties to decide on the subjects under a particular instrument, their rights, and obligations. Because in the inter-war period internationalism was struggling with accommodating individuals as subjects of international law, further implications of this phenomenon were hardly explored.

7 The Supreme International Crime

The third example involves the International Military Tribunal at Nuremberg, which in the aftermath of the Second World War set an unmistakable precedent for individual responsibility in international law.⁴² The Tribunal had before it leading members of the Nazi regime. Twelve defendants were sentenced to death, three to life imprisonment, and four to prison terms ranging from 10 to 20 years.⁴³ In the years that followed, the judgment induced military tribunals set up by, in particular, the United States to make a series of remarkable statements: '[i]nternational law, as such, binds every citizen just as does ordinary municipal law'; '[t]he laws and customs of war are

³⁹ *Steiner and Gross v. Poland*, 1 Sammlung von Entscheidungen des Schiedsgerichtes für Oberschlesien (1928), at 10.

⁴⁰ *Ibid.*, at 22 as translated in 4 *Annual Digest of Public International Law Cases* 291, at 292. See also G. Kaackenbeeck, *The International Experiment of Upper Silesia* (1942), at 49–54.

⁴¹ *Steiner and Gross v. Poland*, *supra* note 39, at 32.

⁴² Art. 227 of the Versailles Treaty had provided for the Allied and Associated Powers indicting the former German Kaiser for 'a supreme offence against international morality and the sanctity of treaties', an opaque phrase due to American opposition and a compromise leaving no real prospect for a trial. Art. 228 and similar provisions in other peace treaties were to the effect that 'persons accused of having committed acts in violation of the laws and customs of law' could be brought before military tribunals.

⁴³ Three of the 22 defendants appearing in court were acquitted.

binding no less upon private individuals than upon government officials and military personnel'; '[i]t is a fallacy of no small proportion that international obligations can apply only to the abstract legal entities called states'.⁴⁴

During the Second World War, in the case of *Ex parte Quirin*, the United States Supreme Court had stated that '[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals'.⁴⁵ Likewise, in 1945 a British Military Court remarked: '[f]or many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention',⁴⁶ that is the regulations appended to the Hague Convention IV Respecting the Laws and Customs of War on Land. These and other pronouncements had emerged within national legal systems and, in part, reflected the degree of openness of the particular system towards international law.

In 1946, an international military tribunal was an experiment, if not an improvisation. It was in need of justifying the application of international law to individuals with criminal responsibility in result. The International Military Tribunal did not merely refer to the London Charter by which it had been established and the definitions in Article 6 of crimes against the peace, crimes against humanity, and war crimes.⁴⁷ In addition, there were arguments assuming that the Tribunal occupied a position analogous to that of national courts. Thus, the Tribunal explained that 'the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilized world'.⁴⁸ Also, the Tribunal made reference to what today might be termed the universal jurisdiction of 'any nation' in respect of these crimes. What is more, the Tribunal was careful to demonstrate that '[t]he Charter is not an arbitrary exercise of power on the part of the victorious nations, but ... the expression of international law existing at the time of its creation'.⁴⁹ There was added: 'and to that extent is itself a contribution to international law'.

Addressing instruments such as the regulations appended to Hague Convention IV and the Kellogg–Briand Pact of 1928, the Tribunal pronounced that '[i]n interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters

⁴⁴ See, respectively, *US v. Flick and Others*, 9 War Crimes Reports (1947) 1, at 18, *US v. Krupp and Others*, 10 War Crimes Reports (1948) 69, at 150 and *US v. Ohlendorf and Others*, 15 *Int'l LR* (1948) 656, at 659.

⁴⁵ *Ex Parte Quirin*, 317 US 1 (1942), at 27–28.

⁴⁶ *UK v. Kramer and Others*, 2 War Crimes Reports (1945) 1, at 149 *et seq.*

⁴⁷ Art. 6 was found to be binding upon the Tribunal: see *US, France, UK, and USSR v. Göring and Others*, 1 *Trial of the Major War Criminals* (1946) 411, at 414, 459, 461, and 497.

⁴⁸ *Ibid.*, at 461.

⁴⁹ *Ibid.*

of procedure'.⁵⁰ In short, individual responsibility was a question of interpretation, and the absence of express language to this effect in relevant instruments was not in itself decisive. The Tribunal stressed that treaty law was supplemented by general international law, and reference was made to what would today be termed 'soft' law instruments as well as Articles 227 and 228 of the Versailles Treaty.⁵¹ Also, referring to national case law, the Tribunal observed that '[t]hat international law imposes duties and liabilities upon individuals as well as upon states has long been recognised'.⁵² The weight of these arguments may be subject to doubt. But then this powerful pronouncement followed: '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.⁵³ The words lose some of their clarity upon reflection, yet the nub of the argument seems straightforward: from the perspective of international law, total war followed by a state's total surrender left a choice between ineffectiveness of the law of war and individual responsibility. Against this background, the contentions of the defence could be summarized as if almost nonsensical:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State.⁵⁴

In short, the Tribunal had before it a situation in which internationalism had to be extended to individuals. Leaving aside crimes against humanity imposing obligations *vis-à-vis* the state's own subjects (which by the Tribunal were limited in time to the war beginning in 1939),⁵⁵ the Tribunal's reasoning did not purport to alter the content of primary rules on the legality and conduct of war. But at the secondary level of responsibility, the possible subjects of obligations under these rules were broadened to include individuals, in addition to the belligerents in the names of which individuals had been warring.⁵⁶ As for the defence of *nullum crimen sine lege, nulla poena sine lege*, it had as part of its basis the apparent acknowledgement of individual criminal responsibility. The Tribunal presented the principle as 'not a limitation of sovereignty,

⁵⁰ *Ibid.*, at 463–464.

⁵¹ *Ibid.*, at 464–465, and see *supra* note 42.

⁵² *Ibid.*, at 465. At a later point, it was added: '[t]hat violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument': *ibid.*, at 497.

⁵³ *Ibid.*, at 466.

⁵⁴ *Ibid.*, at 465.

⁵⁵ The notion of crimes against humanity brings to mind the Martens clause dating back to the Hague Peace Conferences of 1899 and 1907: '[u]ntil a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience'. In 1949, the ICJ referred to 'elementary considerations of humanity': *Corfu Channel Case* [1949] ICJ Rep 4, at 22.

⁵⁶ Cf. H. Kelsen, *Peace through Law* (1944), at 82 and 97.

but ... in general a principle of justice' (as opposed to law, one may ask),⁵⁷ and it was quickly disposed of:

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.⁵⁸

Despite the adoption of the Nuremberg principles in the General Assembly of the United Nations,⁵⁹ there was a widespread feeling that the Nuremberg trial, together with the Tokyo trial concluded two years later, formed a major but also unique departure from Benthamite internationalism insofar as individuals were for the first and only time tried and punished by an international tribunal on the basis of international law. The International Military Tribunal had found that in order to be effective international law had to be opened to individuals, yet the very notion of individuals being subjects of international law remained controversial. Challenges to the precedent by reference to victor's justice and retrospective law died down only at the end of the 20th century, with the Security Council establishing two *ad hoc* criminal tribunals and the adoption of the Statute of the International Criminal Court, now in operation at The Hague.

International criminal law has to isolate the individual villain from his or her patron, the state. It has been for other courts to conceive relations between state and individual once individuals have been accepted as being subjects of international law.

8 Collective Enforcement and Human Rights

In 1948, the atrocities committed by the Nazi regime before and during the Second World War prompted further responses in the General Assembly of the United Nations of permanent significance. The most barbarous atrocities having been conceptualized as 'genocide', a neologism, the Genocide Convention confirmed that genocide was a crime under international law consisting in acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.⁶⁰ The Genocide Convention was applicable in time of peace as well as in time of war, and to inter-state and civil wars alike.⁶¹ Having been adopted for 'a purely humanitarian and civilizing purpose' (and the underlying principles being seen as declaratory of existing law readily agreed upon as civilization aspired to be saved from the scourge of war),⁶² the International Court of Justice later took the view that 'the contracting parties do not

⁵⁷ *US, France, UK, and USSR v. Göring and Others*, *supra* note 47, at 462.

⁵⁸ *Ibid.*, at 462.

⁵⁹ See resolutions 95(I) and 177(II).

⁶⁰ Resolution 260(III).

⁶¹ See also *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1996] ICJ Rep 595, at para. 31.

⁶² See also resolution 96(I), according to which genocide 'is contrary to moral law and to the spirit and aims of the United Nations', 'a matter of international concern', and 'a crime under international law which the civilized world condemns'.

have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention'.⁶³ Also in 1948, the General Assembly adopted the Universal Declaration of Human Rights in an important political step, not without legal implications, to achieve a common understanding of rights to be protected in order to avoid, ultimately, genocide and other crimes against humanity.⁶⁴ Numerous human rights treaties were adopted in the decades that followed.

My fourth example is the most prominent human rights system, the European Convention on Human Rights adopted in 1950 under the auspices of the Council of Europe as the contracting parties took 'the first steps for the collective enforcement of certain of the rights in the Universal Declaration'. A crucial part of this enforcement is the European Court of Human Rights, an immensely successful institution that has fleshed out Convention rights and thereby facilitated effective implementation, with individuals as holders of rights. However, that is not to say that the activities of yet another court that found itself in an unprecedented situation have been uncomplicated. Early on, the Court stated: '[g]iven that it [i.e., the Convention] is a law-making treaty, it is ... necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.⁶⁵ In other words, the Court seemed to take a principle of restrictive interpretation as its point of departure, and the question is how far the Court actually departed from it. Although referred to in part of the *Buchrecht* and cultivated by national lawyers, a principle of restrictive treaty interpretation had not found favour with other international courts and tribunals. The question was whether similar ideas would re-emerge by forcing individuals into vertical relationships with states as their sovereigns proper.

It is common for institutions operating under human rights instruments to make observations such as the following: '[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting states. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"'.⁶⁶ As individuals may invoke responsibility and bring claims of their own before the European Court of Human Rights, the Court also found that in 'interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms'.⁶⁷ Ultimately,

⁶³ *Reservations to the Convention on the Prevention of the Crime of Genocide* [1951] ICJ Rep 15, at 23.

⁶⁴ Resolution 217(III).

⁶⁵ *Wemhoff v. Germany*, ECHR Series A No. 7 (1968), at para. 8.

⁶⁶ *Ireland v. United Kingdom*, ECHR Series A No. 25 (1978), at para. 239. Similarly, e.g., from the Inter-American Court of Human Rights, *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83, 70 *Int'l LR* (1983) 449, at para. 50 and, from the UN Human Rights Committee, General Comment No. 24, 107 *Int'l LR* (1994) 65, at 69–70.

⁶⁷ *Soering v. United Kingdom*, ECHR Series A No. 161 (1989), at para. 87.

involvement of individuals led the Court to the language of constitutionalism,⁶⁸ as well as supranationalism.⁶⁹ No doubt, lawyers have been taking advice from national law in conceptualizing the human rights movement.

Most provisions ensuring rights in the European Convention of Human Rights are open-textured. In deciding specific cases, the Court resorted to a principle of proportionality; indeed, at an early point the Court stated that '[t]he Convention ... implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter'.⁷⁰ But, of course, proportionality as such is a balance without weights. In fleshing out Convention rights, the Court gave particular weight to comparative analysis of national law in the member states of the Council of Europe, a tendency facilitated by its composition, as well as international instruments of possible relevance. In short, the responding state was to be judged by its peers.

The Court embraced the principle of dynamic interpretation, interpreting the Convention 'in the light of present-day conditions' in the member states collectively.⁷¹ Also in the light of the relevance of comparative analysis, the Court had to emphasize that terms used in defining Convention rights had to be seen 'within the meaning of the Convention' and to be given a meaning autonomous of particular national legal systems; the Court was guided by 'the common denominator of the respective legislation of the various contracting states'.⁷² The Court also subscribed to the principle of effective interpretation, eventually in the form that '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.⁷³ This is a principle that could have led to a course less dependent on comparative analyses, but it did not quite turn out that way.⁷⁴

In applying the Convention to specific cases, it came to be of some significance that, from early on, the Court defined its own task as one of reviewing the decision of the national authorities rather than itself subsuming the facts of the case under provisions of the Convention. The first case in point, *Wemhoff*, raised the question whether the length of detention before trial was 'reasonable' as required under Article 5(3) of the Convention. In previous cases, the Commission of Human Rights, the original supervisory body

⁶⁸ *Loizidou v. Turkey* (Preliminary Objections), ECHR Series A No. 310 (1995), at para. 75 and App. No 45036/98, *Bosphorus v. Ireland* (30 June 2005), at para 156 (the Convention serving as 'a constitutional instrument of European public order').

⁶⁹ See App. Nos 46827/99 and 46951/99, *Mamatkulov and Abdurasulovic v. Turkey* (6 Feb. 2003), at para. 106. Supranationalism brings the European Communities to mind: see *Bosphorus v. Ireland*, *supra* note 68, at para 150, referring to Case 6/64, *Costa v. ENEL*, [1964] ECR 585, which will be discussed in the following section.

⁷⁰ *Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits), ECHR Series A No. 6 (1968), at 32.

⁷¹ See *Tyrer v. United Kingdom*, ECHR Series A No. 26 (1978), at para. 31 and *Marckx v. Belgium*, ECHR Series A No. 31 (1979), at para. 41.

⁷² *Engel v. The Netherlands*, ECHR Series A No. 22 (1976), at paras. 81 and 82, respectively.

⁷³ *Airey v. Ireland*, ECHR Series A No. 32 (1979), at para. 24

⁷⁴ Cf. *ibid.*, at para. 26.

of first instance, had defined a set of seven criteria on the basis of which to assess the length of detention. The Court took a different position:

The Court does not feel able to adopt this method. Before being referred to the organs set up under the Convention to ensure the observance of the engagements undertaken therein by the High Contracting Parties, cases of alleged violation of Article 5 (3) must have been the subject of domestic remedies and therefore of reasoned decisions by national judicial authorities. It is for them to mention the circumstances which led them, in the general interest, to consider it necessary to detain a person suspected of an offence but not convicted. Likewise, such a person must, when exercising his remedies, have invoked the reasons which tend to refute the conclusions drawn by the authorities from the facts established by them, as well as other circumstances which told in favour of his release.

It is in the light of these pointers that the Court must judge whether the reasons given by the national authorities to justify continued detention are relevant and sufficient to show that detention was not unreasonably prolonged and contrary to Article 5 (3) of the Convention.⁷⁵

Responding states only having to provide 'relevant and sufficient' reasons in what resembled a doctrine of misuse of powers, the approach was equal to awarding states a 'margin of appreciation', as the Court would put it.⁷⁶ This margin is supposedly different from the notion of good faith, or at the very least a radical version of this rhetorical device invoked by heretics doubtful of the normative character of treaties and referred to, controversially, in Articles 26 and 31 of the Vienna Convention on the Law of Treaties.⁷⁷ Power to fill gaps in open texture is not a privilege granted to subjects of international law on a general basis. The articulation of a margin of appreciation could hardly be anything but a witness to state authorities, the supposed subjects, being seen as the more appropriate master of individuals. Admittedly, the Court's approach also stressed the role of national courts in applying the Convention prior to local remedies having been exhausted. But the margin of appreciation was more than a symbolic gesture intended to bring national judges round, nor simply an expression of inter-institutional comity.⁷⁸ Being a margin indeed, this doctrine has epitomized vertical legal relationships and regularly, though erratically, served to lessen the burdens imposed on the state precisely by stressing the sovereignty of the latter and not emancipating the individual fully from its curb. In Waldock's phrase, '[t]he doctrine of the "margin of appreciation" ... is one of the more important safeguards developed

⁷⁵ *Wemhoff v. Germany*, *supra* note 65, at para. 12. See also, e.g., *Belgian Linguistics Case*, *supra* note 70, at 24–25; *Handyside v. United Kingdom*, ECHR Series A No. 24 (1976), at paras. 58 and 50 and *Sunday Times v. United Kingdom* (No. 1), ECHR Series A No. 30 (1979), at para. 59.

⁷⁶ *De Wilde, Ooms and Versyp v. Belgium*, ECHR Series A No. 12 (1971), at para. 93.

⁷⁷ As for the notion of good faith, the International Law Commission made observations to the effect that 'the obligation must not be evaded by a merely literal application of the clauses' and that 'a party must abstain from acts calculated to frustrate the object and purpose of the treaty': see [1966] II *Yearbk Int'l LC* 211 and 221. Repeated invocations of the *pacta sunt servanda* principle and the notion of good faith bear witness to the conception of the State as an international law subject losing ground; systems secure in their normative character do not need to repeat themselves.

⁷⁸ Cf. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law', 16 *EJIL* (2005) 907, at 921.

by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy'.⁷⁹ It might be difficult today to imagine human rights jurisprudence, in Europe and elsewhere, without the doctrine of a margin of appreciation. It facilitates the functioning of overburdened systems, and it is familiar to many national legal systems, not least in areas of constitutional and administrative law. On the other hand, bearing in mind that states come to an international court as, in the first place, subjects of international law – as opposed to national sovereigns – it is not self-evident that an international court less impressed by state sovereignty would have ended up with the same general doctrine justified by the nature of the supervisory system, as distinct from the interpretation of specific primary rules.

More recently, the situation of the European Court of Human Rights has changed in certain respects, partly due to its ever expanding list of pending cases. Also, it is important to stress that many cases have seen the Court not only reviewing reasons given by national authorities but subsuming relevant facts directly under provisions of the Convention (nor is the distinction between review and subsumption necessarily clear cut). Nevertheless, a focus on mere review prevailed in many cases leaving a lasting imprint on case law. In retrospect, the decisions of the European Court leave one with the impression that the involvement of individuals influenced legal reasoning, ultimately to the detriment of individual claimants in that the obligations of states undertaken under the Convention were supervised less stringently. Individuals were not seen as being engaged in horizontal legal relationships under the Convention *vis-à-vis* states.

9 A New Legal Order

The Benthamite notion that international law is confined to relations between states governed on a basis of strict reciprocity has troubled the human rights movement, to a certain extent. But it was for the European Court of Justice to take the notion to the extreme. This is the fifth example.⁸⁰

The three European communities, with the European Economic Community as the most prominent, were established by the 1951 Treaty of Paris and the 1958 Treaties of Rome. The communities had a remarkably wide range of activities and powers and established a treaty-based order that was self-contained to a higher degree than, for example, the human rights movement. States found it necessary before joining the communities to provide constitutional authority for 'limitation' or 'transfer' of sovereign powers. As an integral part of the system, the European Court of Justice generated another bulky collection of case law internationally, just like the European Court

⁷⁹ Waldock, 'The Effectiveness of the System set up by the European Convention on Human Rights', 1 *Human Rights LJ* (1980) 1, at 9.

⁸⁰ The following is based in part on Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order', 10 *EJIL* (1999) 763.

of Human Rights. However, almost the first word in this developing case law came to be a claim that it formed a new legal order different from international law. Again, the reason was the involvement of the individual. In 1991, the European Court of Justice compared the draft European Economic Area agreement with the EFTA states to the Treaty establishing the European Economic Community. The Court was led to this significant conclusion:

The European Economic Area is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up.

In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, in particular, the judgment in Case 26/62 *Van Gend en Loos* [1963] ECR 1). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.⁸¹

This pronouncement echoed some of the most celebrated moments in the Court's own making of the Community legal order. As for 'the new legal order', the phrase had been coined in 1963 in the first judgment on direct effect of treaty provisions on individuals. 'The EEC Treaty', the Court had noted, was 'more than an agreement which merely creates mutual obligations between the contracting states.'⁸² In a famous statement, the Court had declared that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'. Direct effect made the Community legal order 'new' because, in the Court's view, individuals were not subjects of international law and, accordingly, international law did not have direct effect. Because the EEC Treaty, in addition to the Member States, counted individuals as its subjects, the legal order set up by the Treaty was 'a new legal order of international law'. The phraseology of a 'new legal order' endowed the study of Community law with self-confidence. Thirty years after the decision in *Van Gend en Loos*, Judge G. Federico Mancini wrote, 'But if the European Community still exists 50 or 100 years from now, historians will look back on *Van Gend en Loos* as the unique judicial contribution to the making of Europe.'⁸³

The other 'essential' characteristic mentioned by the European Court in 1991, in addition to direct effect, was 'primacy over the law of the Member States'. This principle was articulated by the Court in what was essentially its second judgment on direct effect, *Costa v. ENEL* from 1964. On this occasion, it was stated that the Community

⁸¹ Opinion 1/91, *Draft European Economic Area Agreement* [1991] ECR I-6079, at paras 20–21.

⁸² Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, at 12.

⁸³ Mancini and Keeling, 'Democracy and the European Court of Justice', 57 *MLR* (1994) 175, at 183.

had ‘real powers stemming from a limitation of sovereignty or a transfer of powers from the states’ because the Community legal order was ‘a body of law which binds both their nationals and themselves’.⁸⁴ For this reason, the Court juxtaposed the EEC Treaty with international law: ‘[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply’.⁸⁵ The Community legal order was no longer, as in *Van Gend en Loos*, ‘a new legal order of international law’. It was now ‘an integral part of the legal systems of the Member States’, a new legal order of national law, as it were. The Benthamite rationale was as straightforward as it was antiquated: because of its direct effect, Community law was not merely applicable to relations between states, and consequently the Community legal order was part of national law, as opposed to international law. That being the case, it was only logical that the Court should take seriously the Italian Government’s national law argument that the Italian act of ratification had been overturned by a new Italian act, and therefore *lex posterior derogat priori*.⁸⁶ This argument would have carried no weight in international law. But the Court saw the Community legal order as belonging to the very system that bred that argument, namely Italian national law. While the ‘new legal order’ phraseology had convinced Community lawyers that international law had been left behind, the principle of precedence equipped them with a new understanding of the Community legal order: Community lawyers began to talk about constitutionalism, with the EEC Treaty being a constitution.⁸⁷ This was so even though the ultimate basis for precedence was trivial, as was made clear in a passage in which the Court was hardly carried away by its own eloquence:

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.⁸⁸

As a matter of principle, precedence stands as a poor translation of *pacta sunt servanda*, yet the exceptional gesture towards the state, its sovereignty, and national law may have more than one explanation. Integration was a rather crude way of expressing the view that expansion of internationalism would change the international into the national. *Van Gend en Loos* and *Costa v. ENEL* were preliminary rulings requested by national courts on Community law pursuant to Article 177 of the EEC Treaty

⁸⁴ Case 6/64, *Costa v. ENEL* [1964] ECR 585, at 593.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* This argument had been fuelled by the judgment of the Italian Constitutional Court in *Costa v. Ente Nazionale per l’Energia Elettrica* [1964] CMLR 425, at 436.

⁸⁷ The qualification of the EEC Treaty as a ‘constitutional charter’ originated as a most explicit corroboration of the Court’s part of the rule of law: Case 294/83, *Les Verts v. Parliament* [1986] ECR 1339, at para. 23. Cf. Case E-2/97, *Mag Instrument Inc. v. California Trading Company* [1997] EFTA Court Rep 127, at para. 25 and Case E-9/97, *Sveinbjörnsdóttir v. Iceland* [1998] EFTA Court Rep 95, at para. 59.

⁸⁸ Case 6/64, *supra* note 84, at 593–594.

(Article 234 EC Treaty).⁸⁹ Framing the Court's decisions in a language familiar to national lawyers might add to the trenchancy of Community law. A national court envisages not only the Treaty but also national law and thus potential conflicts between treaty rules and national law, making a principle of precedence more appealing than simply *pacta sunt servanda*. That being said, *Van Gend en Loos* and *Costa v. ENEL* were clearly not only about rephrasing ordinary principles of international law. It can safely be said that Community lawyers, whether judges or readers, were themselves attracted by state sovereignty, a key value of national law that captivates any lawyer distancing himself or herself from international law. Had the new legal order phraseology been merely a rhetorical device for purposes of seeking a higher degree of autonomy in adjudicating future disputes, members of the Court would hardly have chosen a language and a discourse so familiar to traditional dogmas of state sovereignty.⁹⁰ It is instructive that, just like certain human rights lawyers, Community lawyers have tended to assume that international law contains a general, sovereignty-based principle of restrictive treaty interpretation,⁹¹ an assumption that certainly says more about their own preference for state sovereignty than it does about international law. Also, an international lawyer has to be surprised by the Court in 1991 demonstrating the differences between the Community legal order and other treaties and international law by referring to a judgment nearly 30 years old. Still, most lawyers familiar with Community law have not appreciated the evident defects in the Court's self-acclaimed new legal order. For when seen against a Benthamite background coloured by state sovereignty, the Court's making of the Community legal order has appeared innovative, even though it did not quite come up to the promises contained in the Community treaties.

One would be able to demonstrate effects of the Court's restrictive approach other than '[t]he essential characteristics'. The doctrine of direct effect has been impeded in relation to secondary legislation as defined in Article 249 of the EC Treaty, notably directives.⁹²

⁸⁹ Cf. Weiler, 'The Transformation of Europe', 100 *Yale LJ* (1991) 2403, at 2421–2422 and Lecourt, 'Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?', in *L'Europe et le droit: Mélanges en hommage à Jean Boulouis* (1991), at 349.

⁹⁰ Cf. Weiler, 'Rewriting Van Gend & Loos: Towards a Normative Theory of ECJ Hermeneutics', in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (2003), at 150.

⁹¹ E.g., Riese, 'Über den Rechtsschutz innerhalb der Europäischen Gemeinschaften', 1 *Europarecht* (1966) 24, at 27, Donner, 'The Constitutional Powers of the Court of Justice of the European Communities', 11 *CMLRev* (1974) 127, at 135, Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice', in *Judicial and Academic Conference 27–28 September 1976* (1976), i, at 1, 31 and Mancini, 'The Making of a Constitution for Europe', 26 *CMLRev* (1989) 595, at 596. On the other hand, when Community lawyers express doubt as to the European Court's style of interpretation, that is when the Court is criticized for going too far, one sees prominent scholars advocate an alternative style of interpretation that is confined to the text, or to the original intention of the Contracting Parties: e.g., H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986), at 25–33 and T.C. Hartley, *Constitutional Problems of the European Union* (1999), at 22–42.

⁹² Case 33/70, *SACE* [1970] ECR 277, at para. 12, Case 9/70, *Grad* [1970] ECR 837, at para. 5, Case 41/74, *Van Duyn* [1974] 1337, at para. 12, Case 148/78, *Ratti* [1979] ECR 1629, at paras 21–22, and Case C-91/92, *Dori* [1994] ECR I-3325, at paras 23–24.

This line of decisions reflects a state of development no more advanced than the 1928 decision of the Permanent Court concerning the Danzig courts. Part of the explanation would seem to be that the notion of the Community legal order being integrated into national legal systems made it difficult for the Court to distinguish between direct effect (the individual as a subject of international law) and direct applicability (one form of implementing secondary legislation in national law). In other decisions, state liability has been restricted through analogies taken from national law, although the state as a subject of treaty law ought to be in a position different from that enjoyed by the sovereign in the context of national law.⁹³ Also, key provisions of the internal market have regularly been given a restrictive interpretation on account of state sovereignty. In many areas, the Court is a far cry from developing horizontal relationships between states and individuals.

10 International Arbitration

The sixth and last example involves international arbitration of commercial disputes. In the 20th century, arbitration became the favoured form of settling commercial disputes. This was more than a choice of forum since arbitral tribunals were to depart from private international law as understood in the context of national courts.

In the early phases, disputes arising out of concessions granted by developing countries to foreign investors for the exploitation of natural resources featured prominently. In relation to these and other state contracts, it was generally assumed that, for a variety of reasons, choice-of-law principles would in most cases point to the national law of the state party. However, in order to provide for equality between the parties, and to secure that the contract was binding upon the state party as well as the foreign investor, arbitral tribunals made national law subject to the *pacta sunt servanda* principle and other international standards. Internationalization of the proper law of contract was already hinted at in the *Serbian Loans* case,⁹⁴ and a statement to this effect found in an award from 1930 in a dispute involving the Soviet Union,⁹⁵ although in the most sibilant manner, has been characterized by V.V. Veeder as ‘a gigantic first step for international commercial arbitration, almost equivalent to the caveman’s discovery of fire’.⁹⁶ Close scrutiny of awards claiming to be applying national law usually leads to the conclusion that their reasoning had been confined to national law at the price

⁹³ Joined Cases C–46 and 48/93, *Brasserie du Pêcheur* [1996] ECR I–1029, at paras 44–47, which followed Joined Cases C–6 and 9/90, *Francovich* [1991] ECR I–5357, at para. 31.

⁹⁴ *Case concerning the Payment of Various Serbian Loans issued in France*, PCIJ Series A No. 20 (1929), at 33, 36, and 41 and see also for the *pacta sunt servanda* principle *Case concerning the Payment in Gold of Brazilian Federal Loans contracted in France*, PCIJ Series A No. 21 (1929), at 116 as well as 111–112, 114–115, 118 and 120.

⁹⁵ *Lena Goldfields Arbitration*, 5 *Annual Digest* (1930) 3, at 3; also reproduced in 36 *Cornell LQ* (1950) 42, at para. 22.

⁹⁶ Veeder, ‘The Lena Goldfields Arbitration: The Historical Roots of Three Ideas’, 47 *Int’l Comp LQ* (1998) 747, at 772.

of national law being internationalized.⁹⁷ Some of the more explicit awards from the early period departed from the national law of the host state on the ground that it was insufficient, offering but a lacuna,⁹⁸ an argument that suggested the tribunals adopting a point of view external to the national legal system in question.

A more articulate rationale for the approach is found in the celebrated award from 1958 in *Saudi Arabia v. Aramco*. Relying on a concession agreement, Aramco defended its lifeline from the producing areas in Saudi Arabia to the outside markets against the Saudi Arabian Government's subsequent agreement with a third party for transportation of oil. The arbitral tribunal stated that 'some of the effects of the Concession Agreement cannot be governed by the law of Saudi Arabia, both because of objective considerations and because of the subsequent conduct of the Parties'.⁹⁹ The tribunal saw the concession agreement as 'the fundamental law of the Parties, and the Arbitration',¹⁰⁰ leading to principles such as 'both Parties being on an equal footing from a contractual point of view',¹⁰¹ and also that '[n]othing can prevent a state, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights'.¹⁰² In the result, the proper law of contract was not solely Saudi Arabian law:

That law must, in case of need, be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence, in particular whenever certain private rights – which must inevitably be recognized to the concessionaire if the Concession is not to be derived of its substance – would not be secure in an unquestionable manner by the law in force in Saudi Arabia.¹⁰³

Taking as a basis the contract between the host state and the foreign investor, in many cases the question was to which legal system, or systems, to refer the contract, with general principles of law being chooseable in the exact same manner as systems of national law. Perhaps ironically, private international law came to serve as a vehicle for internationalizing state contracts, even though it had by then come to be considered as a branch of national law. It was not that a state contract concluded between a state and a foreign investor derived its legal force from international law. But if contractual rights held by the investor were affected in a way not in conformity with the *pacta sunt servanda* principle, and national law did not provide a remedy in conformity

⁹⁷ E.g., *Administration of Posts and Telegraphs of Czechoslovakia v. Radio Corporation of America*, 30 AJIL (1932) 523, at 530–531, *Alsing Trading Company Ltd. v. Greece*, 23 Int'l LR (1954) 633, at 637–638, 641–643, 645, 649–651, and 656 and *Monsieur Y v. l'Etat Y*, 1 ICC Awards (1968) 218, at 220 and ICC Award No. 3327, 1 ICC Awards (1981) 433, at 434. See also *AGIP v. Congo*, 1 ICSID Rep (1979) 306, at 323.

⁹⁸ *Société Riale v. Ethiopia*, 8 Recueil des décisions des Tribunaux Arbitraux Mixtes (1929) 742, at 748, *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 Int'l LR (1951) 144, at 149, *Ruler of Qatar v. International Marine Oil Company Ltd.*, 20 Int'l LR (1953) 534, at 544–545, and *Saudi Arabia v. Aramco*, 27 Int'l LR (1958) 117, at 163 and 168–169.

⁹⁹ *Saudi Arabia v. Aramco*, *supra* note 98, at 167 and also 165.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, 171 and also 191; see also *ibid.*, 156 concerning procedural law.

¹⁰² *Ibid.*, 168 and also 191–192.

¹⁰³ *Ibid.*, 169 and 171. See also from the period *Sapphire v. NIOC*, 35 Int'l LR (1963) 136, at 171 and 173.

with external standards, an arbitral tribunal was likely to resort to law other than national law. As a result, national law was being applied in certain respects while general principles of law governed other parts of the relationship. Once the *pacta sunt servanda* principle had been admitted as relevant in deciding when to apply general principles of law, having no bearing on any particular system of national law, it was a simplification rather than a revolution to apply the principle directly as part of the proper law of contract.¹⁰⁴

It may be noted that internationalism took the form of general principles of law, as distinct from public international law, as a reflection of the contractual, or private international law, rationale, possibly combined with the risk at the time of being thought eccentric if subjecting contracts and individuals directly to public international law.¹⁰⁵ Alfred Verdross, who treated the European Communities as '*Internen Staatengemeinschaftsrechts*', a third category of legal system besides national and international law,¹⁰⁶ wrote about state contracts: 'these agreements, being neither contracts governed by municipal law nor treaties governed by international law, form a third group of agreements characterized by the fact that the private rights established by them are governed by a new legal order, created by the concurring wills of the parties, i.e. the agreed *lex contractu*'.¹⁰⁷ Nevertheless, it should be stressed that protection of foreign investments against a host state formed yet another archetype of general international law (the international law of coexistence), although it had traditionally been under the guise of diplomatic protection to the effect that rights were held by the state of nationality, as opposed to the individual investor. Like international criminal responsibility, arbitral tribunals resolving disputes arising out of state contracts added individuals as possible subjects under primary rules of international law already in existence. The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) was instrumental. A main purpose underpinning the Convention was to ensure that the agreement on arbitration between a state and a foreign investor also formed an obligation under international law binding on the host state *vis-à-vis* the home state (and the individual investor). With regard to applicable law, Article 42(1) of the ICSID Convention provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

¹⁰⁴ See *Elf Aquitaine Iran v. National Iranian Oil Company*, 96 *Int'l LR* (1982) 254, at para. 19 and *Company Z and others v. State Organization ABC*, 8 *Yearbook of Commercial Arbitration* (1982) 94, at 108–109 and 114.

¹⁰⁵ See, in particular, McNair, 'The General Principles of Law Recognized by Civilized Nations', 33 *BYIL* (1957) 1, at 6, 10, and 19 and also Bourquin, 'Arbitration and Economic Development Agreements', 15 *The Business Lawyer* (1959–1960) 860, at 869.

¹⁰⁶ See A. Verdross, *Völkerrecht* (2nd edn., 1950), at 106–107.

¹⁰⁷ See Verdross, 'The Status of Foreign Private Interests Stemming from Economic Development Agreements with Arbitration Clauses', 9 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1958–1959) 449, at 452 and also 455 ('a special legal community, consisting of the parties to the agreement').

More recently, there has been a surge in international arbitration of investment disputes thanks to generic offers to this effect made in bilateral investment treaties and also some regional and multilateral treaties like Chapter 11 of NAFTA and Chapter 3 of the Energy Charter Treaty. These treaties contain provisions covering much the same ground as general international law (fair and equitable treatment, non-discrimination, expropriation) and, importantly, provide that disputes between an investor and the host state may be submitted by the investor to international arbitration, ICSID being a favoured forum. It would take an excessively narrow standard of interpretation to find that modern bilateral investment treaties do not vest rights in private investors as subjects of international law,¹⁰⁸ yet some commentators – hopefully not a majority – still feel difficult about this.¹⁰⁹ In turn, investment arbitration may constitute the first proper field in which relationships between states and individuals are taken to be horizontal in kind.

International commercial arbitration between private parties at large has also been internationalized, to a certain extent. In the later part of the 20th century, it became generally accepted that arbitral tribunals know no *lex fori* on the basis of which to choose the applicable law. Tribunals cannot be expected simply to apply the choice-of-law rules laid down in national law by the state in the territory of which the tribunal is seated. This is reflected in Article 28(2) of the 1985 UNCITRAL Model Law on International Commercial Arbitration: 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.' When framing the Model Law, the solution ultimately adopted was repeatedly contrasted with the view that the arbitral tribunal should directly determine the applicable substantive law which it considered appropriate. Apparently, it was not disputed that such direct choice would better accord with 'present practices in international commercial arbitration'.¹¹⁰ Indeed, a representative of the International Chamber of Commerce argued that insisting on the use of choice-of-law rules 'would be detrimental to the further development in this domain and would be regarded by many international arbitrators and practitioners as a step backwards'.¹¹¹ This might be why at one point the Working Group expressed the view that the choice of either alternative 'would probably lead to the same result in practice'.¹¹²

¹⁰⁸ See also Paulsson, 'Arbitration Without Privity', in T.W. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (1996), at 422, 429, and 441–442 and Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 136 *Recueil des Cours* (1972) 331, at 349 and also Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties', 20 *Arbitration International* (2004) 179.

¹⁰⁹ E.g., Mann, 'British Treaties for the Promotion and Protection of Investments', 52 *BYIL* (1981) 241, at 248–249, Broches, 'Bilateral Investment Protection Treaties and Arbitration of Investment Disputes', in J.C. Schultz and A.J. van den Berg (eds), *The Art of Arbitration* (1982), at 63, 68, and 72, M. Sornarajah, *The International Law on Foreign Investment* (1994), at 266–267 and A.A. Asouzu, *International Commercial Arbitration and African States* (2001), at 346 and 359–360.

¹¹⁰ H.M. Holtzmann and J.E. Neuhaus, *A Guide to the Uncitral Model Law on International Commercial Arbitration: Legislative History and Commentary* (1990), at 782 and 806.

¹¹¹ *Ibid.*, at 787 and see also at 784, 797, and 798.

¹¹² *Ibid.*, at 780.

In the context of the Model Law, it was supposed that choice-of-law rules would lead the tribunal to one or the other national legal system. This is contradicted by developments in the fields of state contracts and investment arbitration. Also, there are the theories of *lex mercatoria* as well as a series of arbitral awards employing sources of law taken from outside particular national legal systems. These are tendencies suggesting not merely a revival, but a wide expansion of internationalism upon which I shall not embark on this occasion; at the end of the 20th century, they remained controversial and had produced no firm results, one reason being the non-involvement of state interests.

11 Concluding Reflections

The transformation of public international law into a legal discipline concerned with practical application of law was not the worst answer to come up with in response to the challenges facing internationalism in the 20th century. Gradually, it came to be of some importance that international law is concerned not solely with relations between states, but with issues affecting the interests of states. While including relations between states, more and more relations involving other entities and persons were found also to interest pluralities of states.

In Nuremberg, individuals substituted for a state in circumstances where enforcement of international law *vis-à-vis* the state would not have brought one very far. Conversely, arbitral tribunals resolving disputes arising out of state contracts did not uphold misuses of sovereign power by host states only to await diplomatic protection on the part of the home states (the states of nationality). Instead, tribunals admitted arguments similar to those available to a home state espousing the claim of a national. Still, the greatest potential for individuals as subjects of international law did not rest with general international law – the international law of coexistence, or customary international law – but with treaty law (the international law of co-operation). National law being unsuited as the legal framework of contracts between states (treaties), treaty-making accounts for a process of international law-making through which international law expanded in substantive terms as well as in the subjects governed. Leaving aside fascination with state sovereignty alien to internationalism, there is nothing to prevent states from agreeing on treaty provisions conferring rights or imposing obligations on individuals. The inter-war period, the human rights movement, the European Community legal order, and investment protection treaties corroborated examples to this effect. At least some of those examples suggested that expansion of internationalism to non-state actors may have the price of the international being less separate from the national.

In the *LaGrand* case decided in 2001, the International Court confirmed rather unobtrusively that a treaty may create individual rights.¹¹³ The judgment of the International Court suggested that the two individuals had the same rights under Article 36(1) of

¹¹³ *LaGrand Case* [2001] ICJ Rep 466, at para. 77. See also Spiermann, ‘The *LaGrand* case and the Individual as a Subject of International Law’, 58 *Zeitschrift für öffentliches Recht* (2003) 197.

the 1963 Vienna Convention on Consular Relations as Germany, the state of nationality.¹¹⁴ According to the International Court, Article 36(1) gave rise to individual rights, whether or not they were human rights.¹¹⁵ There are uncountable other rules the content of which is not comparable to human rights, even if broadly defined, but under which individuals have rights and may invoke responsibility.¹¹⁶ It may be true that, at least at the international level, bearing responsibility is more fundamental than enjoying rights. This, however, does not detract from the rights held by individuals and the possible international forums in which they may bring claims. As the *LaGrand* case exemplifies, individuals often emerge as holders of international rights or obligations in a defined relationship with a state. Individual rights correspond to obligations undertaken by a state (and individual responsibility is incurred towards the state or the public). This is a circumstance that public international law shares with public law in various national legal systems, and one not surprising in the light of treaty law being the main source of individual rights and obligations and states remaining the gatekeepers and legislators. That it testifies to the key role for the state in international law goes without saying. A more intriguing question is whether to conceive relationships between state and individual as being vertical (sovereign and subject) or horizontal (equal subjects) in kind.

International law is no longer a law of exclusion. Nevertheless, relatively few international lawyers have been willing unhesitatingly to characterize individuals as international legal subjects or persons, a rather marked demonstration of difficulties in understanding internationalism at the turn of the century. James Crawford states that individuals are not 'in any meaningful sense "international legal persons"', the reason being that '[a]s holders of rights and even obligations they do not cease to be subject to the state of their nationality, residence or incorporation, as the case may be'.¹¹⁷ But, of course, this ought not to imply that, in international law, relations involving non-state actors are necessarily vertical in kind. National law is applied to foreign nationals on a daily basis, yet aspects of state sovereignty would hardly recommend themselves as viable arguments in that context. The same ought to apply to international law once the significance of its expansion in the 20th century has been fully digested. The cure suggested by the Permanent Court of International Justice was simple: '[b]ut the right of entering into international engagements is an attribute of state sovereignty';¹¹⁸ moreover, before an international court a state cannot 'avail herself of an objection which ... would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international engagement'.¹¹⁹ Even simpler would it be

¹¹⁴ See *LaGrand Case*, *supra* note 113, at paras 89 and 125 as well as paras 3, 4, and 7 of the *dispositif*. See also Advisory Opinion OC-16/99, *Right to Information on Consular Assistance in the Framework of the Guarantess of the Due Process of Law*, IACHR Series A No. 16 (1999), at paras 80, 82–84, and 89–97.

¹¹⁵ *LaGrand Case*, *supra* note 113, at para. 78 and also para. 125.

¹¹⁶ As another example see *Yaung Chi Oo Trading Pte. Ltd. v. Myanmar*, 42 *ILM* (2003) 540, at para. 39.

¹¹⁷ Crawford, *supra* note 2, at 30, n. 132.

¹¹⁸ *Case of the SS Wimbledon*, PCIJ Series A No. 1 (1923), at 25.

¹¹⁹ *Jurisdiction of the Courts of Danzig*, PCIJ Series B No. 15 (1928), at 26–27.

to accept the status of individuals as subjects of international law. This is a terminological issue, but with possible substantive effects, as illustrated by decisions rendered by regional courts in Europe. In Crawford's words, '[i]t may be that the system is so open in this respect that the former threshold concept [of legal personality] has ceased to have much significance'.¹²⁰ By the same token, and unless the relevant primary rule provides otherwise, relations involving non-state actors ought to be taken to be horizontal in kind, states and non-states being equal subjects of international law.

The International Court of Justice has employed the phrase 'international community' on a number of occasions; it has coined the notion of rights and obligations *erga omnes*,¹²¹ and the Court has now also endorsed the notion of peremptory norms (*jus cogens*);¹²² but in these respects the international community is conceived as essentially an aggregation of states. International law will remain a complementary and residual legal system concerned with issues affecting the interests of states. Still, international law should develop a more relaxed approach to individuals as subjects. Understanding the position of individuals, and hence internationalism in law as it unfolded in the 20th century, was precluded only due to a narrow and Benthamite conception lingering on as an echo from a rather distant past now finally to be overcome. It is high time not only to know what we understand but also to understand what we know.

¹²⁰ J. Crawford, *International Law as an Open System* (2002), at 21.

¹²¹ See *Barcelona Traction, Light and Power Company, Limited* (Merits) [1970] ICJ Rep 3, at paras 33–34.

¹²² See *Case concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (Jurisdiction), 3 Feb. 2006, not yet reported, at para. 64.