

Chapter 2

Introduction to Part I

Part I is intended to unfold and develop the principal issues that have been raised in [Sects. 1.2–1.4](#). [Chapter 3](#) returns to the moment when the PCIJ, in the *Case of the S.S. “Lotus”*, was asked by the parties, France and Turkey, to choose between the framework of authorization and the framework of obligation described in [Sect. 1.3](#). In order to illustrate the actuality of this question, the chapter then turns to *Legality of the Threat or Use of Nuclear Weapons*, where the issue was revisited by the Nuclear Weapon States and Non-Nuclear Weapon States. Both Courts, spanning the transition from the League of Nations to the United Nations, opted for the framework of obligation. In its tail, the chapter then describes how the question was extensively pondered by Judge Shahbuddeen in his Dissenting Opinion in *Legality of the Threat or Use of Nuclear Weapons*. The objective structural framework which he derived from the work of Prosper Weil approximates the reformulated framework identified in [Sect. 1.4](#). The analysis contained in this chapter is located at the international plane.

[Chapter 4](#) zooms in on the claim in [Sect. 1.2](#) that the structure of public international law, while commonly regarded as, in principle, horizontal, must actually be characterized as vertical. To this end, the chapter will, metaphorically, descend into the internal sphere of States by turning to general theory of law. This move is intended to demonstrate the claim that general theory of law and the internal law of the State coincide. To make this claim, it is first argued that the institution of the State and the internal law of the State cannot be explained by social contract theory. If that assertion is sustainable, it follows that the internal law of the State presupposes the existence of the institution of the State and, likewise, that the concept of public international law presupposes the existence of a super-State. It then follows that there is no basis for the so-called domestic analogy, by virtue of which, just like individuals exiting the state of nature have constituted the State, so States may have constituted the concept of public international law. Rather, the vertical structure of the concept of law underlying the concept of public international law is presupposed. This vertical structure

predetermines the choice between the framework of obligation and the framework of authorization. The transposition of domestic legal concepts to the international plane may, in this light, be evaluated in two ways. This transposition may be seen as inappropriate in view of the contrast between the horizontal structure of public international law and the vertical structure of the internal law of the State. Alternatively, this transposition may be seen as appropriate in view of the similarity between the vertical structure of the concept of law underlying the concept of public international law and the vertical structure of the internal law of the State. In so far as social contract theory is rejected as an explanation of the institution of the State and the internal law of the State, however, the explanation of that vertical structure remains absent.

Chapter 5 will then return to the international plane and identify the vertical structure of the concept of law underlying the concept of public international law, in the form of the framework of obligation and the framework of authorization, in theory of public international law. The dominance of the framework of obligation, which the ICJ inferred from the practice of States in *Legality of the Threat or Use of Nuclear Weapons*, corresponds to the main current in theory of public international law prescribed by Grotius and Vattel. Nevertheless, the adequacy and the justification of the framework of obligation continue to be questioned. While critical theory of public international law had done so from the inside, theory of public international law, from Bruns to Allott, has also reverted to the framework of authorization.

Chapters 4 and 5 will also deal with elements in theories of law and theories of public international law which, while developed within the context of a vertical structure of law, can be transposed to the reformulated framework developed in Sect. 1.4. These elements may be fitted to the objective structural framework identified by Judge Shahabuddeen. In this way, the reformulated framework identified deductively in Sect. 1.4, may also be arrived at inductively, by joining the elements provided by theory of law (MacCormick; Finnis) and theory of public international law (Kratochwil; Allott) to the objective structural framework.