ACADÉMIE DE DROIT INTERNATIONAL

FONDÉE EN 1923 AVEC LE CONCOURS DE LA DOTATION CARNEGIE POUR LA PAIX INTERNATIONALE

RECUEIL DES COURS

COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW

2018

Tome 398 de la collection

BRILL | NIJHOFF

Leiden/Boston

GENERAL TABLE OF CONTENTS

The Expansion of International Law, General Course on Public Interna-	
tional Law (2015) by T. TREVES, Emeritus Professor of the Univer-	
sity of Milan	9-398

TABLE OF CONTENTS

Chapter 1. Introductory	31
Chapter II. The material expansion of international law and the relevant techniques: three examples	47
1. Introductory	47 48 50 61
Chapter III. Expansion to entities different from States	69
 States as the main protagonists of international law The privatization of State functions 	69 70
 A. Chartered Companies. B. Responsibility for actions of entities empowered to exercise elements of governmental authority – de facto organs of the State. C. "Outsourcing" of military functions. D. Sovereign Wealth Funds. E. Classification societies F. Individuals authorized to act "on behalf" of a State in international dispute resolution proceedings (Art. 292, UNCLOS). 	70 71 72 73 74 75
 Entities that may become or become again States between effectivity and recognition. Kosovo Illegality of the establishment of the State. Lack of recognition and effectivity: the case of the Turkish Republic of Northern Cyprus and of Taiwan. Regaining of independence by Baltic States. "Failing States": the case of Somalia 	76 78 79 79 80 81
Chapter IV. Expansion to entities created by States: International Organizations	84
 General The expansion of the phenomenon of International Organizations as 	84
an aspect of the expansion of international law	85 86
different from States	88
Organizations: customary law	90 96
Chapter V. Individuals as addressees of international law rules	99
 Human rights: inter-State obligations and international procedural rights for individuals	99
tions for individuals	102
criminal law rules on international relations. 4. Foreign investors' procedural rights under international law	103 105
duals and entities	107 110

14 T. Treves

functions because of the action of non-State entities	112
 Non-State actors different from individuals as such. International Non-Governmental Organizations (NGOs) 	112 113
 A. The impact of NGOs on international relations: a law-oriented action B. The attitude of States and of intergovernmental organizations C. The Cardoso Report and the ambivalent attitudes of States and NGOs 	113 117
NGOs	126
3. Terrorists: impact on States and on inter-State relations, the reaction of States. Self-defence and non-State actors	127
A. The impact of terrorism on States and their relationships B. The fight against terrorism through the establishment of State-to-State obligations	127 129
State obligations	130 133
Chapter VII. The expansion of the "sources" of international law: customary rules	137
•	137
 Overview: the expansion of the sources of international law. Customary law's persistent importance and expansion 	137
3. Some theoretical aspects	141
A. Notion: has interpretation a role?	141
B. The question of the basis of customary international law C. The elements of international customary law and the role of the	142
will of States	144 144
of customary rules	146
4. The approach of States and judges	147
A. Definitions: Article 38 (1) (b) of the Statute of the ICJ and others B. The approach of the ICJ and other international tribunals	147 148
Chapter VIII. The expansion of international practice	156
1. General	156
 The time factor	157
	158
A. What States say and do	158
B. Practice of which State organs?	161 163
C. Inaction	103
regional custom	164
4. Practice of States taken in groups	167
A. Practice by joint action, statements and declarations	167
B. Certain resolutions of United Nations organs	168
C. Treaties	170
5. Practice of International Organizations	173
6. Judgments of international courts and tribunals	174
7. A role for non-State actors? NGOs and scholarly contributions	176
Chapter IX. Customary rules and general principles	178
1. The uncertain borderline between customary rules and general	178
principles	1/0

General Course on Public International Law	15
2. Two categories of customary rules in the <i>Gulf of Maine Judgment</i> . 3. Principles applicable in international law and Article 38 (1) (c) of	178
the ICJ Statute	179
rules or principles?	181 185 186
Chapter X. Codification: the borderline between custom and treaties	188
 Introductory	188 188
4. Prospects for future expansion of codification – the ILC and theoretical matters: fragmentation, customary law.	193 195
A. Is there room for further codification? Achievements, current work and prospects of the ILC	195
B. Continuation of major projects: law of treaties, law of immunities, law of international responsibility	196
C. Revisiting aspects of projects already concluded: reservations, subsequent practice, provisional application of treaties	197
D. Environmental law and other items reflecting pressing concerns of the international community	198
tation, identification of customary law, jus cogens	199
5. Codification and "progressive development" of international law. Codification, crystallization, generation of international law rules .6. Recent techniques adopted by the ILC to nuance the distinction	202
between codification and progressive development	204
results of the process	206
practice	211 215
Chapter XI. Treaties, the law of treaties and the expansion of international law	219
 Introductory: treaties and the expansion of international law. The expansion of the law of treaties. 	219 220
A. Reservations and interpretative declarations	220 225 229 230
(a) Systemic interpretation	230 234 236
E. The expansion of the Vienna Convention's rules on interpretation to non-treaty instruments	239
Chapter XII. The expansion of international law through treaty-derived law-making	240
 Rule-making by voluntary procedures different from treaty-making. The Security Council as legislator	240 241
A. The expansion of the competences of the Security Council under Chapter VII of the Charter	241

	B. "Legislative" resolutions	242 245 249
3.	Law-making by treaty bodies	250
	A. Law-making by treaty-authorized treaty bodies	250
	obligations adopted through new law-making procedures C. Difficult-to-interpret or insufficient treaties. Discussions on implied powers and the States' fight for control of the obligations incumbent upon them	252255
	D. Questions of legitimacy, international and national E. The global administrative law perspective	258 261
Chap	oter XIII. The development of a hierarchy of rules	263
1.	The basic "horizontal approach" of international law and the emergence of a hierarchy of rules	263
2.	gence of a hierarchy of rules	263
	A. Article 103, UN Charter	264 264
3.	Jus cogens and erga omnes obligations	266
4.	Immunities and jus cogens	271 273
6.	The idea of the UN Charter as a constitution	277
Chap	oter XIV. Soft law	280
2. 3. 4. 5.	Soft law: not treaty, not customary, not binding An expanding phenomenon	280 281 282 283 283 285
	 A. Mechanisms for enhancing compliance expectations B. The case of the OECD Guidelines for Multinational Enterprises. C. Treaty provisions giving a binding effect to soft law obligations. D. Soft law obligations endorsed by binding Security Council resolutions E. Transformation of soft law into conventional and other binding 	285 286 288 289
	law	290
	F. Hardening of "soft" binding law	292
Chap	ster XV. The expansion through the penetration of new values	294
2. 3. 4.	Introductory	294 294 296 299 300
	The "sacred trust"	301 302
	oter XVI. The expansion through the multiplication of courts and bunals and the acceptance of compulsory settlement	304
1.	Introductory	304 305

General Course on Public International Law	17
A. International courts and tribunals: a multi-faceted notion B. An expanding nebula	305 307
3. The "revolution" of compulsory settlement, and its limits	308
 A. A first step: the "optional clause" of Article 36, para. 2, of the ICJ Statute. B. The Cold War and the "principle" of free choice of means. C. The turning point: the Law of the Sea Convention and the WTO 	308 309
disputes settlement mechanism	312 315
4. The impact of the expansion of tribunals and of compulsory dispute settlement	318
A. The impact of judicial and arbitral decisions	318
B. The impact of judgments when jurisdiction is based on a spe-	
cific treaty	319
UNCLOS?	322
D. The impact of compulsory settlement on the formulation of treaty rules	325
5. Limits of, and reactions to, the expansion of international adjudica-	
tive bodies and of compulsory jurisdiction	329
jurisdiction	329 332 334
Chapter XVII. Fragmentation: is there a real danger?	339
 Self-contained regimes and the multiplication of international courts and tribunals: a danger for the unity of international law? The debate on fragmentation: is the danger exaggerated? Conflicts of jurisprudence of different courts and tribunals. Reliance by a court or tribunal on the jurisprudence of other courts 	339 342 344
or tribunals	346 348 349 351 352
9. International rules setting out mechanisms to avoid conflicts of jurisdiction and divergent decisions: "open" and "exclusive" systems	355
A. States and the avoidance of conflicts.	355
B. Rules on jurisdiction: openness and exclusivity	356 358
10. Approaches of international courts and tribunals to avoid conflicts of jurisdiction and divergent decisions	360
 A. Concepts judges may resort to in order to minimize conflicts of jurisdiction. B. Judicial propriety C. Criteria developed by courts and tribunals on the relevance of other courts' and tribunals' jurisprudence 	360 364 366
11. "Fragmentation" through compromissory clauses	369
A. The alternative paths open to judges and arbitrators	369 370

Chapter XVIII. Conclusions: the resilience of international law	374
 The causes of expansion	374
3. International law's resistance to attacks	375
4. Internal tension and democracy as relevant factors	376
Bibliography	378

T. Treves