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Preface to the ninth edition

The last edition of Volume 1 of Oppenheim's International Law, the 8th, was published as long ago as 1955, and the work on it had been completed during the previous year. That distinguished edition, like the 5th, 6th and 7th before it, was prepared by Professor Hersch Lauterpacht (as he was, before going on to become a Judge on the International Court of Justice in 1955, and to receive a knighthood). Hersch Lauterpacht intended to prepare a 9th edition and had done a lot of work to that end. His untimely death in 1960 intervened before the project could be completed. Happily, however, the work which he had done in preparing for a 9th edition was published subsequently by his son, Mr Eli Lauterpacht CBE QC, as part of Hersch Lauterpacht's Collected Papers. Readers of those materials will be aware that Hersch Lauterpacht intended that the 9th edition would be a re-writing almost more than a new edition. Obviously we were neither able nor indeed qualified to attempt in any way to complete the kind of new volume that Hersch Lauterpacht had intended.

When, some years later, we began work on revising the 8th edition we were aware that any attempt to revise a work with the standing and reputation of Lauterpacht's 'Oppenheim' was not one to be undertaken at all lightly. There is indeed, a question whether the kind of work on international law exemplified by 'Oppenheim' still finds a useful place at the present time, when the scope of international law and the range of state activities have both increased beyond all bounds. Yet, perhaps because of this very increase, there does seem a continuing need for a book which presents this material as part of a coherent structure, even though we recognise that in many areas those who are researching the law in any detail will need to refer to specialist works on particular topics.

A further factor has been the vast increase in the material which is now available. The number of international legal periodicals and Year Books increases all the time; so do collections of state practice, together with the number of states whose practice now influences international law; the documentation available from international organisations is now vast; and collections of relevant material in valuable works such as the International Law Reports (now 83 volumes, compared with 15 when the 8th edition was prepared), and International Legal Materials (a new publication since 1962) have transformed the scale of the work of those concerned with the study and practice of international law.

In addition to the new material now available, there have been substantial changes in the body of international law since the mid-1950s. Perhaps the most noticeable have been the major treaties concluded since then as a result of the work of the International Law Commission, or separately as with the Law of the
Preface to the ninth edition

Sea Convention 1982. Indeed, if one considers the major Treaties on State Succession, Law of the Sea, Nationality, Diplomatic and Consular Relations, and the Law of Treaties, it is apparent that a considerable portion of the 8th edition needed substantial rewriting simply on their account. Some other parts of international law are either new, or so vastly developed compared with how matters stood in the 1950s that they need to be considered as virtually new subjects. Outer space, Antarctica, the new-type fishing zones, the Exclusive Economic Zones, deep-sea mining, human rights, economic rights and duties of states, and self-determination spring to mind in this context; and recent growth in concern for the environment has demonstrated that this is a continuing process.

With this great increase in both the available material and the content and scope of the subject, we have felt it necessary to make a number of changes in this present 9th edition.

Perhaps the most substantial change has been made in recognition of the extent to which the law and practice relating to international organisations have now become a separate field of study. It no longer seems useful to attempt to include a necessarily brief summary in the present volume, and better for these matters to be dealt with in a separate volume. It is the intention, therefore, that, having deleted those sections from the present volume, there will be in due course a new Volume III of 'Oppenheim' to deal with international organisations.

Other changes are less far-reaching, but should nevertheless be noted here. In order to allow more room for dealing with matters of contemporary relevance, we have deleted the chapter dealing with the history of international law; this again is now a matter which is well treated in specialised works. We have faced difficult decisions over the bibliographies for each chapter. To the researcher, the tradition of very full bibliographies, going back many years, has been a valuable feature of 'Oppenheim'. However, pressure of space and the passage of time have made it necessary to cut down on the bibliographies. First, we have omitted from all bibliographies material preceding the 1914-18 War: that older material dealt with a world so different from today's that it can only be of limited value for current international law. Bibliographical material going back to 1918 does, nevertheless, still cover just over 70 years. Second, we have as a general rule not included in bibliographies references to general textbooks on international law. This is in no sense any disparagement of their value, but simply a recognition that any serious researcher or practitioner wishing to enquire into any particular matter is likely, as a matter of course, to consult other leading textbooks, whose structures and indexes will readily provide access to their contribution to the subject in question.

These changes, and of course others throughout the volume necessary in the course of bringing the work up to date, we have been able to a very large extent to keep to the arrangement of subjects as it has traditionally appeared in 'Oppenheim'. In doing so we have thought it better to start afresh with the numbering of paragraphs (§§), so that they now run consecutively throughout the volume from §1 to §669.

Not only have we followed so far as possible the structure of 'Oppenheim' but we have also tried wherever possible to keep the language of the 8th edition, where it still in substance represents the state of the law. We have also retained the practice of a liberal use of footnotes, which has been such a distinctive feature of 'Oppenheim'. This reflects one of the principal characteristics of 'Oppenheim' which we have sought to preserve and enhance wherever possible. That is its status as a practitioner's book, rather than as an academic treatise, and its attempt to provide a helpful beginning for an inquiry into particular problems. We believe that the wealth of material relating to state practice which it is possible to include in the footnotes makes a valuable contribution to the use of 'Oppenheim' by practitioners.

It is a similar concern for the interests of practitioners which has led us to include in footnotes extensive citations of decisions of national courts as well as of international courts. This has value not only within the framework of common law systems, with their reliance upon judicial precedent, but also more generally, and irrespective of the legal system within which a practitioner operates, by illustrating the way in which particular practical issues arise and are dealt with. In referring to cases we have concluded that it is often more useful to give references to reports which are likely to be available to international lawyers in many countries, rather than always to give references to national law reports which it may be difficult for lawyers in other countries to consult. The one general exception to this practice is in relation to reports of cases decided in the United Kingdom, where, generally, only the national law reports are referred to.

In this new edition we have endeavoured to state the law as it stood on 1 January 1991, although in some instances it has proved possible to take account of developments as late as the autumn of that year. We should also say that while, in performing our editorial task, we have divided the initial work on the various chapters between us, we have each seen, commented on and contributed to all the chapters, so that we have a shared responsibility for the volume as a whole. We must also add, lest there be any doubt, that although during the preparation of this edition we have been associated with the institutions identified on the title page, the views expressed in this volume represent our personal views as editors and do not necessarily reflect the views of those institutions.

We have already noted the intention to prepare a Volume III on international organisations. We should add that it is also intended to prepare a new edition (which will be the 8th) of Volume II, on disputes and armed conflict; we have therefore left for that volume discussion of, for example, the dispute settlement provisions of the Law of the Sea Convention, along with other similar dispute settlement aspects of substantive matters dealt with in this present Volume I.

We wish, finally, to record our thanks to the many people who, despite many discouragements, have made the publication of this volume possible. These are particularly due to all those at Longman who have worked so patiently and devotedly to bring this project to a conclusion. In addition we have benefited enormously from the comments and suggestions of many colleagues who have with great generosity spared time to cast an eye over various passages.

RYJ

ADW

January 1992
The books referred to in the bibliography and notes are, as a rule, quoted with their full titles and the date of their publication. But certain books and periodicals which are often referred to throughout this work are quoted in an abbreviated form. The list omits abbreviations of national law reports.

Accioly Accioly, Tratado de direito internacional público, 3 vols (1933–35)
AD Annual Digest and Reports of Public International Law Cases: vols 1 and 2, covering the years 1919–24, edited by Sir John Fischer Williams and H Lauterpacht; vols 3 and 4, covering 1925–28, edited by A D McNair and H Lauterpacht; vols 5–15, covering 1929–48, edited by H Lauterpacht. Thereafter see ILR
AFDI Annuaire français de droit international
AJ American Journal of International Law
Ann Suisse Annuaire Suisse de droit international
Annuaire Annuaire de l’Institut de Droit International
Anzilotti Anzilotti, Corso di diritto internazionale, vol 1, 3rd ed (1928) (trans by Gidel, 1929); vol 3, pt 1 (1915)
AS Proceedings Proceedings of the American Society of International Law
Aust YBIL Australian Year Book of International Law
Balladore Pallieri Balladore Pallieri, Diritto internazionale pubblico (1937)
Baty Baty, The Canons of International Law (1930)
BFSP British and Foreign State Papers (Herslet), vol 1 (for 1812–14), continued up to vol 170 (for 1968)
Bibliotheca Vissariana Bibliotheca Vissariana Dissertationum jus Internationale Illustrantium
Bittner Bittner, Die Lehre von völkerrechtlichen Urkunden (1924)
Bluntschli Bluntschli, Das moderne Völkerrecht der civilistischen Staaten als Rechtsbuch dargestellt, 3rd ed (1878)
Borchard Borchard, The Diplomatic Protection of Citizens Abroad (1915)
BPIL E Lauterpacht, British Practice in International Law, pts for 1963–67
Bustamante Bustamante, Derecho internacional público, 3 vols (1933–35)
BY British Year Book of International Law
Calvo Calvo, Le Droit international théorique et pratique, 5th ed, 6 vols (1896)
Can YBIL Canadian Year Book of International Law
Cavaglieri Cavaglieri, Lessioni di diritto internazionale (general part, 1925)
CILSA Comparative and International Law Journal of Southern Africa
CL Current Law
CLJ Cambridge Law Journal
Cluset Journal du droit international
CML Rev Common Market Law Review
Colombos Colombos, The International Law of the Sea, 6th ed (1967)
Abbreviations

Dickinson, Cases Dickinson, Cases and Other Materials on International Law (1950)

Documents Documents on International Affairs

DS Bull Department of State Bulletin

ECTS United Kingdom European Community Treaty Series, vol 1 (1974), and annual volumes subsequently

Europ YB European Year Book

Faucille Faucille, Traité de droit international public, 8th ed of Bonfils’ Manuel de droit international public; vol 1, pt 1 (1922); vol 1, pt 2 (1925); vol 1, pt 3 (1926); vol 2 (1921)

Fiore Fiore, Nouveau droit international public (Fr trans by Antoine from 2nd Italian ed), 3 vols (1885)

Fiore, Code Fiore, International Law Codified (Eng trans by Borchard from 5th Italian ed) (1918)

Fischer Williams, Chapters Fischer Williams, Chapters on Current International Law and the League of Nations (1929)

Fontes Juris Gentium Fontes Juris Gentium. Series A: successive vols published periodically from 1931 digesting decisions of the PCIJ, ICJ, and the Permanent Court of Arbitration (pt 1), and decisions of German courts relating to public international law (pt 2)

Ga JIL Georgia Journal of International Law

Ga JI & CL Georgia Journal of International and Comparative Law

Garner, Developments Garner, Recent Developments in International Law (1925)

Gemma Gemma, Appunti di diritto internazionale (1923)

Genet Genet, Traité de diplomatie et de droit diplomatique, 3 vols (1931–32)

Geo L J Georgetown Law Journal

Gurm YBIL German Year Book of International Law

Gidel Gidel, Le Droit international public de la mer, le temps de paix: vol 1. Introduction — La Haute mer (1932); vol 2. Les eaux intérieures (1932); vol 3. La Mer territoriale et la zone contiguë (1934)

Grotius Grotius, De Jure Belli ac Pacis (1625)

Grotius Amstelodami Grotius Amstelodami International

Grotius Society Transactions of the Grotius Society

Guggenheim Guggenheim, Lehrbuch des Völkerrechts, pts 1 and 2 (1947)

Hackworth Hackworth, Digest of International Law, 7 vols (1940–43)

Hag R Recueil des cours, Académie de Droit International de La Haye

Hague YBIL Hague Year Book of International Law (1926)

Hall Hall, A Treatise on International Law, 8th ed (1924) by A Pearce Higgins

Harv ILJ Harvard International Law Journal

Harv Research Research in International Law. Under the auspices of the Harvard Law School. Draft conventions prepared for the codification of international law. Directed by M O Hudson: (1929) 1. Nationality (Reporter: Flounory); 2. Responsibility of States (Borchard); 3. Territorial Waters (G G Wilson); (1932) 1. Diplomatic Privileges and Immunities (Reeves); 2. Legal Position and Functions of Consuls (Quincy Wright); 3. Competence of Courts in regard to Foreign States (Jessup); 4. Piracy (Bingham); 5. A Collection of Piracy Laws of Various Countries (Morrison); (1935) 1. Extradition (Barclay); 2. Jurisdiction with respect to Crime (Dickinson); 3. Treaties (Garnier)

Heffter Heffter, Das europäische Völkerrecht der Gegenseit, 8th ed by Geffen (1888)

Heilborn, System Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen (1896)

Hertslet’s Commercial Treaties Hertslet, Collection of Treaties and Conventions between Great Britain and Other Powers, so far as they relate to Commerce and Navigation, 31 vols (1820–1925) (reprinted in 10 vols, 1970)

HLR Harvard Law Review

Holland, Lectures Holland, Lectures on International Law, eds T A and W L Walker (1933)

Holland, Studies Holland, Studies in International Law (1898)

Holzendorff Holzendorff, Handbuch des Völkerrechts, 4 vols (1885–89)

Hudson Cases Hudson, Cases and Other Materials on International Law, 3rd ed (1951)


Hyde Hyde, International Law, chiefly as interpreted and applied by the United States, 2nd ed, 3 vols (1947)

IBS International Boundary Service

ICLQ International and Comparative Law Quarterly

ILM International Legal Materials

ILQ International Law Quarterly, 4 vols, 1947–51


Indian JIL Indian Journal of International Law

Int Stud International Studies

Israel YBHR Israel Year Book on Human Rights

Ital YBIL Italian Year Book of International Law

JCL Journal of Comparative Legislation and International Law

JYBIL Jewish Year Book of International Law

Keith’s Wheaton Wheaton’s Elements of International Law, 6th Eng ed by A Berriedale Keith, vol 1 (1929); vol 2, 7th ed (1944)

Kiss, Répertoire Kiss, Répertoire de la Pratique française en matière de droit international public, 7 vols (1962–72)

Lapradelle-Politis Lapradelle-Politis, Recueil des arbitrages internationaux, vol 1 (1925); vol 2 (1924)

H Lauterpacht, Analogies H Lauterpacht, Private Law Sources and Analogies of International Law (1927)

H Lauterpacht, The Function of Law H Lauterpacht, The Function of Law in the International Community (1933)

Lawrence Lawrence, The Principles of International Law, 7th ed, revised by P H Winfield (1923)

Lindley Lindley, The Acquisition and Government of Backward Territory in International Law

Liszt Liszt, Das Völkerrecht, 12th ed by Fleischmann (1925)

LNTS League of Nations Treaty Series. Publication of Treaties and International Engagements registered with the Secretariat of the League of Nations

Lorimer Lorimer, The Institutes of International Law, 2 vols (1883–84)


De Louter De Louter, Le Droit international public positif (Fr trans from Dutch original), 2 vols (1920)

LQR Law Quarterly Review

McNaIr, Opinions McNaIr, International Law Opinions, 3 vols (1956)

McNaIr, Treaties McNaIr, Law of Treaties (1961)

Maine Maine, International Law, 2nd ed (1894)

Martens Martens, Völkerrecht (Ger trans from Russian original), 2 vols (1888–86)

Martens, Causes célèbres Martens, Causes célèbres des droits des gens, 2nd ed, 5 vols (1858–61)

Abbreviations

Vattel Vattel, Le Droit des gens, 4 books in 2 vols, new ed (1773)
Verdross Verdross, Die Verfassung der Völkerrechtsgemeinschaft (1926)
Walker Walker, A Manual of Public International Law (1895)
Westlake Westlake, Elements of International Law, 2 vols (1873)
Yale JIL Yale Journal of International Law
YBILC Year Book of the International Law Commission
ZI Zeitschrift für internationales Recht
ZLW Zeitschrift für Luft- und Weltraumrecht
ZöR Zeitschrift für öffentliches Recht
ZöV Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZV Zeitschrift für Völkerrecht

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Verdross  Verdross, Die Verfassung der Völkerrechtsgemeinschaft (1926)
Walker  Walker, A Manual of Public International Law (1895)
Weis, Nationality and Statelessness  Weis, Nationality and Statelessness in International Law (2nd ed, 1979)
Westlake  Westlake, International Law, 2nd ed, 2 vols (1910-13)
Westlake, Chapters  Westlake, Chapters on the Principles of International Law (1894)
Westlake, Papers  The Collected Papers of John Westlake on Public International Law (ed L. Oppenheim) (1914)
Wharton  Wharton, A Digest of the International Law of the United States, 3 vols (1886)
Wheaton  Wheaton, Elements of International Law, 8th US ed by Dana (1866)
Whiteman, Digest  Whiteman, Digest of International Law, 15 vols (1963-73)
Yale JIL  Yale Journal of International Law
YBECCHR  Year Book of the European Convention on Human Rights
YBILC  Year Book of the International Law Commission

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Introduction

Foundation and development of international law
Chapter 1

Foundation of international law

THE NATURE OF INTERNATIONAL LAW


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§ 1 Concept of international law

International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law.

International law in the meaning of the term as used in modern times began gradually to grow from the second half of the Middle Ages. As a systematic body of rules it owes much to the Dutch jurist Hugo Grotius, whose work, De Jure Belli ac Pacis, Libri iii, appeared in 1625, and became a foundation of later development.

That part of international law that is binding on all states, as far as is the greater part of customary law, may be called universal international law, in contradistinction to particular international law which is binding on two or a few states only.

General international law is that which is binding upon a great many states. General international law, such as provisions of certain treaties which are universally binding and which establish rules appropriate for all states.

One can also distinguish between those rules of international law which, even though they may be of universal application, do not in any particular situation give rise to rights and obligations erga omnes, and those which do. Thus, although all states are under certain obligations as regards the treatment of aliens, those obligations (generally speaking) can only be invoked by the state whose nationality the alien possesses: on the other hand, obligations deriving from the outlawing of acts of aggression, and of genocide, and from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, are such that all states have an interest in the protection of the rights involved.

Rights and obligations erga omnes may even be created by the actions of a limited number of states. There is, however, no agreed enumeration of rights and obligations erga omnes, and the law in this area is still developing, as it is in the connected matter of a state's ability, by analogy with the actio popularis (or actio communis) known to some national legal systems, to institute proceedings to vindicate an interest as a member of the international community as distinct from an interest vested more particularly in itself.

The International Court of Justice has held that proceedings in defence of legal rights or interests require those rights or interests to be clearly vested in those who claim them (even though they need not necessarily have a material or tangible object damage to which would directly harm the claimant), and that the actio popularis is not known to international law as it stands at present.

Although the notion of actio popularis is in some respects associated with that of rights and obligations erga omnes, the two are distinct and, to the extent that they are accepted, each may exist independently of the other.

International law is sometimes referred to as 'public international law' to contrast it with 'private international law'.
distinguish it from private international law. Whereas the former governs the relationships of states and other subjects of international law amongst themselves, the latter consists of the rules developed by states as part of their domestic law to resolve the problems which, in cases between private persons which involve a foreign element, arise over whether the court has jurisdiction and over the choice of the applicable law: in other terms, public international law arises from the juxtaposition of states, private international law from the juxtaposition of legal systems. Although the rules of private international law are part of the internal law of the state concerned, they may also have the character of public international law where they are embodied in treaties. Where this happens the failure of a state party to the treaty to observe the rule of private international law prescribed in it will lay it open to proceedings for breach of an international obligation owed to another party. Even where the rules of private international law cannot themselves be considered as rules of public international law, their application by a state as part of its internal law may directly involve the rights and obligations of the state as a matter of public international law, for example where the matter concerns the property of aliens or the extent of the state's jurisdiction.

§ 2 Ius cogens States may, by and within the limits of agreement between themselves, vary or even dispense altogether with most rules of international law. There are, however, a few rules from which no derogation is permitted. The latter - rules of ius cogens, or peremptory norms of general international law - have been defined in Article 53 of the Vienna Convention on the Law of Treaties 1969 (and for the purpose of that Convention) as norms accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which may be modified only by a subsequent norm of general international law having the same character; and Article 64 contemplates the emergence of new rules of ius cogens in the future. Such a category of rules of ius cogens is a comparatively recent development and there is no general agreement as to which rules have this character. The

10 See an article by Beckett, BY, 7 (1926), pp 73–96, entitled: 'What is Private International Law?'; Dicey and Morris, ch 1; Cheshire and North, Private International Law (11th ed, 1987, ch 1).


11 For a survey of the decisions of the PCIJ on questions of private international law see Hammarkjold, Reuse critique du droit international, 30 (1934), pp 315–44. As to conflict of laws before international tribunals see Lipstein, Grotius Society, 27 (1941), pp 141–81, and 29 (1943), pp 51–83; Hambro, loc cit in Hg, R, above.


12 See the Serbian Loans Case, PCIJ, Series A, No 14, at p 41. Several treaties have been concluded at various Hague Conferences since 1902, the conferences themselves having begun in 1893. The value of these conferences led to their being established on a permanent basis by a statute drawn up in 1915 (TS No 65 (1955)). See Review of the Multilateral Treaty-Making Process (UN Legislative Series, ST/LEG/SERIES 8/21 (1985)), pp 513–21; van Loon, in, The Effect of Treaties in Domestic Law (eds Jacobs and Roberts, 1987), pp 221–51. Other major treaties on private international law include the 1928 Bautism Code (LNVT, 8b, p 111), now binding on a number of Central and South American states; conventions signed by States parties to the EEC; and also various conventions concluded within the Council of Europe. Convention on uniform enforcement of judgments, 1970, 1972, 1975 (TS No 101 (1978)), pp 267–441; David, The Internatinal Unification of Private Law (1971), being pt V of vol II of The International Encyclopedia of Comparative Law; Zweigert and Kropholler, Sources of International Uniform Law (3 vols, 1971, 1972, 1973); Kropholler, Internationalen endrechtsrecht (1959), I, pp 376–406; The International Institute for the Unification of Private Law (UNIDROIT), established in 1926, has undertaken extensive work in this field: among its various publications see Unification of Law (1948); Survey 1947–52, Survey 1953–55, and, from 1956 to 1971, an annual UNIDROIT Year Book. See also Reuse de droit uniforme, from 1973 and Stanford, in The Effect of Treaties in Domestic Law (eds Jacobs and Roberts, 1987), pp 253–71. See also § 106, n 1, para 4, as to the activities of the UN Conference in International Trade Law (UNCTRAL).

The initial uniformity established by a treaty may to some extent be lost as a result of diverse interpretations in the national courts of the various States: see on this aspect of the Warsaw Convention 1929, Mankiewicz, ICLQ, 21 (1972), pp 718–57.

Note also that many multilateral treaties, eg in the field of human rights, are intended to standardize the treatment accorded within the states parties to them, and to that extent involve a measure of unification or harmonization of law.
International Law Commission regarded the law of the Charter concerning the prohibition of the use of force as a conspicuous example of such a rule. Although the Commission refrained from giving in its draft Articles on the Law of Treaties any examples of rules of ius cogens, it did record that in this context mention had additionally been made of the prohibition of criminal acts under international law, and of acts such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to cooperate; the observance of human rights, the equality of states and the principle of self-determination. The full content of the category of ius cogens remains to be worked out in the practice of states and in the jurisprudence of international tribunals. In this connection it is important that Article 66 of the Vienna Convention on the Law of Treaties provides for the judicial settlement of disputes concerning the application and interpretation of Articles 53 and 64.

The operation and effect of rules of ius cogens in areas other than that of treaties are similarly unclear. Presumably no act done contrary to such a rule can be legitimated by means of consent, acquiescence or recognition; nor is a protest necessary to preserve rights affected by such an act; nor can such an act be justified as a reprisal against a prior illegal act; nor can a rule of customary international law which conflicts with a rule of ius cogens continue to exist or subsequently be created (unless it has the character of ius cogens, a possibility which raises questions — to which no firm answer can yet be given — of the relationship between rules of ius cogens, and of the legitimacy of an act done in reliance on one rule of ius cogens but resulting in a violation of another such rule).

§ 3 Legal force of international law

Almost from the beginning of the science of international law the question has been discussed whether it is law properly so-called. Hobbes and Pufendorf had already answered the question in the


YBILC (1966), ii, pp 247–99, and as to slavery see also commentary on Art 61. The ILC subsequently considered that it was among the four areas which it had identified as giving rise to an international crime (see § 157, n 5) 'that are to be found the rules which the contemporary international legal order has elevated to the rank of ius cogens': YBILC, 1976, vol II, pt 2, p 121 (para 67).


1 De Cive, iv, 4.
2 De Jure Naturae et Gentium, ii, c iii, § 22.

negative. During the 19th century Austin3 and his followers took up the same attitude. In large measure the problem is one of definition, and different definitions of what constitutes 'law' can produce different answers to the question whether any particular body of rules may properly be regarded as 'law'.

Definitions are drawn up primarily in terms of the internal (or municipal)4 law of states may be unnecessarily restrictive when applied to rules obtaining in other kinds of community. Although the characteristics of municipal law may side a valid standard against which to measure the quality as law of the rules in some other, and particularly the international community, a body of rules may be law in the strict sense of the term even though it may not at some stages of its development possess all the international characteristics of municipal law. Divergence from the usual characteristics of municipal law has nevertheless often been regarded as expressive of the weakness of a body of rules qua law.6

In earlier editions of this treatise7 law was defined as a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power.8 The three requirements of this definition are satisfied by international law, to a greater or lesser extent. The states of the world do together constitute a body bound together through common interests which create extensive intercourse between them, and differences in culture, economic structure, or political system, do not affect as such the existence of an international community as one of the basic factors of international law.9

3 Lectures on Jurisprudence, v. i.
4 On the legal nature of international law see Hart, The Concept of Law (1961), ch X; H Lauterpacht, Collected Papers (vol 1, 1970), pp 11–36. The matter is also discussed in many of the works cited in n 9.
5 The term 'municipal law' is often used in the sense of national or state law in contradistinction to international law. Municipium was a 'town, particularly in Italy, which possessed the right of Roman citizenship ... but was governed by its own laws': Lewis and Short, Latin Dictionary.
7 8th ed, § 5; see also ibid, §§ 6–9.
8 That is, external to the person against whom they are enforced.
9 The preamble to the Draft Declaration on Rights and Duties of States, adopted by the General Assembly of the UN in 1949 (Res 375 (IV)), affirms that 'the states of the world form a community governed by international law'.

conduct of the members of that community exist, and have existed for hundreds of years. Equally, there exists a common consent of the community of states that the rules of international conduct shall be enforced by external power, although in the absence of a central authority for this purpose states have sometimes to take the law into their own hands by such means as self-help and intervention—although the outlawing of resort to force, and the hesitant steps being taken towards international enforcement action, may indicate less reliance on self-help as the normal means for the enforcement of international law. The Security Council’s primary responsibility for and powers in relation to the maintenance of international peace and security, which extend to enforcement action including mandatory measures of various kinds, or the establishment of peacekeeping forces operating with the consent of the state in which the force exercises its functions, offer possibilities of future development towards an effective system of sanctions. They also serve to demonstrate that enforcement of the law through an agency which is both external to the state in default and representative of the international community has the authority of a recognised principle of international law. All the same, it must be recognised that deficiencies in the means at present available for the enforcement of international law, including in particular the absence of truly compulsory arrangements for the judicial settlement of disputes—make it, by comparison with municipal law and the means available for its enforcement, certainly the weaker of the two in that respect.

While some deficiencies in international law make it as yet undeniably an imperfect legal order, developments over the past half century in particular indicate considerable progress towards their amelioration. An emerging system of sanctions for the enforcement of international law is discernible, while recourse to so-called law-making treaties, and certain aspects of the activities of international organisations, may be pointers in the direction of an emergent nature of international law.
legislative process or at least an international analogue thereof. There are also certain other indications of a growing maturity in the international legal order. These include the recognition that certain rules have the character of *ius cogens*, which reduces the area for the operation of purely consensual rules, and establishes that within the general body of rules of international law there exists superior legal rules, with which rules of a 'lower' order must be compatible. Article 103 of the United Nations Charter may also be regarded as establishing, for members of the United Nations at least, the 'superior' nature of the obligations under the Charter. There is similarly increasing acceptance that the rules of international law are the foundation upon which the rights of states rest, and no longer merely limitations upon states' rights which, in the absence of a rule of law to the contrary, are unlimited. Although there are extensive areas in which international law accords to states a large degree of freedom of action (for example, in matters of domestic jurisdiction), it is important that the freedom is derived from a legal right and not from an assertion of unlimited will, and is subject ultimately to regulation within the legal framework of the international community. In the *Military and Paramilitary Activities* case the International Court of Justice upheld the essential justiciability of even those disputes raising issues of the use of force and collective self-defence.

Furthermore international law may now properly be regarded as a complete system. By this is meant not that there is always a clear and specific legal rule readily applicable to every international situation, but that every international situation is capable of being determined as a matter of law, either by the application of specific legal rules where they already exist, or by the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles. It is thus not permissible for an international tribunal to pronounce a *nou law* to invoke the absence of clear legal rules applicable to a dispute as a reason for declining to give judgment (unless the tribunal is submitting the dispute to the tribunal in some way limits the power of the tribunal to apply international law as a whole). The International Court takes judicial notice of international law.

§ 4 Practice and the legal nature of international law

Theoretical arguments about the legal nature of international law, insofar as some of them seek to deny the legally binding character of international law, take on an increasingly unrealistic appearance, since in practice international law is constantly recognised as law by the governments of states who regard their freedom of action as legally constrained by international law. States not only recognise the rules of international law as legally binding in innumerable treaties, but affirm constantly the fact that there is a law between themselves. They further recognise this law by requiring their officials, courts, and nations, to act conformably with the duties imposed upon the state by international law. The legal character of international law is acknowledged in the 1970 Declaration on Principles of International Law.

18 As to which see also § 32. 19 Note also 'general principles of law' as a source of international law less dependent upon consent than other sources: see § 12. 20 See § 592. 21 See Fitzmaurice, *BY*, 3 (1953), pp 8–18, and Hug R, 92 (1957). iv, pp 49–59; H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 399–407; Waldock, Hug R, 106 (1962), pp 60–61. *The younger view found some support in the dictum of the PCIJ in the Lotus case that 'international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.' (PCIJ, Series A, No 10, p 18.) Although the Court was directed by the *compromis* to consider the matter from the standpoint of seeking a rule prohibiting Turkey from doing what she had done, the Court explained that this 'way of stating the question is also dictated by the very nature and existing conditions of international law' (ibid). 22 Thus the notion of 'abuse of right' is unavailable unless, but is available when, there is a right which is being exercised. 23 ICJ Rep (1986), pp 26, 27. The Court has also noted that while it may be aware that political aspects may be present in any legal dispute brought before it, the purpose of recourse to the Court is the peaceful settlement of legal disputes: its judgment is a legal pronouncement, and it cannot concern itself with issues of political motivation which might lead a state at a particular time, or in particular circumstances, to choose judicial settlement. 24 See H Lauterpacht, *The Function of Law*, pp 51–135; *Development of International Law by the International Court* (1958), pp 165–7, in *Symposiuiu Versilii* (1958), pp 196–221, and in *Collected Papers*, vol 2 (1970), pp 94–8; Siorat, *Le Problem de laic en droit international* (1959); Stone, BY, 35 (1959), pp 124–61; Salmon, *Rev Belge* (1967), pp 402–50; Higgins, ICLQ, 17 (1968), pp 50–84; Thurlow, BY, 60 (1969), pp 76–84. But note the critical analysis taken of the completeness of international law by Carty, *The Decay of International Law* (1986).
concerning Friendly Relations and Cooperation among States; the seventh Principle includes the duty of every state to fulfil in good faith its obligations under the generally recognised principles and rules of international law.

§ 5 The basis of international law It is not possible to say why international law as a whole is binding upon the international community without entering the realm of non-legal considerations. It is, however, in accord with practical realities to see the basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law — international law — to govern their conduct as members of that community. In this sense 'common consent' could be said to be the basis of international law as a legal system. That common consent is reinforced by there being an increasing number of matters (such as international civil aviation, the use of international rivers, and questions of pollution) for which some rules are a real necessity and which can only be satisfactorily regulated by internationally valid rules.

This 'common consent' cannot mean, of course, that all states must at all times expressly consent to every part of the body of rules constituting international law, for such common consent could never in practice be established. The membership of the international community is constantly changing; and the attitude of individual members who may come and go must be seen in the context of that of the international community as a whole, whilst dissent from a particular rule is not to be taken as withdrawal of consent to the system as a whole.

The common consent that is meant is thus not consent to particular rules but to the express or tacit consent of states to the body of rules comprising international law as a whole at any particular time. Membership of the international community carries with it the duty to submit to the existing body of such rules, and the right to contribute to their modification or development in accordance with the prevailing rules for such processes. Thus new states which come into existence and are admitted into the international community thereafter become subject to the body of rules for international conduct in force at the time of their admittance. No single state can say on its admittance into the community of nations that it desires to be subjected to such and such rules of international law, and not to others. The admittance includes the duty to submit to all the rules in force, with the sole exception of those which are binding upon such states only as are parties to a treaty creating the rules concerned.

Similarly, no state can at some time or another declare that it will in future no longer submit to a certain recognised rule of international law. The body of the rules of this law can be altered by the generally agreed procedures only, not by a unilateral declaration on the part of one state. This applies to all rules other than those created by treaties which admit of denunciation or withdrawal.

Different from the duty to submit to existing rules, however, is the liberty of all states within the international community — newly admitted as well as old-established — to contribute to the evolution of those rules. In this way, while a single state's withdrawal of consent to a putative new rule will not in itself affect the legal character of the rule, it may over a period and taken together with a similar attitude on the part of other states lead to a change in the law. Many states which have achieved independence, particularly in the last quarter of a century, have questioned the extent to which certain parts of the hitherto accepted body of customary rules are properly to be regarded as rules of international law: the influence of these states on the evolution of international law is likely to be significant. They have for example made a notable contribution to the demand for a codification of the principles of friendly relations and cooperation among states, and for the establishment of a new international economic order, and their new-found (or reacquired) independence has produced an emphasis on the sovereignty of states which is affecting many aspects of international law. The emergence of 'consensus' as an appropriate procedure for the adoption of many decisions at international conferences and in such bodies

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3 See § 105. Note also the terms of the Draft Declaration on Rights and Duties of States cited at § 3, n 9.


5 For a bibliography of earlier discussion of the subject see 8th ed of this vol, p 15, n 1.

6 It may be noted that in Marxian theory in particular the requirement of consent, as a reflection of state sovereignty, is given notably strong emphasis: see §§ 23, n 22, and 104, n 5; and § 104, n 6 as to 'peaceful coexistence'.

7 See Fitzmaurice, Annales: L'Annuaire de Centenaire (1973), pp 237–45. The matter is also discussed in many of the works cited in § 3. In relation to treaties a new state can exercise a degree of choice (which may be substantial) as to which treaties formerly extending to its territory it will regard as continuing to bind it after independence: see generally § 66.

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It may be that the tendency of some newly independent states to question rules of customary international law on the basis that they reflect concepts which are culturally alien to their cultures, attitudes and interests no longer represents a major element in their approach to international law. Those states increasingly seem to accept, eg in pleadings before the ICJ, international law as the appropriate general frame of reference for the discussion of international legal issues (while, of course, remaining free — as are all states — to contest for the existence of particular rules in a form which reflects their requirements).

8 See § 105.

9 See § 106.

10 It must be remembered that many 'new' states in fact have a long history as one-time independent political societies.

11 See § 575, n 13.
as the United Nations General Assembly has mitigated the consequences which would otherwise flow from rigid requirements of consent in an international community now numbering over 150 states, and has permitted the continued development of international law in accordance with the general consent of the international community.

§ 6 States as the normal subjects of international law States are the principal subjects of international law. This means that international law is primarily a law for the international conduct of states, and not of their citizens. As a rule, the subjects of the rights and duties arising from international law are states solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being, such as an alien or an ambassador. Rights which might necessarily have to be granted to an individual human being according to international law are not, as a rule, international rights, but rights granted by a state's internal law in accordance with a right granted to, or a duty imposed upon the state concerned by international law. Likewise, duties which might necessarily have to be imposed upon individual human beings according to international law are, on the traditional view, not international duties, but duties imposed by a state's internal law in accordance with a right granted to, or a duty imposed upon, the state concerned by international law.2

§ 7 Persons other than states as subjects of international law States are primarily, but not exclusively,1 the subjects of international law. To the extent that bodies other than states directly possess some rights, powers and duties in international law they can be regarded as subjects of international law, possessing international personality. It is a matter for inquiry in each case whether—and if so, what—rights, powers and duties in international law are conferred upon any particular body.

States may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subjects of international law.2 Although individuals cannot appear as parties before the International Court of Justice,5 states may confer upon them the right of direct access to international tribunals.7 As the Permanent Court of International Justice recognised in the Advisory Opinion concerning the Jurisdiction of the Courts of Danzig, states may expressly grant to individuals direct rights by treaty; such rights may validly exist and be enforceable without having been previously incorporated in municipal law.5

A notable example of the direct applicability to individuals of the provisions of a treaty is afforded by the operation of the European Economic Community.6 Many treaties framed in terms of human rights and fundamental freedoms also apply directly to individuals, who may in certain circumstances institute proceedings before an international tribunal to secure the observance of such rights, even as against the state of which they are nationals.7 Moreover, it is an established principle of customary international law that individual members of armed forces of the belligerents—as well as individuals generally—are directly subject to the law of war and may be punished for violating its rules.5 Similarly, offences against the peace and security of mankind are offences for which the responsible individuals are punishable.8 The doctrine adopted in many municipal systems to the effect that international law is part of the law of the land is upon analysis yet another factor showing that international law may act per se upon individuals, who become, to that extent, subjects of international law.10 Finally, even in respect of those rules of international law which regulate the conduct of states we must not forget that the conduct actually regulated is the conduct of human beings acting as the organ of the state. As Westlake said, 'The duties and rights of States are only the duties and rights of the men who compose them.'11

Not only individuals but also certain territorial or political units other than states may, to a limited extent, be directly the subject of rights and duties under international law. This applies, for example, to the rights and duties of political communities recognised as belligerents and insurgents.12 Prior to 1929 the Holy See, though not at that time a state, was a subject of international right and duties.13 It must also be noted that international practice has gradually recognised a measure of international legal personality of territorial units which are

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1 As to when a community constitutes a state see generally § 34; see also § 40 (recognition of states). As to the international personality of states, and certain other entities, see § 123.
2 See the Miettenmaats Palestina Concessions Case (1924), PCIJ Series A, No 2, p 12, line 10.
3 The question whether there could be any subjects of international law other than states was at one time a matter of strenuous debate. In the first three editions of this work the view was expressed that only and exclusively are the subjects of international law. It is now generally accepted that there are subjects other than states, and practice amply proves this. One of the most important pioneers in getting this 'modern' view accepted was Sir Hersch Lauterpacht, the editor of the 8th ed of this vol. See H Lauterpacht, LQR, 63 (1947), pp 435–60, 64 (1948), pp 97–119, and Collected Papers, I (1970), pp 136–50. See also § 2 on p 19 of the 8th ed of this vol for an extensive bibliography of the earlier discussion.
4 See generally § 375. In Golumbov-Vojka v Republic of Austria I L R, 71 (1958), p 265, liquidators of a bank, appointed under a treaty provision pursuant to which the bank was put into liquidation, were held to have acquired a 'status of persons under international law'.
5 Article 34 of the Statute of the ICJ provides as follows: 'Only States may be parties in cases before the Court'. See vol II of this treatise (7th ed), § 25a.
6 See § 375, n 2, which refers also to the right of individuals to submit petitions to international tribunals; and § 407, n 49.
7 While admitting that in principle a treaty 'cannot, as such, create direct rights and obligations for private individuals', the Court said: 'It cannot be disputed that the very object of the parties of some definite rules creating individual rights and obligations and enforceable by national courts': (1928) PCIJ Series B, No 15, p 17. See for comment thereto H Lauterpacht, The Development of International Law by the International Court (1950), pp 173–6.
8 See § 19, sect (3).
9 See § 148. See also § 399 as to refugees.
10 See § 148.
11 See §§ 148, n 8, and 455.
12 See § 19.
13 Collected Papers, p 78.
14 See § 49; and more particularly § 49, n 4 as to so-called 'national liberation movements'.
not states but which nevertheless have been admitted to participation in their own name in important international organisations of states such as the Universal Postal Union and the World Health Organisation. The possibility that inter-governmental organisations may possess international legal personality is now accepted. In the case concerning Reparation for Injuries Suffered in the Service of the United Nations the International Court of Justice expressly rejected the view that only states can be subjects of international law. It noted that the international personality of the United Nations as being indispensable for the fulfilment of the purpose for which it was created, the Court pointed out that ‘throughout its history the development of international law has been influenced by the requirements of international life’ and that ‘the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States’. Such new subjects of international law, the Court declared, need not necessarily be states or possess the rights and obligations of statehood. For the subject of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Furthermore, as the International Court stated in a later

14 See § 84, n. 17. See also § 85, n. 29, as to the concept of ‘people’. As to the position of dependent territories in general see § 84; and see § 75 on the international position of the member states of a federation; and also § 22, n. 7 as to the position of certain native communities.


16 In addition to certain rights and capacities to be enjoyed by the UN within the domestic legal systems of states and the right to present claims in the Reparations case, the UN’s international personality finds expression in its general possession of ‘juridical personality’ (‘Art 1 of the Convention on Privileges and Immunities of the United Nations 1946; that personality which entitles to participate in international agreements with states – including non-member states – and other international organisations, and the power to exercise direct jurisdictional and legislative powers (see Art 81 of the Charter); and also note certain powers vested in the UN under the Treaty of Rome in relation to the so-called ‘Community’ (Art 93 TEC). Certain powers in relation to West New Guinea (West Irian) under GA Res 1752 (VII) (1962); UNYBC (1962), pp. 124–7; and the powers of the UN Council for Namibia (§ 88, n. 20).


18 Ibid. An international personality is not limited to states, the latter are bound to fulfill international duties – ie duties prescribed by general international law – not only in relation to other states but, in proper cases, to international persons generally. This explains why in the Reparation for Injuries case, an international organisation is not to be considered as some form of super-state: ‘International organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’. The constitutions of many international organisations contain an express provision similar to that of the UN Charter, establishing that the organisation a legal personality in international law separate from that of the member states. The constitution of an international organisation often also confers on it specific international capacities which necessarily imply a measure of international personality. Furthermore, the states setting up an organisation may confer upon it functions which for their fulfilment necessitate the possession of certain international legal capacities and thus, to that extent, of international personality. Whether, and to what extent, an organisation possesses international personality distinct from that of the states members of it, is a question to be answered in the light of its particular circumstances. The international personality of international organisations is
manifest in various areas of international law, such as the law of treaties, international claims, privileges and immunities, and maritime flags. Although international organisations may not be a party in cases before the International Court of Justice, certain of them are entitled to seek advisory opinions from the Court.

Of particular interest is the development of the international personality of the European Communities. They, like many international organisations, have an international personality distinct from that of the member states. The extent of that personality is, however, not just a matter of having certain necessary powers and capacities alongside the full range of international powers and capacities still possessed by the member states, but extends also to matters for which the Community has acquired competence through action within the Community and for which the member states have accordingly, by Community law, ceased to have international competence, having in effect transferred their powers in relation to those matters to the Community.

Some organisations, though international in scope and organisation, are not composed of states or governments and operate under private law rather than international law. Such non-governmental organisations (often referred to as NGOs) vary greatly in their significance and standing. Some have been accorded certain very limited rights on the international plane, such as the right to attend as observers meetings of inter-governmental organisations or international conferences. Under Article 71 of the United Nations Charter the Economic and Social Council may 'make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence. A European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations was concluded on 24 April 1986. The difficulty of drawing sharp lines between different categories of organisation the pooling of sovereignty involved in membership of the Communities are, however, limited by the principle of international law. Such non-governmental organisations have been accorded various levels of recognition in the exercise of certain rights to participate in Community activities, but the extent of such recognition remains limited. Any transfer of powers from states to the organisations is in the last analysis essentially temporary. Furthermore, such transfer or pooling of sovereign powers as has taken place is limited to the fields, mainly economic, which are governed by European Community law. They do not, accordingly, involve such matters as defence and foreign policy generally. For matters not falling within the scope of the Communities' powers the member states have developed separate procedures of political cooperation, through which they cooperate outside the framework of the Community institutions. The transfer of powers to the Communities has thus involved, at a regional level, a notable transfer of sovereign powers from the state to the Community.
tions is illustrated by a further intermediate class between inter-governmental organisations and purely private international organisations. This comprises companies and consortia which, while their structure is essentially that of private organisations is illustrated by a further intermediate class between inter-governmental and purely private international organisations, are partly or wholly composed of governmental agencies: they may also, to a limited degree, have conferred on them certain attributes of international personality.

**Sources of International Law**


§ 8 Meaning of 'source'. There is much discussion of the meaning of the source to which such terms as 'source', 'cause', 'basis' and 'evidence' of international law. There is, however, an unavoidable degree of flexibility and overlap in the use of such terms, and little practical purpose is served by attempting to define them too precisely or to differentiate them too rigidly. Nevertheless, the concept of a 'source' of a rule of law is important, since it enables rules of law to be identified and distinguished from other rules (in particular from rules de lege ferenda) and concerns the way in which the legal force of new rules of conduct is established and in which existing rules are changed.

The causes of a rule of law are generally to be found in particular social and historical circumstances in the development of a community, which suggest the need for a rule of conduct in a particular sense. The source of a rule of law is, by contrast, to be found in the process by which it first becomes identifiable as a rule of conduct with legal force and from which it derives its legal validity.

The sources of international law must not be confused with the basis of international law; this, as we have seen, is to be found in the common consent of the international community. The sources of law, on the other hand, concern the particular rules which constitute the system, and the processes by which the rules become identifiable as rules of law. The sources of a rule of law, while therefore distinct from the basis of the law, are nevertheless necessarily related to the basis of the legal system as a whole.

We should at this point also note the distinction between the formal and the material sources of international law. The former — with which we are more concerned here — is the source from which the legal rule derives its legal validity, while the latter denotes the provenance of the substantive content of that rule. Thus, for example, the formal source of a particular rule may be custom, although its material source may be found in a bilateral treaty concluded many years previously, or in some state's unilateral declaration.


34 See Eijlazé, The Extension of Corporate Personality in International Law (1970), Schermers, International Institutional Law (2nd ed, 1980), pp 18–21. As to the law applicable to certain transactions of states, particularly in their dealings with private corporations, on essentially private law matters, see § 12, n 12...
§ 9 The sources of international law It is the practice of states which demonstrate which sources are acknowledged as giving rise to rules having the force of law. It is useful, however, to consult Article 38 of the Statute of the International Court of Justice, which provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognised by civilised nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Although Article 38 does not in terms state that it contains the formal sources of international law, this is usually inferred. Article 38 cannot itself be creative of the legal validity of the sources set out in it, since it belongs to one of those sources itself. It is, however, legally binding on the International Court of Justice because of its inclusion in the Statute of the Court, and is authoritative generally because it reflects state practice.

The sources set out in Article 38 are, in fact, such as will ensure the conformity of the resulting rules as a whole with that common consent of the international community which is the basis of international law. This is not to say, however—nor is it the case—that the source of every rule of international law is to be found in the consent of states. This is often obscured by the fact that custom and treaties, which are sources dependent on at least the general consent of states, are the principal and regular sources of international law, and that, as the international community is at present organised, the will of states normally predominates in the creation of rules of international law. Nevertheless, the will of individual states does not play an unrestricted role. Custom is itself a matter of general rather than universal consent, so that a dissenting state cannot free itself from an act by will from the obligations imposed on it by a rule of customary law; and even with treaties, where the will of the contracting states is normally paramount (even in derogation from otherwise applicable rules of customary international law), states are not free to ignore the prescriptions of ius cogens. Furthermore, the sources of international law are not self-contained but interrelated, and each source gives rise to rules which have to be understood against the background of the rules deriving from other sources, so that any non-consensual element in one source of law may indirectly affect the rules deriving from other sources. Of importance, both in that context and also in its own right, is the acceptance in the Statute of the International Court of Justice of the general principles of law recognised by civilised nations as a source of international law. This was said to mark the abandonment of the positivist view, according to which treaties and custom were the only sources of international law. It equally signified the rejection of the naturalist attitude, according to which the law of nature was the primary source of international law. It amounts to an acceptance of what has been called the Grotian view, which, while giving due—and, on the whole, decisive—weight to the will of states as the authors of international law, did not divorce it from legal experience generally.

§ 10 Custom Custom is the oldest and the original source of international law as well as of law in general. For this reason, although an international court is

[Notes and references]

1. The ICJ in applying international law must also apply any special rules in the compromiss under which the parties have agreed to refer the dispute to the Court: Tunisia–Libya Continental Shelf Case, ICJ Rep (1982), p 37.

2. On this point see also Ross, A Textbook of International Law (1947), pp 83, 93. As to the relationship between the sources of international law see Thirwby, By, 6 (1929), pp 145-57.

3. As to provisions prescribing the law to be applied by particular international tribunals, see the UN Secretariat's Systematic Survey of Treaties for the Peaceful Settlement of Disputes 1928-1948, p 1164. See also Art 11 of the ILC Draft on Arbitral Procedure (YBILC, 1958), ii, p 9, providing for the application of Art 38.1 of the Statute of the ICJ in the absence of the agreement between the parties to a dispute as to the law to be applied by the tribunal. See also the Maxima and Quasiall Cases, AD, 4 (1927-28), No 317.


5. See on the significance of consent in international law, Schwarzenberger, Hag R, 87 (1955), 1, pp 262-89; and generally § 3.
bound in the first instance to consider any applicable treaty provisions binding upon the parties, the treaty will in case of doubt be interpreted against the background of customary international law, which in so far as it embodies a rule of *ius cogens* with which the treaty is in conflict, will indeed prevail over the treaty. This explains why the International Court of Justice, whose jurisdiction has been most frequently invoked for the purpose of interpreting treaties, has largely relied upon and, in turn, made a substantial contribution to, the development of customary international law. However, the formulation in the Statute serves to emphasise that the substance of this source of international law is to be found in the practice of states. The practice of states in this context embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic despatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere. The formulation in the Statute serves to emphasise that the substance of this source of international law is to be found in the practice of states. The practice of states in this context embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic despatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.

The Court declined to acknowledge, in the case before it, the existence of a knowledge of state practice in this wide sense has increased greatly in recent years with the publication of volumes recording the practice of several states. The terms of Article 38(1)(b) also make it clear that there are two essential elements of custom, namely practice and *opinio juris*. This serves to distinguish custom from usage. In everyday life and language the terms are used synonymously, but in the language of the international jurist they have different meanings. A custom is a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right. On the other hand, a usage is a habit of doing certain actions which has grown up without there being the conviction that these actions are, according to international law, obligatory or right. Some conduct of states concerning their international relations may therefore be usual without being the outcome of customary international law. In the *Asylum* case between Colombia and Peru the International Court of Justice, relying on Article 38 of its Statute, formulated the requirements of custom in international law as follows:

"The party which relies on custom must prove that this custom is established in such a manner that it has become binding on the other party... that the rule invoked... is in accordance with a constant and uniform usage, practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State..."

The conclusion of state practice in this wide sense has increased greatly in recent years with the publication of volumes recording the practice of several states. The terms of Article 38(1)(b) also make it clear that there are two essential elements of custom, namely practice and *opinio juris*. This serves to distinguish custom from usage. In everyday life and language the terms are used synonymously, but in the language of the international jurist they have different meanings. A custom is a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right. On the other hand, a usage is a habit of doing certain actions which has grown up without there being the conviction that these actions are, according to international law, obligatory or right. Some conduct of states concerning their international relations may therefore be usual without being the outcome of customary international law. In the *Asylum* case between Colombia and Peru the International Court of Justice, relying on Article 38 of its Statute, formulated the requirements of custom in international law as follows:

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custom as claimed by Colombia. In the North Sea Continental Shelf cases the International Court of Justice, in considering whether state practice since the conclusion of the Geneva Convention on the Continental Shelf had been such as to lead to the creation of a new rule of customary international law on the basis of what was originally a purely conventional rule, stressed that in order for state practice to constitute the necessary \textit{opinio juris} two conditions had to be fulfilled:

'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the \textit{opinio juris} see \textit{necessarii}. The States concerned must therefore be of the opinion that they are committed to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, eg, in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.'

This subjective element may be deduced from various sources, including the conclusion of bilateral or multilateral treaties, attitudes to resolutions of the United Nations General Assembly and other international meetings, and statements by state representatives.

\begin{enumerate}
\item The Court said: 'The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on different occasions; there has been an almost rapid succession of positions in some cases, that it is not possible to discern in all this any constant and uniform usage.' For a denial, on somewhat similar grounds, of the claim of existence of a custom in this United States Nationals in Egypt case, Series A, No 1, ICJ Rep (1952), p 200.
\item As to the development of customary rules from treaties, see § 11.
\item These would seem to be the states taking the action in question, or other states in a position to react to it: see the Military and Paramilitary Activities Case, ICJ Rep (1986), p 129.
\item ICJ Rep (1969), pp 3, 44. In the Rights of Passage case the Court regarded the fact that permission had always to be sought before certain kinds of passage were undertaken as negating any right of passage, it being immaterial that permission had in fact always been granted, since there was no obligation to grant it: ICJ Rep (1962), at pp 42–3. See also the judgment of the PCIJ in the Lotus case, Series A, No 10: Even if the majority of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom' (at p 28).
\item See § 11, n 12.
\item It must be noted, however, that the inclusion of a provision in a treaty does not necessarily mean that the parties believe they are merely reflecting what is already a matter of legal obligation; the parties may include the provision because they wish to record a special rule even though it may depart from customary law, or because they are not agreed, or have no view, as to its consistency with customary law and merely wish to be clear as to the rule to apply between themselves, or because one party agreed to the provision for reasons having nothing to do with, or even negating, any \textit{opinio juris} on its part (see eg Government of Kuwait v American Independent Oil Co (1982), ILR, 66, pp 518, 606–7).
\item \textit{Military and Paramilitary Activities Case}, ICJ Rep (1986), pp 99–101; and see § 16.
\item Ibid, pp 100–1.
\end{enumerate}
A practice which is not general, but limited to a number of states (even to two only) but accepted as law by them, may still constitute a customary rule of law, of particular rather than general application. Such a rule of particular customary international law will normally involve a departure from an otherwise generally applicable rule. Being in the nature of an exception, its existence will be a matter of strict proof. It is probable, therefore, that in such a case it is necessary to establish a state's clear assent to the practice as law in order for the rule to be relied on by or against it. This would appear to be the significance of certain rule of customary international law, reflecting a general practice, the mere fact that the rule which may be abstracted from certain circumstances customary rules can develop fairly legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law.

Custom is normally a relatively slow process for evolving rules of law, since the practice in question will take time to develop and it will usually only be some time thereafter that the necessary opinio juris will grow up in relation to it. In certain circumstances customary rules can develop rapidly, as for example in relation to the continental shelf, and perhaps the exclusive economic zone; this may occur particularly where the new rule has its origin in, or is soon reflected in, a multilateral treaty of appropriately general application. However, usually customary international law is too slow a means of adapting the law to fast-changing circumstances. To some extent the growth in the role of international organisations as a factor in international life contributes to a more rapid adjustment of customary law to the developing needs of the international community. Apart from any more direct function of international organisations as a potential source of international law, the concentration of state practice now developed and displayed in international organisations and the collective decisions and the activities of the organisations themselves may be valuable evidence of general practices accepted as law in the fields in which those organisations operate.

Sources of international law

§ 11 Treaties. Historically, treaties are the second source of international law. They developed as the means whereby states could give to rules for their mutual conduct a greater particularity than was provided by custom. Consequently, treaties have to be interpreted and applied against the background of customary international law. Furthermore, not only is custom the original source of international law, but treaties are a source the validity and modalities of which themselves derive from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of international law that treaties are binding upon the contracting parties.

Treaties are, however, a formal source of international law in only a somewhat special sense. As a material source of law they have very considerable impact, but it may be strictly more correct to regard them formally as a source more of rights and obligations than of law, which is usually taken to require a generality and automaticity of application which treaties do not typically possess. Treaties are, all the same, a most important source of rules for international conduct, and in this respect their importance has increased immeasurably over the last century and a half.

Of particular importance is the Charter of the United Nations which, in addition to being a treaty embodying the constitution of that organisation, has become the basic legal instrument for the international community. Its principles are increasingly regarded as applicable generally in international relations and have been developed so as to permeate many branches of international law. In case of conflict between a state's obligations under the Charter and its obligations under any other international agreement, the former prevail. Despite this pre-eminence the Charter remains a "multilateral treaty, albeit a treaty having certain

References:
1. See § 16.
2. See § 854. See also Finch in Hagg, 53 (1935), iii, pp 588-604.
4. See de Visscher, RG, 58 (1955), pp 325-69. There are now several authoritative collections of treaty texts, notably the LNTS (205 vols, 1920-46), and the UNTS (1946 onwards). See also Hudson, International Legislation (9 vols, 1931-50); Parry, The Consolidated Treaty Series 1648-1918, comprising approximately 150 vols. Many states publish official collections of treaties entered into by them: see eg the UK's Treaty Series from 1892 onwards and the European Communities Treaty Series from 1974 onwards, and the USA's Treaties and Other International Agreements (13 vols for the years 1776-1949, thereafter annual vols). See also BDP (170 vols, covering the period from 1812 to 1965).
5. Charter of the UN Art 103.
special characteristics" and accordingly the principles and rules applicable in general to the interpretation of treaties apply also to the Charter.

The general importance of treaties lies primarily in the fact that the rules established by them, and the rights and obligations to which they give rise, are legally binding on the parties to the treaty. This applies to all treaties, whether bilateral or multilateral. It is this aspect of treaties which is foremost in Article 38(1)(a) of the Statute of the International Court of Justice which refers to 'international conventions, whether general or particular, establishing rights or obligations among the international community generally. Such treaties are often for convenience present no central law-making authority which makes law for the international community as a whole in the way that parliaments make law by statute within a state. Exceptionally, however, as the International Court of Justice has recognised,


4 Article 38 of the Vienna Convention on the Law of Treaties 1969 provides that the Convention applies to any treaty which is the constituent instrument of an international organisation without prejudice to any relevant rule of the organisation. See E Lauterpacht, Hag R, 152 (1976), iv, pp 414-65 on the interpretation of constitutional instruments.

The reference to 'the contesting states' emphasises the forensic character of Art 38.

5 Article 5 of the Vienna Convention on the Law of Treaties 1969 provides that the Convention down the law governing the conduct of the parties in the future; (b) the term 'law-making' does not imply that there exists mterrational, the convenience of the term 'law-making treaties' may become a source of confusion if we fail to keep in mind that: (a) all treaties are in a real sense law-making inasmuch as they lay down the law governing the conduct of the parties in the future; (b) the term 'law-making' does not imply that there exists among states international legislation in the accepted meaning of the term, namely, the enactment of laws overriding the will of a dissenting minority.


On the danger of assuming the need in international law for some legislative procedure equivalent to the national enactment of statutes, see Jennings, ICLQ, 13 (1964), at p 388.

nised, a treaty, such as the Charter of the United Nations, may create rights and obligations for states not parties to the treaty.

11 Somewhat different is the situation where rules contained in a treaty (or treaties) commend themselves to the international community in general, so that the rules originally formulated in the treaty may come to have the character of customary law and as such be binding on those states which are not parties to the treaty. Quite apart from the final treaty provision itself, the preparatory work leading up to the negotiations for the treaty, and in some cases the course of the negotiations themselves, will have also made its own contribution to the development of customary law, particularly in the case of those treaties which have been carefully prepared in the manner of those flowing from the work of the International Law Commission.

One must also distinguish between the treaty which creates new rules which become accepted at once, and the treaty which codifies or otherwise reflects in its terms existing customary law. Although this latter kind of treaty can

1 See § 1, n 7.

2 In states where customary international law can apply as part of the law of the land, but treaties require some legislative action for them to be applicable in municipal law, the question whether a treaty provision also represents a rule of customary international law is of particular importance. A general and constant practice of numerous bilateral treaties containing similar provisions may afford evidence of a rule of customary law in that sense; see the Notteboom Case, ICJ Rep (1955), pp 22–3; Lagus v Baggianini, ILR, 22 (1955), pp 533, 536–7; Lauritzsen et al v Governments of Chile, ILR, 23 (1956), pp 708, 715–16, 729–30; of The States (Duggan) v Tapley, ILR, 18 (1954), No 10; Italy v Belgium, National Re-Extradition Case, ILR, 70, pp 374, 376–7. See generally Baxter, BY, 41 (1966–67), pp 273–300, and Hag R, 129 (1970), pp 305–309.

3 The reference to 'the contesting states' emphasises the forensic character of Art 38.

As to the principle pacta sunt nec nec possunt, see § 626.


Even an unratified treaty may have some value in this respect: see Re-Lechin, AD, 16 (1949), No. 1; but cf Re Campero, ILR, 24 (1957), p 518, and in n 4 below. In any particular dispute the parties may have expressly or implicitly accepted the rules laid down in a treaty to which they are not parties, and in such cases the treaty's rules will apply to them even if they have not become so generally accepted as to become applicable to them as customary law. But note the warning of the ICJ against lightly concluding that a state which could have become a party to a treaty but has chosen not to do so has necessarily been bound in some other way: North Sea Continental Shelf Case, ICJ Rep (1969), at p 25.

A notable example of treaty provisions being accepted as acquiring also the character of customary international law is afforded by certain stipulations of the Hague Conventions relating to the rules of warfare (see vol II of this work (7th ed), § 69(a) and, as regards the transformation of the Geneva Conventions of 1949 into customary international law, in the light of the Military and Paramilitary Activities Case, ICJ Rep (1986), at p 14, see Meron, AJ, 81 (1987), pp 348–70.


Such a treaty may accordingly have made a contribution to customary international law even if unratified.

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formally be regarded as creating legal rules binding only between the parties, so that the same rule, in both treaty and customary form, continues to exist by side, the very act of reducing customary law to writing in this way (and thus, to give one example, attracting different rules of interpretation) affects the nature of the initial customary rule itself.

These matters have been considered by the International Court of Justice in the North Sea Continental Shelf cases and in the Military and Paramilitary Activities case. In the former the Court had to consider whether principles of equidistance for delimiting the continental shelf, as enshrined in Article 6 of the 1958 Convention on the Continental Shelf, represented a rule of customary international law so as to be opposable to a state which was not a party to the Convention. For this purpose it is necessary to examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of state practice subsequent to the Convention. The Court concluded that the history of the circumstances in which the provision was included in the Convention showed that the principle was not then regarded as lege lata or as an emerging rule of customary international law, and found confirmation for this conclusion in the express permissibility of reservations to Article 6. Thus, the Court found, the rule was embodied in the Convention purely as a conventional rule. The Court then turned to the question whether Article 6 has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since become accepted by the international or contractual in its origin, has since passed into the general body of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the


17. Even before the treaty enters into force, either generally or for the forum state, the customary rule embodied in it will accordingly apply as a rule of that nature: see eg Querouil v Breton (1967), ILR, p 38; the Golder Case (1975), ILR, at p 213–14; Young Loan Arbitration (1986), ILR, p 329.

18. The continuing application to treaties concluded before the entry into force of the Vienna Convention on the Law of Treaties of rules of the customary international law of treaties notwithstanding that they have been repeated in the Vienna Convention itself, see Art 4 of that Convention (see § 581, n 10), and McAuley, ILQ, 35 (1986), pp 499–511.


21. For a decision as to the applicability of Art 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone as customary international law, see Re Martinez (1999), ILR, 28, p 170.


23. As to the effect of reservations to this Art upon the applicability of customary international law in the same matter to a dispute between parties to the Convention, see UK–France Continental Shelf Arbitration (1977–78), ILR, p 6.


26. Ibid, at p 43.


The Court also rejected the argument that for it to decide the dispute on the basis of customary rules only, when reference to the treaty obligations of the parties is barred, would in its result be a wholly academic exercise. In doing so, the Court found that the content of the treaty rules and the customary rules was so different as to make a judgment confined to the law ‘ineffective or inappropriate, or ... not susceptible of compliance or execution’ (p 97): this suggests that were the differences greater, the conclusion might not be the same.
The Court noted that the areas covered by the customary rules and the rules contained in the treaties did not overlap exactly and did not have the same content; and it went on to observe that:

"even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary international law has been clearly recognized by the Court in the North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either in the North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because the treaty had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule involved, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle: on the contrary, it considered it to be clear that certain other articles of the treaty in question were regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" [ICJ Rep (1969), p 39, para 63]. More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "survives" the former, so that the customary international law has no further existence of its own." 27

The Court supported its conclusion on this point by reference to differences in the applicable content of treaty law and customary law, and to differences in treaty norms and customary norms. The existence of identical rules in international treaty law and customary international law has been clearly recognized by the Court in the Barcelona Traction Case, ICJ Rep, 1970, at pp 34–37. See also Munch, ZS, 36 (1976), at pp 347–372, as to the reference of the principles of international law, as they are established between civilized nations, from the laws of humanity, and the requirements of the public conscience" in para 9 of the preamble to the Hague Convention with respect to the Laws and Customs of War on Land 1899. As to the reference generally of municipal law upon international law, see Strebel, ZS, 36 (1976), pp 168–187.

27 ICJ Rep (1986), at p 94. See also § 10 n 18.


As to the effect of Art 38(1)(c) on the controversy between the positivist and naturalists, see § 9, n. 9. For the view that this provision includes usages, even if it is not identical with, the principles of natural law, see Fitzmaurice, Hag R, 92 (1957), ii, p 56, n 1. There was a tendency to minimize the significance of that Article (see eg Strup, Elements, Ch II, § 9). See, on the other hand, Verdoorn, Gesellschaft, Staats und Recht. Pfortschr für Rechtsw., 1963, p 362, to whom is inclined to regard Art 38(1)(c) as the basic hypothesis of international law.

2 See H Lauterpacht, Analogiae, passim; Bluhdorn, op cit above, pp 142–46; Laun, Der Wandel der Ideen Staat und Völker (1933), pp 70–85; Knobben, ZS, 16 (1933–34), pp 56–95; 300–15; Ripka, Hag R, 44 (1933), ii, pp 520–665; Schreuer, Hag R, 68 (1939, ii), pp 195–250, and the literature cited above, n 1, as to 'general principles of law'. Contrary to the view expressed in the text, a few writers believe that the general principles can only be principles of international law, not general principles of the different national legal systems: see Funk, Hag R, 93 (1958), ii, pp 23–25. See also pp 38–40. In the following case the ICJ emphasized that when it intended to refer to institutions of municipal law, it was generally accepted rules of municipal legal systems which recognized the institution that reference was made to; ICJ Rep, 1970, at pp 34–47. See also Munch, ZS, 36 (1976), at pp 347–372, as to the reference to the 'principle of international law, as they are established between civilized nations, from the laws of humanity, and the requirements of the public conscience' in para 9 of the preamble to the Hague Convention with respect to the Laws and Customs of War on Land 1899. As to the influence generally of municipal law upon international law, see Strebel, ZS, 36 (1976), pp 168–187.

This may often be achieved by the essentially inductive process of discerning a principle which is found to underlie the particular rules of many national legal systems, since the necessary comparative approach to this task will tend to discount the national differences of detail or procedure and to isolate the basic uniform principle which is common to all.


See also the South-West Africa Case, PCJ, Series A, No 17, p 29 (repeal for breach of an agreement); German Interests in Polish Upper Silesia, PCJ, Series A, No 6, 20 (independence); Interpretation of the Greco–Turkish Agreement, PCJ, Series B, No 16 (action by individual members of corporate bodies); Chorów Factory Case: Jurisdiction, PCJ, Series A, No 9, p 31; Jurisdiction of the Courts of Danzig, PCJ, Series B, No 15, p 27 (a person cannot plead his own wrong). Interpretation of the Laws and Customs of War on Land, PCJ, Series B, No 12, 22 (subject in jus causae; on which see also Cheng, General Principles of Law (1953), pp 279–89; Fitzmaurice, BY, 35 (1959), pp 225–9; and Schwarzenberger, Anglo-Aus Law Rev, 1 (1972), pp 482–98. It is probable that these 'general principles of law' include the 'elementary considerations of human-
since as a rule conventional and customary international law have been sufficient to supply the necessary basis of decision. A principle which has, however, been invoked by the Court, and is of overriding importance, is that of good faith. It is incorporated in Article 2(2) of the United Nations Charter, which lays down that ‘All Members, in order to ensure to all of them the rights and benefits resulting from membership,’

Paragraph (1)(c) of Article 38 nevertheless constitutes an important landmark in the history of international law inasmuch as the states parties to the Statute did expressly recognize the existence of a third source of international law independent

ity, even more exacting in peace than in war’ which the ICJ, in the Corfu Channel Case, ICJ Rep (1949), at p 22, adduced as one of the grounds of the responsibility of Albania for failure to give warning of the minefields in her waters.


On the principle pacta sunt servanda, see Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953), pp 112–14, and § 564. On adhering states, see Cheng, op cit, pp 336–72. On equality between the parties to litigation (often expressed in the maxim aequis judicature et altera part), see Cheng, op cit, pp 290–8. On the principle nullum crimen sine lege praecox, see YBLIC (1976), ii, pp 90–91. See also § 55, as to ex istria inio nonturi; § 15, as to equity; and § 124, as to abuse of right (including the maxim, sic utere tuo ut alterum non laedat). As to the notion of public order as a general principle of law, see the Opinion of Judge Lauterpacht in the Guardianship of Infants Case, ICJ Rep (1958), at p 92ff; and to international public policy, see Jenks, The Prospect of International Adjudication (1964), pp 428–466.

The significance of this principle

of law, or of the general principles of law, or to the question of the legal status of international courts and tribunals as providing the legal basis for the law of the United Nations.


dent of custom or treaty. This was in fact the practice of international arbitration before the establishment of the Court, since its establishment a number of international tribunals, although not bound by the Statute, have treated that paragraph of Article 38 as declaratory of existing law7 and have relied on ‘general principles of law’ in reaching their decision.10

Similarly, reliance on general principles of law has played an important part in the provision of legal rules in those areas which, while outside the normal scope of national rules of private law, do not fall within the traditional scope of international law, such as relations between international organisations and between them and, on the other hand, states or private persons (especially their employees)12 and certain transactions of states (particularly in their dealings with private corporations) on essentially private law matters.12
This acknowledgement of general principles of law as a source of international law enables rules of law to exist which can fill gaps or weaknesses in the law which might otherwise be left by the operation of custom and treaty, and provides a background of legal principles in the light of which custom and treaties have to be applied and as such it may operate to modify their application. General principles of law, however, do not have just a supplementary role, but may give rise to rules of independent legal force; and it is to be noted that general principles of law are included in Article 38 of the Statute of the Court in the same manner as are treaties and custom, rather than as one of the ‘subsidiary means’ referred to in Article 38(1)(d).


See generally on transactions between states (and public entities) and foreign private parties, Böckstiegel, Der Staat als Vertragspartner Ausländischer Privatunternehmen (1971); Scidli-Hohenfeldern, Lalíveis and van Hecke, Rev Belge, 11 (1972), pp 567–84; Saccorci, I contratti tra Stati e stranieri nel diritto internazionale (1972); Bettens, Les Contrats entre États et personnes privées étrangères (1988); Rigaux, Hag R, 213 (1989), i, pp 9, 207–37. See also § 406, n 16.


For the view that certain provisions of the Vienna Convention on the Law of Treaties 1969 apply to concession agreements see BP Exploration Company (Libya) Ltd v Government of the Libyan Arab Republic (1973–74), above, at p 322. But note that in the Anglo-Iranian Oil Co Case, ICJ Rep (1952), p 93, the ICJ held that the concession contract between the company and Iran did not constitute a treaty. On the nature of concession agreements see § 408, n 12.

Article 13 of the Procedures for the Settlement of Disputes under Art XVIII of the Agreement relating to the International Telecommunication Union 1932, Article 19 of the Agreement relating to the International Telecommunication Union 1965, Article 20 of the Operating Agreement of 1971 relating to that organisation provides for the arbitral tribunal to base its decisions only on those two 1971 agreements and on ‘generally accepted principles of law’. Note also Art 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, on which see generally § 407, n 49. Article 42 requires the tribunal to apply, if the parties have not agreed the applicable law, the law of the state party to the dispute ‘and such rules of international law as may be applicable’.


§ 13 Decisions of tribunals

Decisions of courts and tribunals are a subsidiary and indirect source of international law. Article 38 of the Statute of the International Court of Justice provides that, subject to Article 59, the Court shall apply judicial decisions as a subsidiary means for the determination of rules of law. Since judges do not make law but apply existing law, their role is inevitably secondary since the law they propound has some antecedent source.

Nevertheless, judicial decision has become a most important factor in the development of international law, and the authority and persuasive power of judicial decisions may sometimes give them greater significance than they enjoy formally.

In the absence of anything approaching the common law doctrine of judicial precedent, decisions of international tribunals are not a direct source of law in international adjudications. In fact, however, they exercise considerable influence as an impartial and well-considered statement of the law by jurists of authority made in the light of actual problems which arise before them. They are often relied upon in argument and decision. The International Court of Justice, while prevented from treating its previous decisions as binding, has, in the interests of judicial consistency, referred to them with increasing frequency. It is probable that in view of the difficulties surrounding the codification of international law, international tribunals will in the future fulfil, inconspicuously but efficiently, a large part of the task of developing international law.

Decisions of municipal courts represent the most frequent form in which judicial consideration is given to international law. Such decisions are not a source of law in the sense that they directly bind the state from whose courts they emanate. But the cumulative effect of uniform decisions of national courts is to afford evidence of international custom (although the weight to be attached to
that evidence will vary with the status of the courts and the intrinsic merits of the decisions).

Although courts are not organs of the state for expressing in a binding manner its views on foreign affairs, they are nevertheless organs of the state giving, as a rule, impartial expression to what they believe to be international law. For this reason, as well as for those stated with regard to international decisions, judgments of municipal tribunals are of considerable practical importance for determining what is the correct rule of international law. This has been increasingly recognised, and several collections of decisions of both international and municipal courts are now published.\footnote{1}

§ 14 Writings of authors

The Statute of the International Court of Justice enumerates as a subsidiary source of international law 'the teachings of the most highly qualified publicists of the various nations'. The Court has so far found no


Prize courts, acting as they do in time or under the influence of war, may not always be in a position to preserve an attitude of detached impartiality. See the judgment of Lord Stowell in The Maria (1799) 1 Ch Rob, 346, for an affirmation of the universality and impartiality of the law administered by the British Prize Court. As to the character of prize courts, see vol II of this work (7th ed), § 434. Similarly, national courts are not always free to give effect to international law where their own law conflicts with international law; see § 19. A possible line of development may lie in voluntarily conferring upon the ICJ jurisdiction on appeal from judgments of municipal courts in matters bearing upon international law.

See, in particular, Annual Digest and Reports of Public International Law Cases (now International Law Reports), Fontes Juris Gentium and the Reports of International Arbitral Awards. As to the ICJ, in addition to the official series of reports of its judgments and opinions note also Hamnbro (later Hambro and Rovine), The Case Law of the International Court (8 vols 1952–1976) (repertory of judgments and opinions of the ICJ to 1974). Verbatim reports or digests of the more important decisions of municipal and international tribunals in matters of international law are (or were) included in most leading periodicals dealing with matters of international law, such as the Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Revue générale de droit international public, and, to a smaller extent, in the British Year Book of International Law, Journal de Droit International (Clunet), American Journal of International Law, Revue de droit international public, Zeitschrift für Völkerrecht and Zeitschrift für Internationales Recht. See also Dickinson, Hag R, 40 (1932), ii, pp 372–92, for a critical survey of the contribution of English and American courts; Perles, Judicial Interpretation of International Law in the United States (1928); Hyde, BY, 18 (1937), pp 1–16. See also Chaline, Le droit international public dans la jurisprudence française de 1789 à 1848 (1934). As to the interpretation and application of treaties by national courts, see § 19, § 631, n 2. As to Germany see Fontes Juris Gentium, Series A, Section II, vols 1–7, for digests of decisions of the German Staatsgerichtshof from 1879 to 1975; and as to the USA, see Deak, American International Law Cases, 1793–1968, Ruddy, ibid, 1969–78, and Reams, ibid, 1979–86; as to the UK, see Parry, British International Law Cases, and to other states members of the Commonwealth, see Parry, Commonwealth International Law Cases, and to Italy see Capotorti, Sperduti and Ziccardi, La giurisprudenza italiana in materia internazionale (1st series, 1861–90) (1973).\footnote{1}

For an example of direct reference to legal writings as a source of law see Art 1 of the Swiss Civil Code which instructs the judge, in the absence of an applicable legal provision or custom, to take account of, among others, opinions of writers. On the impact of teachings of international law, see Lachs, Hag K, 151 (1976), pp 212–36.

Sources of international law

2 For a comparison of the authority of writers on international law in the early period with the responses of the Roman jurists, see Buckland and McNair, Roman Law and Common Law (1936), p 13.

3 See R v Kay (1876), 2 Ex Div 63, 202; West Rand Central Gold Mining Co v R (1905), 2 KB 391, 421; The Paquete Habana and The Lola, 175 US Reports 677 (where Mr Justice Gray discussed the matter in some detail), Filartiga v Pena-Irala (1980), ILR, 77, pp 169, 174–8. On the other hand, where owing to the scarcity of actual practice judges find it necessary to decide a matter by reference to principle and analogy, or where the prevailing rule of international law is controversial, they do not hesitate to avail themselves of published work. See eg the copious references to writings in New Jersey v Delaware (1934), 291 US 361, Re Piracy Jure Gentium [1934] AC 586, and Banco Nacional de Cuba v Sabbatino (1964), 376 US 470. But a balance must be struck between admitting evidence of writings, and allowing courts to serve as 'debating clubs': see Tel-Oren v Libyan Arab Republic (1984), ILR, 77, pp 193, 256 (per Robb, Senior Circuit Judge).

4 As to the consequences of differences in literary tradition and method upon the presentation of international law by writers, see Allott, BY, 45 (1971), pp 79–135.

5 In some national legal systems (such as the English) 'equity' bears a very special meaning, which is not normally imported into that term in international law. The meaning of an equity court as a source of international law in the English common law sense may, however, be relevant to the meaning of that term in a treaty: see the Ambatielos Claim (1956), RIAA, xii, at pp 108–9. Equity is also sometimes used as equivalent to political or economic justice, rather than as a legal concept.

material source of law, but not as a formal source, nor in itself constituting a legal rule. It is perhaps in this sense that equity has its widest significance for international law.

In a more strictly legal sense, however, equity may be regarded as forming part of certain specific rules of law or even as part of international law generally. Thus it may be regarded as incorporated in and forming a necessary part of certain general principles of law, such as, for example, the principle of good faith. The tribunal in the Rann of Kutch arbitration held that since equity formed part of international law, the parties were free to present and develop their case with general principles of law, such as, for example, the principle of good faith. The reliance on principles of equity, may require their application. In that case equity acquires a legal character, and is applied not just as equity but as part of a legal rule. Finally, however, equity may be used in the sense of Article 38(2) of the Statute of the International Court of Justice, which empowers the Court, if the parties to a case agree, to decide the case ex aequo et bono. On this basis the decision will not be based on the application of legal rules but on the basis of such other considerations as the court may in all the circumstances regard as right and proper. The International Court of Justice has not yet given any judgment on the basis of Article 38(2).

2 To the same effect, see Hudson, Permanent Court (1943), p 617: 'This long and continuous acceptance of equity as a source of law which is applicable by international tribunals would seem to warrant a conclusion that equity is an element of international law itself; and also in the Diversion of the Waters of the River Mouse Case (1937), PCIJ, Series A/B, No 70, at p 76. In the Barkina Faso/Mali Frontier Dispute case the ICJ had regard to 'equity infra legem, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes': ICJ Rep, 1986, pp 554, 567–8.

(1968), ILR, 50, p 2.


5 In the Ottoman Empire Lightships Claims (1956) the tribunal held that it could not act ex aequo et bono unless so authorised by the parties: RIAA, xii, at pp 187–8.

For a tribunal to award compensation ex aequo et bono does not necessarily mean that it is departing from principles of law but may indicate that the amount to be paid cannot be based on any specific rule of law if it is fixed on the basis of what is reasonable: see the Administrative Tribunal of the ILO Case, ICJ Rep (1956), at p 100. See also the Norwegian Shipowners' Claims (1922), RIAA, i, pp 339, 341.

7 In 1947 Guatemala accepted the compulsory jurisdiction of the ICJ in respect of a decision ex aequo et bono on the dispute with the UK over British Honduras: see Year Book of the ICJ (1947–48), p 155.

8 For a judicial tribunal such as the ICJ to be asked to decide a dispute ex aequo et bono is sometimes regarded as inconsistent with the essentially judicial function of the Court. However, if the parties to a dispute are content for the Court to act in that way, there seems no reason why it should not do so. See H Lauterpacht, The Development of International Law by the International Court (1938), pp 213–23, and The Function of Law in the International Community (1933), pp 313–28. See also vol II of this work (7th ed), p 69, n 2. Examples of cases where a state has been willing for the tribunal to act ex aequo et bono include Art 2 of the Treaty of 21 July 1938 between Bolivia and Paraguay, relating to arbitration of a frontier dispute between the two states, RIAA, ii, p 1819; the Pough Claims (1933), ibid p 1441; Art 8 of the Franco–Swiss Règlement concernant les importations into Switzerland from the Free Zones, ibid, p 1474; and see also the Timoco Arbitration (1923), RIAA, i, at p 395.

It may happen that a treaty will provide for the settlement of disputes in accordance with considerations of equity, often together with other considerations such as those of law, international law, good conscience or good faith. In such a case the tribunal must interpret the relevant treaty provision in order to establish in which sense the term 'equity' is being used.

§ 16 The functions of the International Court of Justice and the sources of international law Article 38 of the Statute of the International Court of Justice cannot be regarded as a necessarily exhaustive statement of the sources of international law for all time. Those sources are what the practice of states shows them to be, and one may therefore ask whether developments in the international community since Article 38 was first adopted call for any additions to the sources set out in that Article. In this context particular significance has been attached to the important development in the international community over the last 50 years has been the increased number and the developing role of international organisations. Their impact upon the sources of international law has been considerable.
The activities associated with international organisations can be fitted into the traditional categories for the sources of international law, either as being attributable to treaties (since the constituent instrument of an international organisation is a treaty) or as part of customary international law. The fact that the International Court of Justice, in its numerous judgments and opinions relating to international organisations, has always been able, without remarking upon the incompleteness of Article 38, to dispense with the questions arising on the definition of a treatise, is a strong argument for suggesting that their activities are for the moment at least still properly regarded as coming within the scope of the traditional sources of international law. Indeed, were the activities of international organisations to be regarded as a separate source of law, the resulting rules would not be applicable by the Court within the framework of Article 38 of its Statute. Nevertheless, the fact is that the members of the international community have in a short space of time developed new procedures through which they can act collectively. While at present this can be regarded as merely providing a different forum for giving rise to rules whose legal force derives from the traditional sources of international law, there may come a time when the collective actions of the international

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2 See generally, with reference to the possible emergence of something in the nature of an international legislative procedure, § 32.

3 Thus, for example, in relation to the law relating to international claims, and matters covered by treaties entered into by the international organisations, the practice of international organisations may be directly relevant to the development of international law, quite apart from those other areas where the position of international organisations is itself the subject of rules of international law (such as their privileges and immunities). See Schachter, BY, 25 (1948), pp 91–132. The legal opinions of the UN Secretariat are now published in annual volumes. See also the Reports for Injuries Case, § 31; see Art 189. See also § 19, n 81 ff.

4 See generally, with reference to the possible emergence of something in the nature of an international legislative procedure, § 32.

5 Thus, for example, in relation to the law relating to international claims, and matters covered by treaties entered into by the international organisations, the practice of international organisations may be directly relevant to the development of international law, quite apart from those other areas where the position of international organisations is itself the subject of rules of international law (such as their privileges and immunities). See Schachter, BY, 25 (1948), pp 91–132. The legal opinions of the UN Secretariat are now published in annual volumes.
by states, in some respects approaching the position of permanent international conferences. Through them expression can be given to the general consensus of the international community on a particular matter, so providing evidence of and contributing to the development of custom in a way never before possible. This collective action often takes the form of the adoption of resolutions by the member states, acting either unanimously or by some form of majority. These resolutions vary considerably in their legal significance. They may be given particular titles in certain cases, such as 'decisions' or 'recommendations', but such nomenclature, while it may be indicative of the legal effect of the resolution, is not conclusive. On a formal plane one can distinguish, for example, the legal force of a resolution as stipulated in the constitutional instrument of the organisation, its force as it results from some extraneous agreement between two or more states, its force as an authoritative interpretation of some other legal instrument (particularly the organisation's own constitutional instrument), and its legal force within the framework of customary international law. In this last respect, to the extent that international organisations may be assimilated to international conferences, resolutions adopted in organisations may be assimilated in their legal effect to resolutions adopted at conferences. Furthermore, resolutions adopted unanimously, being a matter of consensual agreement, are sometimes regarded as equivalent to treaties concluded in simplified form. However, this is not always so, since it would be wrong to disregard the role of the resolution, once adopted, as part of the law of the organisation and as subject to that law as much as, if not in preference to, the law of treaties. It is here that one must note the dual capacity in which states now act within international organisations, as individual states and as part of the collectivity of the membership of the organisation. It is the change in international organisations from being merely a gathering of individual states to a collective institution of the international community which has contributed most to the changing nature of international organisations in relation to the sources of international law. It is relevant in this connection to note the distinction of the European Economic Community between decisions taken by the Council (the legal force of which is determined by Article 189 of the EEC Treaty) and decisions of representatives of the member states meeting in (but not as) the Council (which are regarded as international agreements concluded in simplified form).

Furthermore, the legal significance of a resolution may also be considered in relation to the development of customary international law, in particular whether it is declaratory of existing law or a contribution to the creation of new law. As declarations of existing law, the resolution, by reducing customary law to written form, shares some of the characteristics of a codifying multilateral treaty and similarly by the very act of articulating the customary rule in writing changes to some extent its nature. As contributory to developing customary law it is important to be clear that the process is not one of legislation. Even a unanimously adopted resolution of a near-universal body such as the General Assembly of the United Nations does not necessarily reflect an opinio juris or give rise forthwith to a new customary rule. In assessing the significance of resolutions in this respect it is necessary to bear in mind not only the facts relating to the practice of which the resolution relates but also the legal force (if any) which the resolution has under the treaty establishing the organisation, the course of debates or other preparatory work leading to its adoption (since this may often disclose a lack of opinio juris which is not apparent from the terms of the resolution itself) and the degree to which a resolution is one of a series indicating a uniform trend. Most resolutions are probably not intended to be anything more than expressions of an essentially political view of the situation, although in certain cases they have been held to express an opinio juris respecting the rules declared by them.

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6 See generally § 574.
7 Majority voting, by departing from the unanimity rule, marks also a departure from a directly consensual basis for the resolution insofar as it has effects for those not voting for it.
9 In this respect see eg to the Universal Declaration of Human Rights and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, §§ 437, 105, respectively. Note also the observations of the IJC in the Military and Paramilitary Activities Case, ICJ Rep (1986), pp 99–100.
10 See §§ 574–5.
12 See § 385, n 3.
Fifthly, one may note the impact of international organisations upon the development of international law through multilateral treaties. Such treaties prepared in an almost universal conference on the basis of detailed preparatory study, including particularly the work of the International Law Commission in fulfilment of its tasks of codifying and progressively developing international law, are a different product from the kind of multilateral treaty formerly concluded between the (relatively few) major powers of the time. The results of conferences held in such circumstances may have a significant effect on the rules of international law even before the treaty which results from the conference has entered into force; a treaty adopted by such a conference will usually have a far greater significance than attaches to an unratified bilateral treaty, and even when it finally enters into force after receiving the requisite number of ratifications, its legal effects will tend to extend beyond those states which are formally parties to it. Even if the conference fails altogether to lead to the conclusion of a treaty, this will not be without its effects upon international law, particularly where the conference has been based on the extensive preparatory work of the International Law Commission. Given the authoritative status of the members of the Commission as individual jurists, the fact that collectively they represent many nationalities, and the close connection of their work with the international political realities of the day, the work of the Commission, even where it does not result in the development of a treaty and a cogent material source of law.

§ 17 International comity and morality

A factor of a special kind which also influences the growth of international law is the so-called comity (comitas gentium, convenance et courtoisie internationale, Staatsgunst). In their inter-

ICJ found that the existence of the necessary opinio juris could 'with all due caution' be deduced from the attitude of states to the relevant resolutions. As to the value, in terms of customary international law, of UN resolutions concerning sovereignty over natural resources, see Libby Am. Co v Government of Libya (1977), ILR, 62, pp 140, 167-9; Government of Kuwait v American Independent Oil Co (1982), ILR, 66, pp 519, 588. As to 'declarations' adopted by the UN General Assembly, see particularly Arrangao-Ruiz, Hag R, 137 (1972), ii, pp 431-628; the matter is also covered in many of the works cited at n 1.

As to the effects of a treaty before it enters into force, see § 612.

Thus members of the Commission usually have very close connections with the governments of the states with which they are nationals, and the work of the Commission is closely related to the work of the General Assembly, particularly its Sixth Committee. See generally on the relation of the Commission to the sources of international law, Jennings, ICLQ, 13 (1964), pp 385–97. See also § 31.

Meaning of the word comity: this word is or has been used from time to time in connection with international law in the following not easily reconcilable senses:

(1) in the text: the rules of politeness, convenience, and goodwill observed by states in their mutual intercourse without being legally bound by them. See eg the Parking Privileges for Diplomats Case (1971), ILR, 70, p 396. It is probably in this connection that some English judges have expressed the view that 'would be contrary to our obligations of international comity as now understood' to enforce in England a contract made abroad with a view to deriving profit from the commission of a criminal act in a foreign country and that a decision to enforce it would furnish a just cause of complaint on the part of the foreign government; Foster v Driscoll (1929), KB, 470; and AD T, (1927–28), No 10 and Note; Wadsworth Brewing Co Ltd v Maynard (1928–29), Ontario Law Reports, pp 5–12 and 573; Westgate v Harris (1929), ibid, p 358;

course with one another states observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and goodwill. Such rules of international conduct are not rules of law, but of comity. Thus, for instance, it was as the result of a rule of comity and not of international law that states used to grant to diplomatic envoys exemption from customs duties. In the sphere of the law of war chivalry fulfils the same function. The comity of nations is not a source of international law. But many a rule which formerly was a rule of international comity only is nowadays a rule of international law. The distinction, although clear-cut in logic, is not always observed in practice. English and American courts often refer to 'international comity' in situations to which there ought to be more properly applied the term 'international law'. It is probable that many a present rule of international comity will in future become one of international law. Not to be confused with the rules of comity are the rules of morality, which

Harwood and Cooper v Wilkinson (1929), ibid, p 392 (and see on these cases Webber, NYULQ Rev, 7 (1929–30), pp 674–82, and Marjorie Owen, Can Bar Rev, 8 (1930), pp 413–19; Regazzoni v K Sethia (1944) Ltd v ICJ Ltd [1953] 1 Ch 19; Application of Chase Manhattan Bank (1962), ILR, 34, p 43. (2) as examples to prove the international law, eg Phillimore, IV, § 1. (3) to quote the New English Dictionary (Murphy): 'Apparently misused for the company of nations mutually practising international comity (in some instances erroneously associated with L. comes, 'companion', is to be suspected); (4) as equivalent to international law: see above in the text.

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ought to apply in the intercourse of states as much as in the intercourse of individuals. Moral principles may and do form the basis of much of international law,6 but as the International Court of Justice has stated, it can only take account of moral principles in so far as they are given a sufficient expression in legal form.7 Nevertheless, since the duties and rights of states are only the duties and rights of the people who compose them, it is scientifically wrong and practically undesirable to divorce international law from the general principles of law and morality which underlie the main national systems of jurisprudence regulating the conduct of human beings. To the extent that law reflects the prevailing rules of morality its strength as a legal system is increased: this applies no less to international law than to municipal law. The progressive development of international law depends much upon the standard of public morality as upon economic interests. The higher the standard of public morality rises, the more will international law progress. For, looked upon from a certain standpoint, international law is, just like municipal law, a product of moral and of economic factors and at the same time the basis for a favourable development of moral and economic interests.


8 The term ‘dualist’ is generally employed to denote one who believes that international law and municipal law are two separate and distinct systems of law, and that they do not share any common field of application.

§ 18 International law and municipal law: differences of doctrine

The relationship between international law and municipal law has been the subject of much doctrinal dispute. At opposing extremes are the ‘dualist’ and ‘monist’ schools of thought. According to the former, international law and the internal law of states are totally separate legal systems. Being separate systems, international law would not be capable of forming part of the internal law of a state: to the extent that in particular instances rules of international law may apply within a state they do so by virtue of their adoption by the internal law of the state, and apply as part of that internal law and not as part of international law. Such a view avoids any question of the supremacy of the one system of law over the other since they share no common field of application: each is supreme in its own sphere.
On the other hand, according to the monistic doctrine, the two systems of law are part of one single legal structure, the various national systems of law being derived by way of delegation from the international legal system. Since international law can thus be seen as essentially part of the same legal order as municipal law, giving rise to no difficulty of principle in its application as international law within states. These differences in doctrine are not resolved by the practice of states or by such rules of international law as apply in this situation. International developments, such as the increasing role of individuals as subjects of international law, the stipulation in treaties of uniform internal laws and the appearance of such legal orders as that of the European Communities, have tended to make the distinction between international law and national law less clear and more complex than was formerly supposed at a time when the field of application of international law could be regarded as solely the relations of states amongst themselves. Moreover, the doctrinal dispute is largely without practical consequences, for the main practical questions which arise - how do states, within the framework of their internal legal order, apply the rules of international law, and how is a conflict between a rule of international law and a national rule of law to be resolved? - are answered not by reference to doctrine but by looking at what the rules of various national laws and of international law prescribe.

§ 19 International law and municipal law: the position in various states

A survey of the varied practice of states shows that, except possibly in terms of dialectics, it is impossible to accept the view that rules of international law cannot, without express municipal adoption, operate as part of municipal law, or the opposite view that they always so operate. On the contrary, states show considerable flexibility in the procedures whereby they give effect within their territories to the rules of international law, although a great many states adopt the doctrine that international law is part of the law of the land. But while the procedures vary, the result that effect is given within states to the requirements of international law is by and large achieved by all states. This result may be called for in relation to almost any field of activity which is regulated by international law, although in certain fields, such as the observance of human rights, it has assumed special importance.  

2 There is an alternative theory which, while being monistic, asserts the supremacy not of international law but of municipal law. See eg Wenzel, Juristische Grundbegriffe (1920), p 387; Decencetre-Ferrandini, CG 42 (1933), pp 45-70, and, for trenchant criticism, Kelsen, Souveränität, pp 151-204. See also Rousseau, pp 55-68.

3 See § 7.

4 See § 11.

5 See § 19, sect (3).

6 But see § 113, as to the effect to be given to a foreign law which is contrary to international law, and § 119, n 14ff, as to seizures effected in violation of international law.

It is of importance not to confuse, as many do, the question of the supremacy of international law and of the direct operation of its rules within the municipal sphere. It is possible to deny the latter while fully affirming the former.

2 See § 442, n 5, as to the direct effects within certain national systems of law of obligations arising under human rights instruments.
they will in those respects have at least an indirect, and persuasive, authority for national courts called upon to consider those issues. States may by treaty regulate the effects which decisions of a tribunal set up by the treaty are to have within their national legal systems, a notable example being the Court of Justice of the European Communities.⁸

As with judicial decisions, so too there is no settled practice in national courts as regards the effect to be given to decisions of international institutions.⁹ Much will depend on the degree of binding force possessed by such decisions under the treaty establishing the institution, and any special measures taken by the state in question to give effect to them.¹⁰

(1) The United Kingdom

As regards the United Kingdom all such rules of customary international law as are either universally recognised or have at any rate received the assent of this country are per se part of the law of the land. To that extent there is still valid in England the common law doctrine, to which Blackstone gave expression in a striking passage,¹¹ that the law of nations is part of the law of the land. It has been repeatedly acted upon by courts¹² and can be regarded as an established rule of English law. However, it is probably necessary to distinguish between the application of those rules of international law which prescribe or proscribe a certain course of conduct, and those which are merely permissive, such as a rule permitting a state to exercise jurisdiction in certain circumstances or over certain areas. The existence of such a permissive rule of international law does not necessarily mean that an English court will assume that English law will contain rules to the full extent permitted by international law.¹³

The application of international law as part of the law of the land means that, subject to the overriding effect of statute law,¹⁴ rights and duties flowing from rules of customary international law will be recognised and given effect by English courts without the need for any specific act adopting those rules into English law. It also means that international law is part of the lex fori and does not have to be proved as a fact in English courts in the same way as a foreign law;¹⁵ although evidence of state practice and of received international opinion is permitted, in order to establish the existence or content of a rule of international law,¹⁶ Judicial notice is taken of the conclusion of treaties by the United Kingdom.

⁸ See this §, sect (3). Article 4(3) of the US–Iran Claims Settlement Agreement 1981 (ILM, 20 (1981), p 230) provided that 'any award which the tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with Articles 49 and 50 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (see § 407, n 49).


¹⁰ Obligations which might arise under mandatory resolutions of the UN Security Council can be given effect in the UK under the United Nations Act 1946: see eg the Southern Rhodesia (Prohibited Trade and Dealing) (Overseas Territories) Order 1967 (SI 1967, No 18), on which see Bridge, ICLQ, 18 (1969), pp 689, 690–4, and the Iraq and Kuwait (United Nations Sanctions) Order 1990 (SI 1990/1651). See also the decision of a US Court of Appeals in Digg v Schultz (1971), ILR, 60, p 393. As to certain sanctions imposed on South Africa, see § 132, n 4. See also p 73 as to the European Communities Act 1972. See also the Report of the UN Commissioner for Namibia on the possibility of instituting legal proceedings in the domestic courts of states against corporations or individuals acting contrary to Directive No 1 of the UN Council for Namibia, and certain other instruments: UN Doc A/AC 131/194 (1985); AJ 80 (1986), pp 442–91; and see § 88, n 41.

For decisions denying to UN Security Council resolutions the character of self-executing treaties for purposes of their application in domestic law see n 96; cf Bradley v Commonwealth of Australia (1973), ILR, 52, p 1. Decisions of international bodies with only recommendatory force are unlikely to be given effect by municipal courts in the absence of specific legislation: Règire des Télègraphistes et Téléphonistes vs Société pour la Coordination de la Production de l'Énergie Electrique (1978), ILR, 77, p 419; R v Secretary of State for the Home Department, ex parte Buggaya (1981) 1 AC 514, 523–5.


¹² See eg Triquet and Others v Bath, 3 BUR 1478; Heathfield v Chilton 4 BURR 2015; 2016; Vickers v Reeder, 3 M 5 & 5 286, 292, 296; De Witz v Hendricks 2 Bing 314, 315; Emperor of Austria v Day, 2 Giff 628, 678 (a striking application of the doctrine); and see later in text.

¹³ For decisions denying to UN Security Council resolutions the character of self-executing treaties for purposes of their application in domestic law see n 96; cf Bradley v Commonwealth of Australia (1973), ILR, 52, p 1. Decisions of international bodies with only recommendatory force are unlikely to be given effect by municipal courts in the absence of specific legislation: Règire des Télègraphistes et Téléphonistes vs Société pour la Coordination de la Production de l'Énergie Electrique (1978), ILR, 77, p 419; R v Secretary of State for the Home Department, ex parte Buggaya (1981) 1 AC 514, 523–5.

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part of English law, they are, once they have been pronounced upon by English courts, subject to the rules of English law relating to the binding force of judicial precedent. The former view, expressed in two of the leading statements of the position as to the application of international law in England, qualified the proposition that international law may be applied as part of domestic law with the proviso that it be not inconsistent with rules finally declared by the courts. The consequence of that view was that although the rules of international law might change, English courts were unable to apply the new rule but had to continue to apply the former rule. In 1977 the Court of Appeal, in Trendex Trading Corp v Central Bank of Nigeria,48 which raised questions as to the application of international law relating to sovereign immunity, held that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court, as to what was the ruling of international law 50 or 60 years ago, is not binding on this court today. International law knows no rule of stare decisis.49

Where a treaty affects private rights or, generally,50 requires the imple-
mentation of its obligations a modification of existing law, the necessary changes in the law must be the subject of action by or under the authority of an Act of Parliament before an English court can give effect to the changes in the law called for by the treaty.51 Even then the court, unless directed otherwise by the legislation,52 will apply the law as changed by the legislation rather than as it stood prior to the enactment.

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Bank of Canada [1983] AC 168, 189. As to the recognition by English courts of legal personality conferred under international law, see § 7, n. 21.

18 Since 1946 the House of Lords has not been bound by its own decisions. See Goodhart, LQR, 82 (1966), pp 441-4.


20 See eg Thai-European Tapioca Service Ltd v Govt of Pakistan [1973] 3 All ER 961; Swiss Israel Trade Bank v Government of Salta and Banco Provincial de Salta [1972] 1 Lloyd’s Rep 497. Atkin LJ dissenting on this point. The House of Lords in Ugando Com (Holdings) Ltd v Government of Uganda [1979] 1 Lloyd’s Rep 481; but the ‘new rule’ of international law on sovereign immunity was reaffirmed by the Court of Appeal in Hispanic Americana Mercantil SA v Central Bank of Nigeria [1979] 2 Lloyd’s Rep 277, and accepted by the House of Lords in In re Congreso del Partido [1983] AC 244, and in Alcom Ltd v Republic of Colombia [1984] AC 580. See also the acknowledgement by the Privy Council of changes in international law concerning sovereign immunity in actions in rem in Philippine Admiral (Owner) v Walleigh Shipping (Hong Kong) Ltd [1971] 1 All ER 78.

21 See also Raduwan v Raduwan [1972] 3 All ER 967, discounting earlier authorities relying on the now-discredited principle of extraterritoriality as the basis for diplomatic immunity; and R v Kent Justices, ex parte Lye [1967] 2 QB 153, at pp 173, 188-96, as to changes in international law on the breadth of territorial waters.

22 At p 890, per Lord Denning MR. See also Schreuer, Neth Intl Rev, 25 (1978), pp 234-8. See also, on the ‘duty of English courts so far as possible to keep in step with the settled practice of other nations’, Standard Chartered Bank v International Trust Bank [1987] 1964 WL 641, 648. Similar views as to the need to apply international law as it develops were expressed by a US Court of Appeals in Filaritiga v Pena-Itala [1980], ILR, 77, pp 169-79 and Amebrada Hess Shipping Corp v Argentine Republic [1987], ILR, 79, pp 11; and by the South African Supreme Court in Kaffirsfa Property Co (Pty) Ltd v Government of the Republic of Zimbabwe [1980], ILR, 64, p 708.

23 There are certain somewhat special cases where constitutional practice requires legislation even if private rights or the existing law are not directly affected by the treaties involving a cession of territory and conversely where legislation is probably not required even if private rights are affected (eg treaties affecting belligerent rights: Porter v Freedenburg [1915] 1 KB 857, The Dirigo [1919] P 204 (see McNair, Law of Treaties [1961], pp 89-91; or treaties extending the area of the Crown’s territorial sovereignty: Post Office v Ettrick Radio Ltd [1968] 2 QB 740,
changed by the terms of the treaty itself. 26 To that extent therefore treaties which are binding on the United Kingdom in international law do not as such affect or form part of the law of the land; 27 they may not be invoked directly by individuals as a basis for legal rights or obligations to be asserted before the courts 28 (in that respect, however, the directly applicable provisions of European Community law, including such provisions of Community treaties, constitute a somewhat special and exceptional case). 29 That departure from the traditional common law rule is largely because according to British constitutional law, the conclusion and ratification of treaties are within the jurisdiction of the House of Commons. 30

26 See eg Inland Revenue Commissioners v Colico Dealings Ltd [1962] AC 1, 18. However, the terms of the treaty may affect the interpretation to be given to the statute: see § 61-2 and § 203. For a survey of the manner in which, in the UK and Australia, statutes incorporate references to international law standards, see Crawford, AJ, 73 (1979), pp 628-47.

27 Thus see also § 602. Authorities administering the law are as a matter of English law entitled, in exercising their functions, to have regard to the terms of whatever instruments validly (as a matter of English law) contain their instructions, and need not have regard also to the terms of any relevant treaty (at least where the relevant treaty can be regarded in English law terms as international); R v Chief Immigration Officer, ex parte Salamat Bhui [1976] 3 All ER 843, 847-8, in which the Court of Appeal withdrew observations to the contrary which it had made in R v Home Secretary, ex parte Bhajan Singh [1976] 2 QB 198 and R v Home Secretary, ex parte Phanoron [1976] 2 QB 666. The position in the law of Scotland is the same (but apparently over a treaty if an implementing statute is ambiguous): see Ker v Lord Advocate 1981 SLT 322, and comment by JMT, LQR, 98 (1982), pp 183-6.

Some authorities suggest that a treaty may only be referred to in order to clarify an ambiguity in a statute or other legal text (n 35); but see n 37. In particular there is authority as a matter of English law on the government to act in conformity with the UK's treaty obligations in exercising a statutory discretion (see particularly the decision of the Court of Appeal in R v Immigration Appeal Tribunal, ex parte Chanan Das [1988] Imm AR 161; see also Fernandez v Secretary of State for the Home Department [1981] Imm AR 1; J v Secretary of State [1989] 1 WLR 913; R v Secretary of State for the Home Department, ex parte Kirkwood [1984] 1 WLR 913, 918-19; R v Home Secretary, ex parte Bind [1991] 2 WLR 588 (House of Lords). See also n 36. Government departments, in carrying out their administrative functions, will usually do so in such a way as to avoid acting in breach of international obligations resting on the UK, even if no implementing statute has been enacted. Where no such statute is necessary from the point of view of English law, it is consistent with the requirements of international law to leave the observance of international obligations to be achieved through administrative action consistent with those obligations. See also Ward, ICLQ, 58 (1989), pp 965-77. But see § 21, n 16.

28 Nor is the Crown, in negotiating a treaty in the exercise of the Royal prerogative, acting as agent or trustee for any individual; see § 158, n 13.

29 Although these provisions of the Community treaties apply by virtue of express statutory provision in s 2(1) of the European Communities Act 1972, the special characteristics of Community law give to their direct application a distinctive quality: see generally this, see (3). The constitutional position regarding the conclusion of treaties was the subject of debate in the House of Commons on 20 January 1972: see House of Commons Debates (Commons), vol 829, cols 677-800, in particular the speech by the Solicitor-General at cols 793-4 and by the Chancellor of the Duchy of Lancaster at cols 696-700. See also the debate in the House of Lords on 11

to give any necessary internal effect to the obligations of a treaty would result in a breach of the treaty, for which breach the United Kingdom would be responsible in international law, the normal practice is for Parliament to be given an opportunity to approve treaties prior to their ratification 31 and, if changes in the law are required, for the necessary legislation to be passed before the treaty is ratified.

30 The fact that international law is part of the law of the land does not mean that English law recognises in all circumstances the supremacy of international law. English statutory law is binding upon English courts, even if in conflict with the requirements of international law, 32 although in doubtful cases there is a presumption 33 that Parliament did not intend to act in a manner contrary to the
international obligations of the United Kingdom. If there is any ambiguity in a statute, and particularly (but not necessarily only)34 where it is expressly enacted to give effect to a treaty, it will be interpreted in the light of and, if possible, in such a way as to be consistent with the United Kingdom's international obligations:35 the position would appear to be similar where it is a question of seeking to resolve uncertainty in non-statutory rules or legal principles.36 Accordingly, a litigant may invoke before a court a relevant treaty obligation:37 it will themselves not contrary to any international obligations); see Federal Steam Navigation Co Ltd v Department of Trade and Industry, The Huntingdon [1974] 2 All ER 97, and The Norwalk [1975] 1 QB 889.

As to particular problems arising over the application in English law of statutes giving effect to treaties prescribing uniform laws, see Mann, LQR, 99 (1983), pp 376–406.38

The statute may have been enacted to give effect to a treaty but without expressly referring to it (see eg The Jade, The Escherscheim [1976] 1 All ER 920), or it may be unrelated to the implementation of a treaty.


The international obligation relevant to the interpretation of a statute will often be a treaty obligation, but it may also be an obligation flowing from customary international law: see eg The Jade, The Escherscheim (1976) 1 All ER 920.

If the statute is unambiguous there will be no room for the presumption to apply: see

Although in circumstances involving uncertainty as to non-statutory law any presumption as to Parliament’s intention in enacting a statute cannot be relevant (see Maloney v Attorney-General of Hong Kong [1985] AC 733; R v Secretary of State for the Home Department, ex parte Brind [1991] 2 WLR 588.

See Pan-American World Airways Inc v Dept of Trade [1976] 1 Lloyd’s Rep 257, 262; R v Chief Immigration Officer, ex parte Salamat Bibi [1976] 3 All ER 843, 847; Attorney-General v BBC [1982] 3 All ER 832, 884; Cheaffe v Association of Professional, Executive, Clerical and Computer Staff [1982] 3 All ER 855, 886 (reversed on other grounds [1983] 2 AC 180). Although in circumstances involving uncertainty as to non-statutory law any presumption as to Parliament’s intention in enacting a statute cannot be relevant (see Maloney v Attorney-General of Hong Kong [1985] AC 733; R v Secretary of State for the Home Department, ex parte Brind [1991] 2 WLR 588.

In addition to giving precedence to statutes over treaties, courts are required in certain circumstances to treat statements by the Executive as conclusive upon the matters contained therein,39 and may not enquire into their consistency with international law. Similarly, a declaration of territorial sovereignty by the Crown in exercise of the prerogative, if made in excess of what is permitted by international law, would nevertheless be enforced by the courts.35

(2) Other West European States

Austria Customary international law is applied by Austrian courts by virtue of Article 9 of the Constitution of 1955,40 which provides that the generally recognised rules of international law are component parts of Austrian law.41 Article 50 provides that treaties containing provisions modifying or completing existing laws require for their validity the approval of the National Assembly, which at the time of giving its approval may decide that the treaty should be implemented by the promulgation of laws. Treaties of the kind referred to in Article 50 must be published in the Federal Law Gazette, and unless otherwise expressly provided (or unless they are to be implemented by the promulgation of further laws) they become effective in Austria the day after their publication: Article 49(1). A treaty which thereby becomes effective in Austrian law will be directly applied by Austrian courts if it has a self-executing character; and if so, it has the same legal standing as Austrian law and can prevail over a prior statute.42

By virtue of a new provision in Article 9.2 of the Constitution, which entered into force in 1981, federal sovereign powers can be vested in inter-governmental institutions and their organs by statute, or by treaty subject to approval in

not directly give rise in English law to rights or obligations for private parties, but indirectly it may affect them, for example by bringing it into operation the presumption referred to or by affecting the interpretation of an applicable statute.

In addition to giving precedence to statutes over international law, English courts are required in certain circumstances to treat statements by the Executive as conclusive upon the matters contained therein,40 and may not enquire into their consistency with international law. Similarly, a declaration of territorial sovereignty by the Crown in exercise of the prerogative, if made in excess of what is permitted by international law, would nevertheless be enforced by the courts.42

Relation between international and municipal law

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34 See § 460.
37 See Austrian Treaty (Postal Administration) v Aver, AD 14 (1947), No 125; Drallah v Republic of Czechoslovakia, ILR, 17 (1950), No 41; Employees of Roumanian State-owned Enterprise Case (1960), ILR, 32, p 5; Interpretation of Customs Valuation Statute (Austria) Case (1962), ILR, 40, p 1.
39 A law enacted to give effect to a treaty may be interpreted in the light of the treaty’s origin and purposes: Public Prosecutor v Günther (1970), ILR, 71, p 247.
accordance with Article 50. This avoids the complex procedure whereby decision-making powers by international organs had previously to receive special constitutional authorisation.43

Belgium The Constitution (Article 68) provides that treaties of commerce and treaties which may impose obligations on the state or on individuals have effect only after the consent of the Belgian Parliament has been obtained. A treaty which has not received that consent is of no effect in Belgian law, and Belgian courts will not apply it.44 Of treaties which have been duly approved, Belgian courts distinguish between those which create rights and obligations only for the contracting states, and those which are capable of direct application to individuals. The former, which cannot be directly invoked by individuals, cannot distinguish between those which create rights and obligations only for the territory.45 The latter, however, which can be directly invoked by individuals, may conflict with the provisions of national law, and if they do so the treaty provisions prevail even if the national law is subsequent to the treaty, provided that the treaty has been officially published.46 Rules of customary international law do not prevail over Belgian municipal law.47

Federal Republic of Germany Article 25 of the Basic Law provides that the general rules of international law form part of federal law and take precedence over the laws and create rights and duties directly for the inhabitants of federal territory.48 This applies only to general customary rules of international law. A treaty provision which can be applied by the German courts does not benefit from the precedence conferred by Article 25 unless it constitutes a general rule of international law50 (as, for example, in a treaty codifying certain rules of international law).

Article 59 of the Basic Law requires treaties which regulate relations51 of the Federal Republic or relate to matters of federal legislation to be the subject of a federal law. Treaties which have been duly consented to in that way will be applied by German courts, at least if they are self-executing.52 However, since such treaties derive their force in German law from a federal law, they have no higher status than other federal laws, so that a later law will prevail over a prior treaty; a treaty must also be consistent with the Basic Law.53

France The rules of international law were acknowledged in the preamble to the French Constitution of 1946, and this was reaffirmed in the preamble to the 1958 Constitution. This has been admitted by the French courts of customary international law.

As to treaties, Article 53 of the Constitution requires certain categories of treaties (such as commercial treaties, or treaties implying commitments for state finances, modifying legislative provisions or relating to the status of persons) to

43 See Schreuer, ZGV, 42 (1982), pp 93–8; and, as to the previous arrangements, ibid, 37 (1977), pp 468–502.
45 As to the possibility of the Belgian Parliament delegating certain powers to organisations set up under public international law, see Article 25bis of the Constitution, promulgated in 1970.
48 Bautier v Mèlard, ILR, 20 (1953), p 429; Ministère Public v Simon (1974), ILR, 77, p 387 (noting the need for publication particularly in the case of agreements in simplified form, which in any case did not necessarily prevail over municipal law in all circumstances).
50 See also Art 100(2). Article 25 is striking at an affirmation not only of the supremacy of international law but also of its direct operation upon individuals, to the extent that the substantive content of a rule of customary international law requires such direct operation: Parking Privileges for Diplomats Case (1971), ILR, 70, pp 396–404. A rule of customary international law will not, unless it has the character of lex cogens, be applied under Art 25 if a treaty relevant concluded by
52 See Commercial Treaty (Germany) Case, ILR, 19 (1952), No 99.
54 But in accordance with the principle that a treaty should be effective, it will not be held contrary to the Basic Law if, although not wholly in conformity with it, it is in greater conformity with it than the previous state of affairs: Statute of Saar Territory Case, ILR, 22 (1955), p 630. And a treaty should be interpreted so as to give it validity in terms of the Basic Law: Re Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic (1972) (1973), ILR, 78, pp 150, 166. For other decisions regarding the application of treaties see Denominational Schools Case (1967), ILR, 57, p 5; interference with Contracts Case (1967), ILR, 59, p 597; Officina Meccanica Gorzes v Burgsmüller (1971), ILR, 70, p 428. But a mere understanding between relevant authorities of the Federal Republic and another state will not be judged the same as the Federal Republic if it departs from federal law: Danish Company Tax Liability Case (1971), ILR, 72, p 210.
be ratified or approved by a law. Under Article 54 the Constitutional Council may declare a treaty to be contrary to the Constitution, in which case it may only be ratified or approved after the Constitution has been amended.

Article 55 (in this respect largely following Articles 26 and 28 of the 1946 Constitution) provides that treaties which duly ratified or approved shall have an authority superior to that of laws, even if later than the treaty, subject to reciprocity.

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France

Article 28(1) of the Constitution which entered into force in 1975 provides that: 'the generally accepted rules of International Law, as well as international conventions from the time they are sanctioned by law and enter into force according to each one's own terms, shall be an integral part of internal Greek law; and they shall prevail over any contrary provision of law. The application of the rules of International Law and of international conventions to aliens is always subject to the condition of reciprocity'. So far as it concerns treaties, Article 36(2) requires there to be a law passed by Parliament for treaties on commerce; on taxation, on economic cooperation, and on participation in international organisations; for treaties which contain requirements for which, under the Constitution, no provision can be made without a law; and for treaties which impose a burden upon individuals. Under the previous Constitutions, which contained no provision similar to Article 28(1), it had been generally accepted that customary international law formed an integral part of domestic law; and that treaties required an Act of Parliament for them to have internal legal force, and, thereafter, ranked equally with statutes so that in any conflict it was normally the later of the two which prevailed. In cases of doubt about the correct interpretation of a statute, it should be construed subject to the general principles of international law.

Ireland

Article 29 of the constitution provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states and that treaties are not part of domestic law save as may be determined by the Oireachtas (Parliament). Article 15(2) of the Constitution provides that Parliament may make laws. Accordingly for a treaty to have effect in Irish law it must be given such effect through legislation.

Italy

Article 10 of the Constitution of 1948 declares that the Italian juridical system conforms to the generally recognised principles of international law. Italian courts have treated this as continuing their earlier practice of applying national law in cases of international law.
generally accepted customary international law. Since Article 10 provides a constitutional basis for the application of customary international law, the latter will normally prevail over statute law.

Treaties are applied by the courts provided there has been a legislative or executive act (depending on the subject matter) having the effect of incorporating their provisions into Italian law. Usually this will be the law which, for all treaties which involve changes in Italian law, is required by Article 80 of the Constitution to authorise the ratification of the treaty. A treaty which applies in Italy in this way derives its legal force in Italian law from the law relating to it, rather than directly from the treaty itself. Where the provisions of the treaty which apply in Italian law are not in terms which are capable of being given immediate legal force, further implementing measures need to be enacted by the Italian authorities. Italian law does not adequately take account of Italy's treaty obligations Italian courts will apply Italian law even though to do so may involve Italy being in breach of her international obligations.

Luxembourg Under Article 37 of the Constitution all treaties require the approval, by law, of Parliament before they can take effect, and they must also be published. When so approved and published a treaty will be applied as such by Luxembourg courts. Where a statute is in conflict with a treaty, the Luxembourg courts have held that the treaty prevails, even if the law has been enacted subsequently to the treaty. In relation to customary international law, however, Luxembourg courts appear not to treat it as part of the law they are to apply unless it has been incorporated therein by legislation.

The Netherlands Customary international law has long been regarded as applicable by courts in the Netherlands, although it seems that in case of conflict with statute law it is the latter which prevails.

With regard to treaties, the position was clarified in amendments to the Constitution made in 1953 and 1956, which were substantially re-enacted in the revised Constitution which entered into force in 1983. Article 93 provides that provisions of treaties and resolutions of international institutions, which may be binding on all persons by virtue of their contents, shall have that effect after they have been published, and Article 94 provides that statutory provisions in force within the Netherlands shall not apply if their application would be incompatible with self-executing treaty provisions or resolutions of international institutions (it being well established that this covers treaties which pre-date the enactment of the statute as well as those which are subsequent to it).

Switzerland Article 113 of the Constitution provides that the Swiss Federal Tribunal shall act in accordance with treaties ratified by the Federal Assembly. This Article has been regarded as giving duly ratified treaties the force of law in Switzerland, taking priority over prior national legislation; it is unclear whether they also prevail over subsequent national legislation.

65 Colomù Ministry of War, ILR, 17 (1950), No 13; Ministero Della Difesa-Esercito v Salamone, ILR, 18 (1951), No 211; Ministero Difesa v Ambrosla, ibid, No 213; Sec Timber et al v Ministeri Esteri e Tesoro, ibid, No 192; Carpitgioni v Federal People's Republic of Yugoslavia, ILR, 19 (1952), No 43; Ligabue v Finanze, ibid, No 137; Lagos v Baggianini, ILR, 22 (1955), p 533; Ministry of Defence v Ergiuli, ILR, 26 (1958-II), p 732.

But Art 10 does not allow the incorporation into Italian law of generally recognised rules of international law which have only come into existence after the entry into force of the Constitution and which violate fundamental Italian constitutional principles: Russel v Ministero dell'Interno, ILR, 27 (1956), p 533.

66 See Combes de Lestrade v Ministry of Finance, ILR, 22 (1955), p 882; Re Masini, ILR, 24 (1957), p 11; Estazione Nazionale per la Celiologia e per la Carta v Cartiera Italiana, ibid, p 112; Re Berti, AD, 16 (1949), No 3; Costa v ENEL (1964) CMLR 425, 426-436; Unione Manufacture v Ministry of Finance (1972), ILR, 71, p 589; Treasury Ministry v Di Raffaele (1974), ILR, 77, p 562; Finance Ministry v SpA Manufactura Lane Marrzotto (1973), ibid, p 551. In relation to the law of the European Communities the jurisprudence of Italian courts has undergone various refinements in order to accommodate the special characteristics of the Community legal order (as to which see generally this §, sect (3)).

67 The fact that the law is implementing an international treaty obligation does not protect the law from scrutiny in the light of the Constitution: Re Cuiller, Ciambramonti v and Valloni, ILR, 78, p 9, in the Separate Opinion of Judge Vanzaghi, p 9.

68 Huberty v Public Prosecutor, ILR, 17 (1950), No 3; Diesanod v Administration des Contributions, ILR, 18 (1951), No 3. See also Pescatore, Journal des Tribunaux, 68 (1953), p 645, Conclusion et effets des traités internationaux selon le droit constitutionnel, les usages et le présumé pouvoir du Grand Duché de Luxembourg (1964), and Paulin,趋ux Luxembourggoise (1969), p 4.

69 Custodian of Enemy Property v Estinger, ILR, 16 (1947), No 2; H and Others v Public Prosecutor, ILR, 18 (1951), No 6.


72 Public Prosecutor v JV, AD, 6 (1931-32), No 199; Public Prosecutor v di B, ILR, 21 (1954), p 3; Public Prosecutor v A D, ILR, 24 (1957), p 590; A J K v Public Prosecutor (1959), ILR, 28, p 268; Ex parte Minister X of the Reformed Church at Y (1959-60), ILR, 35, p 231; Ex parte Minister X of the Oud-Gereformeerde Gemeente at Z (1959-60), ibid, p 380; Vellemanen in Taus NV v Leonidat, ILR, 70, p 435; Nordstern Allgemeine Versicherung AG v Vereinigte Stennes Rheinverkehrsverwaltung (1953), ILR, 74, p 1; Public Prosecutor v JO (1959), ILR, 74, p 130.


74 Guggenheim, vol 1, pp 35-7 and Re Ajj, IL, 46 (1952), pp 641-66 express differing views. In Streerse, the position of the Swiss Federal Courts has been to hold that it would be bound by a subsequent statute inconsistent with a treaty. However, in Kii v Ministere public fédéral (1961), ILR, 34, p 143, the terms of an extradition treaty were applied rather than those of the prior extradition law (although possibly because this was revised before the law was enacted) see also Rosier in Court of Justice of the Canton of Geneva (1962), ILR, 32, p 348; Librairii Hachette SA v Société Coopérative d'Achat et de Distribution (1967), ILR, 72, p 78; Frigerio v Federal Department of Transport (1968), ibid, p 679. On the referendum procedure applied to Swiss treaties, especially by the amendment of 13 March 1977 to Art 89 of the Federal Constitution, see Malinverni, BY, 48 (1978), pp 207-19.
international law may also be applied without any express adoption or transformation into Swiss law.75

(3) Law of the European Communities

Although the European Communities were established by international treaties, it has not proved possible for the member states—Belgium, Denmark, Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom—to accommodate all the consequences of membership within the framework of their normal rules for the application of international law within their national legal systems. The treaties establishing the European Communities created a more closely integrated community than had previously been usual, and contained some provisions of unprecedented scope, such as those giving the Council and Commission76 of the Communities powers to make regulations which were to be binding and directly applicable within the member states. Furthermore, the jurisprudence of the Court of Justice of the European Communities has demonstrated that the system set up by the treaties implicitly involved certain other elements, such as the supremacy of Community law over national law, which served to distinguish those treaties and the regime created under them from those with which the member states had hitherto been familiar.

The special character of the European Communities and of Community law was acknowledged by the Court of Justice in 1963, when it said that “The objective of the EEC Treaty, which is to establish a Common Market, the function of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states ... [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.”77 In the following year the Court added to the conclusions to be drawn from the member states having entered into the treaties establishing the Communities:

By 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. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of

75 Imperial and Royal Austrian Ministry of Finance v Dreyfus, EBG, 44 (1918, i), p 49; Kingdom of Greece v Julius Bär & Co, ILR, 23 (1936), p 195.

76 Under the treaties which originally established the three Communities, each Community had a Council; in addition the European Coal and Steel Community had a High Authority while the European Economic Community and the European Atomic Energy Community each had a Commission. In 1967 a treaty was concluded which merged the three Councils into a single Council of the European Communities, and merged the High Authority and the two Commissions into a single Commission of the European Communities. Previously, in 1957, a single, common Court of Justice, Assembly and Economic and Social Committee were created for the EEC and EECU, which, in the case of the Cour de Justice and the Assembly, also supplanted the pre-existing equivalent ECSC institutions.

More far-reaching have been the decisions of the Court of Justice which have held that if a provision of Community law having direct effect conflicts with the national law of a member state, the Community provision must prevail. The Court of Justice has upheld the supremacy of Community law even where the national law is subsequent to the Community provision in question and even where it is a provision of the constitution itself.

The direct application of Community law in the member states has, after some initial hesitations, been accepted in all member states. Acceptance by them of the priority of Community law over national law, in particular its priority over later as well as earlier national law, continues to create problems in some member states. Nevertheless, for the most part such difficulties as initially arose over the assimilation of Community law have been resolved in practice. In the United Kingdom the desired results have been achieved, so far as is possible within the United Kingdom's present constitutional law, by the express statutory authority of Parliament. Section 2(1) of the European Communities Act 1972 provides that such provisions of Community law as in accordance with the Community treaties are to have direct effect shall be given such effect in the United Kingdom; and s 2(4) provides that any past or future statute shall be construed and have effect subject to the provisions of s 2 (including, therefore, those providing for the direct effect of Community law).

52}
(4) The United States of America

In the United States the principle that international law is part of the law of the land has been clearly adopted.\cite{1990_Hood} Customary international law which is universal-
which in the contemplation of international law are treaties, are not in all respects regarded as such for purposes of Article VI.95 A treaty provision will only be applied by the courts if it is self-executing;96 in other cases some further legislative or administrative action is needed before effect can be given in municipal law to the treaty provision.97

If legislation conflicts with a treaty, the resolution of the conflict depends on whether it is federal or state legislation which is involved. State legislation does not prevail over a prior or subsequent treaty (including executive agreements) in conflict with it;98 but a federal statute is binding on the courts even if it is in conflict with previous customary international law or treaty,99 while the statute

95 US v Guy W Capps, Inc, ILR, 20 (1953), p 412. 'Treaties' are concluded by the President, acting with the advice and consent of the Senate (Art II, s 2(2) of the Constitution). The authority of the Senate is thus not required for the conclusion of international agreements, through a law passed in 1972 (known as the Case Act: ILM, 11 (1972), p 1117) requires international agreements, other than treaties, entered into by the US to be transmitted to Congress within 60 days of their entry into force. See also the Senate Committee on Foreign Relations' Report on the International Agreements Consultation Resolution, and the text of that Senate Resolution, at ILM, 18 (1979), p 82. As to the role of the Senate in connection with the conclusion of treaties see also § 627, nn 3, 10 and 11. See further, § 636, n 4, as to executive agreements. Where a statute uses the term 'treaty', it is a matter of interpretation in each case whether that term includes not only treaties in the narrow sense of the term but also such international agreements as take the form of executive agreements: Weinberger v Rossi, ILM, 21 (1982), p 660. For a decision holding the Universal Postal Convention not to be a treaty (or an executive agreement), but to have the effect of only an administrative regulation, and as such incapable of being treated as a treaty, see see Williams v Blount (1970), ILM, 56, pp 234, 240.


97 See Manhattan Mills Inc v Congoleum Corporation (1979), ILR, 66, pp 487, 497-8. Legislation giving effect to a treaty may impose stricter requirements than those prescribed in the treaty where that is consistent with the treaty's objectives: Deutsche Luftfahrt AG v Civil Aeronautics Board (1973), ILR, 61, p 625.


Canada a treaty requires legislative action before private rights are affected, and a statute will prevail notwithstanding that it may be in conflict with a treaty. In Australia effect will be given to an established rule of customary international law unless to do so would be inconsistent with a statute. Legislative action is required before a treaty can have effect in Australian treaties. In India legislation is required if implementation of a treaty requires legislative action before private rights are affected. In Kenya, the attitude of the courts appears to be similar, at least as regards treaties. In New Zealand too legislation is required if implementation of a treaty calls for a change in the existing law; and there, as well as in Pakistan, the principle that if possible statutes are not to be construed as abrogating international law has been applied.

In South Africa treaties, in the absence of legislation giving the relevant provisions the force of law, do not affect the rights of individuals, and do not prevail over a contrary statute; while customary international law forms part of the law of the land and will be ascertained and applied by the courts.

Not all formerly British territories have adopted the British 'common law' approach. In Cyprus the matter is regulated (at least so far as concerns treaties) by the Constitution, Article 169(3) of which provides that treaties concluded in accordance with the provisions of the Article 'shall have, as from their publication in the Official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto'.

Because much of the law of Israel is based on laws applied in the former British mandated territory of Palestine, Israeli courts act in the matter in accordance with principles similar to those applied by English courts. Customary international law which has received general international recognition is part of the law applied by the courts, unless it is in conflict with a statute; a treaty may not be directly relied on by individuals before the courts, which will not enforce a treaty save in accordance with legislation giving effect to it in Israeli law; where a statute is in conflict with a treaty, the statute prevails; the courts will, however, try to interpret a statute so as to avoid a conflict with Israel's international obligations under treaties or customary international law.

In a number of states the relationship between the national law and international law is wholly or partly determined by express provision in the Constitution. Just as a number of former British territories have in general
followed the British approach to the relationship between international law and national law, so too have several former French territories adopted in their constitutions provisions similar to those in the Constitution of France. Thus Article 32 of the 1959 Constitution of Tunisia (as amended) provides that treaties only have the force of law after their ratification, and treaties duly ratified have authority superior to that of laws. Similarly, Article 72 of the Constitution of Chad, and Article 64 of the Constitution of Mali, provide that duly ratified or approved treaties shall, from the date of publication, prevail over national laws, provided that the treaty in question is being applied by the other party.

In some federal states the constitutional provision is on lines similar to that adopted by the United States of America, at least in providing that treaties, as part of the supreme law of the land, must always prevail over the laws and constitutions of the member states of the federation. Thus Article 31 of the Constitution of Argentina provides that treaties with foreign powers are part of the supreme law of the nation, and are binding on the authorities of every province, notwithstanding anything to the contrary in provincial laws or constitutions. A law passed in 1863 establishes the order of priority to be given by the courts to various categories of law: it provides that they 'shall apply the Constitution as the supreme law of the Nation, the Acts approved or which may be approved by Congress, the treaties with foreign countries, the individual laws of the provinces, the general laws applied in the country in the past and the principles of international law, in the order of priority hereby established'. Treaties, being part of the supreme law of the land, have been held by the Supreme Court to prevail over inconsistent federal statutes, even if enacted subsequent to the treaty. A treaty may be applied by the courts even if there has been no detailed implementing legislation. Customary rules of international law have also been held to be binding on Argentine courts. Article 133 of the Constitution of Mexico contains a provision essentially similar to that in the Argentine Constitution. Although treaties have accordingly been held to have the force of law and to be applicable by Mexican courts, they cannot derogate from provisions of the Constitution itself.

An explicit incorporation of both treaties and customary international law is to be found in Article 5(1) of the Constitution of the Republic of Korea, which provides that 'treaties duly ratified and promulgated in accordance with this international law (eg Arts 10 and 11 of the Italian Constitution of 1947, and Art 9 of the Japanese Constitution).

The various national legal systems usually contain a number of presumptions which serve to facilitate the application of international law by their courts. Perhaps the most widely adopted of these is that, although national courts must apply national laws even if they conflict with international law, there is a presumption against the existence of such a conflict. As international law is based upon the common consent of the different states, it is improbable that a state

Constitution and the generally recognised rules of International Law shall have the same effect as domestic laws of the Republic of Korea'. An equally wide, although slightly less clearly expressed, provision is contained in paragraph 2 of Article 98 of the Constitution of Japan, which reads: 'The Treaties concluded by Japan and established laws of nations shall be faithfully observed'. The accepted view seems to be that this provision establishes that Japanese courts can apply treaties and customary international law, although it is not clear whether their status is equal to or superior to that of Japanese law.

Amongst other states one may note that in Morocco the courts have clearly held international law and municipal law to be part of a single system of law in which the former has superior standing, so that a treaty prevails over national laws. In Brazil a treaty has been held to prevail over prior and subsequent national laws. In relation to the Soviet Union, and several other East European States, the matter is discussed in terms of theory rather than of judicial practice. Soviet legal theory has always tended towards a dualist approach to the relation between international law and municipal law. Prevaling theory appears to recognise that a treaty which has been published after being approved by the relevant authorities of the state – a process which does not necessarily, or even normally, involve the passage of legislation implementing the treaty, but may consist of the act of approval of the treaty by the organ of state constitutionally responsible for the conclusion of treaties – is binding upon individuals in the state; and that if there is any conflict between a treaty and a national law every attempt will be made to reconcile the two, but if that fails the conflict will be resolved in the light of the principle lex posterior priori derogat.

§ 20 Presumption against conflicts between international and national law

Under the Constitution formerly in force, it was believed that customary international law was part of Japanese law and treaties had the force of law if promulgated: Ryuchi Shimoda v The State (1963), ILR, 32, p 626. As to the principles which, because of the division of powers in federal states, arise in giving effect to international obligations, see § 76.

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122 See p 65.
123 As to the problems which, because of the division of powers in federal states, arise in giving effect to international obligations, see § 76.
124 See the Memorandum of 13 September 1951 by the Argentine Permanent Delegation to the UN, Laws and Practices Concerning the Conclusion of Treaties, (1951) (UN Legislative Series), pp 4-5.
127 Re Bianchi, ILR, 24 (1957), p 173.
128 F R Conde v Secretary of Foreign Relations, ILR, 17 (1950), No 6; but cf Re Destileria Francesa, ILR, 24 (1957), p 596.
129 Re Vera, AD, 15 (1948), No 114; Re Ramirez, ILR, 20 (1953), p 410.
131 Ecoffard (widow) v Air France (1964), ILR, 39, p 453; and see Admistration des Habous v Dejean, ILR, 19 (1952), No 67, for acceptance of the effect on Moroccon law of a judgment of the IJC.
would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible be set aside.

Another presumption which serves to avoid or limit conflicts between municipal law and international law, particularly in the context of assertions of extra-territorial jurisdiction, is the presumption that statutes are not intended to regulate matters outside the territory of the legislating state, at least to the extent that they may involve the conduct of aliens. This presumption, like that previously mentioned, cannot however be applied where the legislature's contrary intention is clear.

§ 21 Municipal law and the fulfillment of international obligations

Although the way in which international law applies within a state is a matter regulated by the law of that state, the outcome affects the state's position in international law. International law imposes obligations upon and grants rights to states. So far as concerns international obligations, however, international law requires that states fulfill their obligations and they will be held responsible if they do not. From the standpoint of international law states are generally free as to the manner in which, domestically, they put themselves in the position to meet their international obligations; the choice between the direct reception and application of international law, or its transformation into national law by way of statute, is a matter of indifference, as is the choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations. These are matters for each state to determine for itself according to its own constitutional practices.

From the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied, rather than as a rule to be applied on the international plane as a rule of law, and insofar as the International Court of Justice is called upon to express an opinion as to the effect of a rule of national law it will do so by treating the matter as a question of fact to be established as such rather than as a question of law to be decided by the court. Thus a national statute prescribing treatment of aliens in a manner contrary to international law is simply one of the facts tending to establish the state's breach of its international obligations, and does not establish on the international plane the lawfulness of the state's action, however much it may do so on the national plane. A rule of international law may, however, in certain cases directly involve the application of rules of national law, as where a treaty provides a uniform law for some matter of private law; or international law may itself incorporate a concept of municipal law, in which case international law, in the absence of any corresponding concept of its own, will refer to the relevant rules generally accepted by municipal legal systems which recognise the concept in question.

1. The fact that two parties to a treaty choose different legal techniques for implementing their treaty obligations in their internal law will not, therefore, constitute a lack of reciprocity between them: Hza Mans vs Kupferberg [1982] ECR 3641, 3663-4.

2. As to the role of municipal law as a source of international law, see §§ 10, 12, 13.

3. See the Case Concerning German Interests in Polish Upper Silesia (1926) PCIJ, Series A, No 7, at p 19; Spanish and Brazilian Loans Cases (1929) PCIJ, Series A, Nos 20-1, at pp 18-20, and 124; Lighthouses Case (1934) PCIJ, Series A/B, No 62, at pp 22; Pannevezzy-Saldisistas Railway Case (1939) PCIJ, Series A/B, No 76, at p 19; Nottobohm Case ICJ Rep (1959), at pp 20-1, 24-6.


5. See the Barcelona Traction Case (Second Phase), ICJ Rep (1970), at pp 33-4, 37. See also the Raibl Claim (1964), ILR, 40, p 260; and § 95, nn 6, 7, as to the concepts of 'mandate' and 'trusteeship'; and, Gold, AJ, 72 (1978), pp 856-66, as to the notion of 'trust'. See also § 12, as to the 'general principles of law recognized by civilised nations', which involves reference to concepts and principles adopted in municipal law. See also The Wolje Laws' in Article 30 of the American Convention on Human Rights (1986), ILR, 79, pp 325, 330-1; interpreting 'laws' as a term in a treaty, taking account of the different legal systems of the parties. In the Exchange of Greek and Turkish Populations Advisory Opinion (1925), PCIJ, Series B, No 10, the PCIJ noted the fact that no explicit provision referring to a concept (such as national status) which could only be based on the law of a state, and, on the other hand, one referring to a concept which was not necessarily dependent on some particular national law but could refer to a mere situation of fact (at p 19). The fact that a term, not in itself of a legal nature, is used in a treaty in such a way...
A national law which is in conflict with international law must in most states nevertheless be applied as law by national courts, which are not competent themselves to adapt the national law so as to meet the requirements of international law. On the international plane such a law will however be inapplicable as against other states, whose rights and obligations are in the first place determined by international law and not by the national law of another state, and which therefore are entitled to disregard that law and its purported consequences to the extent of its conflict with international law. Furthermore, if a state’s internal law is such as to prevent it from fulfilling its international obligations, that failure is a matter for which it will be held responsible in international law. It is firmly established that a state when charged with a breach of its international obligations cannot in international law validly plead as a defence that it was unable to fulfil them because its internal law was defective or contained rules in conflict with international law; this applies equally to a state’s assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement which in the circumstances cannot be met or severe practical or political difficulties which would be caused. The obligation is the obligation of the state, and the failure of an organ of the state, such as a Parliament or a court, to give effect to the international obligations of the state cannot be invoked by it as a justification for failure to meet its international obligations.

There is some uncertainty about the extent to which a state is in international law obliged to have laws enabling it to fulfil its international obligations, or is prohibited from having laws which do, or may, put it in breach of its international obligations. The question is really whether the law itself is a sufficient test of compliance with international obligations, or whether what matters is action actually taken in pursuance of the law. It is probable that no one answer applies to all situations. The answer probably turns to a large extent on whether the particular international obligation in question relates to the possession or non-

that legal consequences flow from it does not necessarily mean that its meaning is dependent upon the national laws of the parties (at p 21).


5 See § 19, n 32. See also Officina Meccanica Gorlice v Burgumüller (1971), ILR, 70, pp 428, 432.

8 The national law is not rendered null and void by international law: see Interpretation of the Statute of the Holy See by the Vatican City (1956), ICJ Rep (1966), n 21. The ICJ in the Nottebohm case (at pp 17), and in the case in the Officina Meccanica Gorlice v Burgumüller (1971), ILR, 70, pp 428, 432, made it clear that the question of nullity in international law is a different one from the question of invalidity in national law. Thus in the Anglo-Norwegian Fisheries Case, ICJ Rep (1965), the ICJ said that delimitation of sea areas is not dependent merely upon the will of the coastal State as expressed in its municipal law, to the extent of its conflict with international law: see Furet, RG, 68 (1964), pp 887–916; Schnitzer, Recherches d’études de droit international en hommage à Paul Guggenheim (1968), pp 702–42; Jenkins, The Prospects of International Adjudication (1964), pp 547–603; Rougéaux, RG, 81 (1977), pp 361–85; Thirillay, BY, 60 (1989), pp 117–28; and § 633, 204, 239, 354, 401, 402, 619, 656, 673, 832.

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3 See § 19, n 32. See also Officina Meccanica Gorlice v Burgumüller (1971), ILR, 70, pp 428, 432.

4 The national law is not rendered null and void by international law: see Interpretation of the Statute of the Holy See by the Vatican City (1956), ICJ Rep (1966), the ICJ emphasised that it was dealing with the limited question of the international significance of Nottebohm’s Liechtenstein nationality as against Guatemala (at p 17), and without reference to the validity of his nationality according to the law of Liechtenstein (at p 20). As to the attitude of national courts when faced with a law of another state which is conceived to be in violation of international law, see § 113.
possession of certain laws, in which case the existence or otherwise of the law itself will affect the state's international obligations; or whether the obligations to perform or refrain from certain acts, in which case it is more likely that it is actual conduct which determines compliance with a state's international obligations rather than the terms of the legislation, if any, which a state has enacted. But no clear line exists between the two categories. In particular, somewhat special considerations may apply where a treaty is intended to provide for rights to be enjoyed directly by individuals, as compared with those treaties which are primarily concerned with the rights and obligations of the states parties. Even where no international obligation is violated until actual conduct takes place in pursuance of a law, there is no doubt that the existence of a law which permits or could permit conduct in breach of a state's international obligations, or the absence of a law required for their performance, puts the state in a position of potential breach of its international obligations and can properly be the subject of diplomatic representations by other states affected.

13 See eg Art V of the Genocide Convention 1948, in which the Contracting Parties 'undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present Convention'. Another example is afforded by conventions providing for uniform laws on various matters of private law (see § 1, n 11).

14 See also Portugal v Liberia (ILO Complaint) (1963), ILR, 36, pp 351, 401–4, European Commission v France (1974) ECR 139, and European Commission v Italy (1988) ECR 1799 in all of which it was held that in the circumstances under consideration the fact that a state did not in practice apply legislation which was inconsistent with its international obligations was insufficient to constitute compliance with those obligations. See also the Decision of the Austro-German Arbitration Tribunal, 15 January 1972, ZIV, 32, (1972), p 36 (with comment by Mosley, ibid, pp 57–66): Klass Case (1978), ILR, 58, pp 423, 443; Marcks Case (1979), ILR, 58, pp 561, 576–7; Dudgeon Case (1981), ILR, 67, pp 395, 411. In the Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (ICJ Rep 1988, p 12) the USA argued that a law which, although enacted, did not in its relevant parts take effect for a further 90 days, did not, before the legislation was implemented, constitute a breach of treaty obligations with which the law was inconsistent, or give rise to a dispute over the relevant treaty provision, or make arbitration appropriate (pp 18–22, 26, 29–30). The ICJ, while not deciding to do on the consistency of US measures with the relevant treaty obligations, found that the opposing attitudes of the parties showed that a dispute existed so giving rise to an obligation to have recourse to arbitration under the treaty.

15 See the Panama Canal Tolls affair (1912–13), McNair, Law of Treaties (1961), pp 547–9; Mariposa Development Co Case (1933), RIAA, vi, pp 340–41; De Becker Case (1962), YBECHR, p 320.

16 See § 19, nn 81–7, as to directly applicable Community law; and § 442, n 5 as to the European treaty on Human Rights. In the context of the implementation of the obligations under the EC treaties it has been held that the continued existence of legislation contrary to a directly applicable treaty obligation involves a breach of the treaty, even if administrative circulars have been issued intended to secure conformity with the treaty; the remedial measures adopted must have the same legal force as those giving rise to the breach. See Case 168/85, European Commission v Italy (1986) ECR 2945; Case 169/87, European Commission v France (1988) ECR 4093. See also § 19, nn 27 and 87.

17 For examples of protests against legislation before its application in particular cases see eg RG 82 (1986), p 780; and, for representations by European Community states to the US Government about the prospect of the latter failing to meet its financial obligations to the UN because of legislation before Congress, ILM, 25 (1986), p 482. See also examples given by Haight, ILA Report, 51st Session (1964), pp 582–4; and see MacCibon, BY, 30 (1953), pp 293, 299–305; Worlsey. Expropriation in International Law (1959), pp 74–5. Representations may even be made before legislation is enacted, where if enacted as presented to the legislature it would involve a violation of rights enjoyed by other states. Thus when, in 1980, Israel introduced a Bill proposing a change in the status of Jerusalem, the Security Council adopted Res 476 requesting Israel to refrain from doing so: see § 55, n 50. Similarly the UN Secretary-General made representations to the US government against proposed legislation, before it was signed into law on 22 December 1987, in relation to the activities of the observer mission of the PLO in New York: see Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (ICJ Rep 1988), pp 12, 15–18, and other documents at ILM, 27 (1988), p 7120. That Advisory Opinion also concluded that a 'dispute' could exist even if legislation had not yet been enforced: ICJ Rep (1988), pp 29–30. For other examples of representations made about legislation before its enactment see eg UKMIL, BY, 50 (1979), pp 362–4 (a US Note to the UK); ILM, 21 (1982), p 840 (US Note to the UK); UKMIL, BY, 59 (1988), p 509 (UK and EEC representations to the USA).

For an instance involving obtaining an advisory opinion from an international tribunal on the compatibility with a treaty of a draft law see Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), ILR, 79, pp 283, 290–1.


2 See generally on the history of international law, § 1, n 3.

§ 22 Universality of the international community International law does not recognise any distinctions in the membership of the international community based on religious, geographical or cultural differences. Nevertheless, the predominant strain of modern international law was in its origins largely a product of Western European Christian civilisation during the 16th and 17th centuries. The old Christian states of Western Europe constituted the original international community within which international law grew gradually through custom and treaty. When the new Christian state made its appearance in Europe, it was received into the existing European community of states. But, during its formative period, this international law was confined to those states. In former times European states had only very limited intercourse with states outside Europe, and even that was not always regarded as being governed by the same
rules of international conduct as prevailed between European States. 3 But gradually the international community expanded by the inclusion of Christian states outside Europe (such as various former colonies of European states in America as they became independent, foremost of which in the development of international law has been the United States of America) 4 and, during the 19th century at the latest, by inclusion of non-Christian states. Particularly significant was the express acknowledgement of Turkey's membership of the international community in Article 7 of the Peace Treaty of Paris of 1878, which was signed by Turkey (and other non-European states) and maintained. 5

When there were numerous states outside the international community, international law was not as such regarded as containing rules concerning relations with such states, although it was accepted that those relations should be regulated by the principles of morality. 6

3. As to the position of non-Christian states and peoples at different stages in the development of international law see Westlake, i, pp 40; Phillimore, i, §§ 27–33; Bluntschi, §§ 1–16; Heffer, § 7; Gareis, Das heutige Völkerrecht (1879), § 10; Rivet, i, pp 13–18; Fauchille, §§ 40–44 (1); Maretens, § 41; Nys, i, pp 126–37; Westlake, Papers, pp 141–43; Lindley, pp 10–17 and passim; Smith, i, pp 14–33; Planet, Les Consuls de France à Alger avant la Conquête (1579–1830) (1930); Irwin, The Diplomatic Relations of the United States with the Barbary Powers, 1776–1816 (1931); Scott, The Spanish Origin of International Law, Francisco de Vitoria and his Law of Nations (1934). For a study of some treaty and diplomatic relations between European and South Asian states in the 17th and 18th centuries, see Alexandrowicz in Hag R, 100 (1960), ii, pp 207–316, suggesting that those relations were conducted on the basis of international law to a greater extent than is often realised, and that the early contribution of non-European and non-Christian influences of the forms of international law is not to be understated. See similarly the same writer in JSL, 33 (1959), pp 162–82, BY, 37 (1961), pp 414–5, BY, 41 (1965–66), pp 301–20, Introduction to the History of the Law of Nations in the East Indies (1967), and Hag R, 123 (1968), i, pp 117–24. See also Wright, AJ, 48 (1954), pp 616–26; Higgins, Conflict of Interests (1965), pp 11–45; Mösinger, Die Völkerrechtspersonlichkeit und die Völkerrechtspflichten der Barbareskstaaten (1968), and in Grotian Society Papers 1972 (ed Alexandrowicz, 1972). See also works cited at § 5, n 3 and n 10 below.

4. See Westengard, JCL, 18 (1918), pp 2–14. This is particularly true in regard to the law of neutrality. See also Corbet, Law in Diplomacy (1959), pp 38–82.

In which the five great European powers of the time, namely, France, Austria, Great Britain, Prussia, and Russia, together with Sardinia, the nucleus of the future great power Italy, expressly déclarèrent la Sultime Porte admis sie à participer aux avantages du droit public et du concert Européens. But see Smith, i, pp 16–18, who points out that even prior to 1856 rules of international law were held to be applicable to Turkey. That view is supported by McKinnon Wood—AJ, 37 (1943), pp 162–74—where regards Art 7 as an "act of admission" to what might today be called a regional understanding" (at p 274); see also Higgins, Conflict of Interests (1965), p 12.

In September 1914, shortly before becoming a belligerent, Turkey denounced the capitulations (see AJ, 8 (1914), p 873). The complete abolition of the Capitulations in Turkey in every respect 7 was announced by the other parties to the Treaty of Lausanne 1923, Art 28; see § 406.

5. See generally as to the position of native peoples Crawford, The Creation of States in International Law (1979), pp 176–84; and § 34, n 3 and (as to territorial rights) § 250, n 4, (as to indigenous peoples) § 428, and (as to treaties) § 595, n 2.


For relations with Indian peoples in the USA, see especially the judgments of Marshall CJ of the Supreme Court in Fletcher v Peck (1810) 16 CR 87, 2 Peters 308; Johnson and Graham's Lessee v M'Intosh (1823) 8 Wheaton 543, 5 L Ed 681; Cherokee Nation v State of Georgia (1831) 5 Peters, 1, 8 L Ed 25; and Worcester v State of Georgia (1832) 6 Peters 515, 8 L Ed 483. See also

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Before the First World War the position of such states as Persia, Siam, China, Abyssinia, and the like, was to some extent anomalous. Belonging, as they did, to ancient but different civilisations there was a question how far relations with their governments could usefully be based upon the rules of international law. On the other hand there was considerable international intercourse between those states and the states of the Western civilisation; many treaties had been concluded with them, and there was full diplomatic intercourse between them and the Western states. China, Japan, Persia and Siam had taken part in the Hague Peace Conferences. After the First World War the capitulations and some other restrictions upon the territorial sovereignty of most of these states were abolished. 8

Membership of the League of Nations was not restricted by cultural, religious or geographical considerations. The contribution of all 'the main forms of civilisation and the principal legal systems of the world' was expressly recognised in Article 9 of the Statute of the Permanent Court of International Justice. 9 There has been a growing awareness since the end of the First World War of the influence of non-Christian and non-European cultures and civilisations upon the development of international law; 10 and that influence has itself been increas-

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Mitchell v United States (1835) 9 Peters 711, 9 L Ed 283; Goodall v Jackson (1832) 20 Johns R 693; United States v Sioux Nation of Indians (1908) 448 US 371; Totten v United States, AD, 10 (1941–42), no 1; Ex parte Green, ibid, no 128.


It is necessary to distinguish the situation in which, because a community does not qualify for recognition as a state, it is inappropriate to apply in relation to it the rules of international law. This is different from saying that the community is a state, but is outside the international community.

See generally on rules of morality, § 17.


This provision is retained in the Statute of the ICJ, and the same principle applies to membership of the ILC, under Art 8 of its Statute (GA Res, 174 (11) (1946), on which see § 30, n 4. See also Art 23(1) of the Charter of the UN, requiring the non-permanent members of the Security Council to be elected with due regard to 'equitable geographical distribution'.

See § 5, n 3 and § 22, n 10.

ing over that period, particularly as a result of the attainment of independence by large numbers of formerly dependent territories in Africa and Asia, and the development of the United Nations as an organisation with a virtually worldwide membership. 12 A fully universal organisation of the international community, membership of which is not only open to all states but also compulsory for them, and which involves comprehensive obligations prescribed in the organisation's constitution, unavoidably implies far-reaching derogations from the sovereignty of states. They have so far been unwilling to relinquish their sovereignty to that extent, but the trend to universality over the second half of the twentieth century has nevertheless been marked. This trend is checked whenever an attempt is made effectively to exclude particular states from the general scope of the international legal system. In this respect there are grounds for concern at recent actions of doubtful legality which have been taken to exclude certain states, notably South Africa, from participation in the work of major international organisations including the United Nations. 13 While falling short of a general exclusion of such states from the scope of international law, the prevention of their participation in major organs of international cooperation and the apparent willingness to disregard in relation to them certain rules of international law, including constitutional provisions of the organisations concerned, are, quite apart from any particular illegality involved in the action taken, inconsistent with the full application of the principle of universality.

§ 23 Universality of international law 14 The international legal order applies throughout the whole of the international community of states, and in this sense has a universal character. But for individual rules of international law the position is different. Some rules apply to all states, and are called universal international law. 15 However, in view of the wide geographic, economic and cultural differences obtaining between states taken together with the increased scope of international law as regards both the number of international persons and the subject matter regulated by international law, the rules capable of universal application must necessarily be more limited than in the relations of individuals within the state. 16 These diversities between states may render necessary developments and adjustments on the basis of a regional community of interests. 17 The importance of regional arrangements in appropriate fields is recognised in Chapter VIII of the Charter of the United Nations. Geographical proximity and the similarity of political attitudes may usefully serve as a basis for more developed forms of international cooperation and mutual political assistance in the preservation of peace than is possible between all states at large; it may also necessitate the adoption of special rules of international law with regard to particular interests and situations.

1 See § 1; and also § 10, nn 23 and 24 as to the application of customary rules against states which dissent from them. A rule of law will still be a universal rule notwithstanding that it contains exceptions so long as the exceptions apply uniformly and automatically to any situation which is within the scope of the exception: the exception is part of the rule. It is thus distinguished from a claim to exemption from the application of a rule, which involves a derogation from it. See Fitzmaurice, BY, 30 (1953), pp 18-26, and Hag R, 92 (1957), ii, pp 108-12.
12 This is so largely for the reason that the operation of the law must be limited to matters capable of uniform regulation. See, for a somewhat different explanation, Brierly, Nordisk Tid, Acta Societatis Acta Scandinaevica 7 (1936), p 9. See also Schindler, Hag R, 46 (1953), iv, p 265.
14 As to Indian and Hindu influences see Bandopadhyay, International Law and Custom in Ancient India (1920), Chacko, Hag R, 93 (1958), i, pp 121-42; Sastri, ibid, 117 (1966), pp 507-615; Derrett, Indian Year Book of International Affairs, 15-16 (1966-67), pp 328-47. See also Viswanatha, International Law in Ancient India (1925), which reveals some interesting anticipations of rules and institutions commonly regarded as exclusively European. See also Jayakar, Hag R, 120 (1967), i, pp 441-563, as to the influence of Buddhist doctrine on international law.
16 Mention should also be made of the contribution of Judaism to the conception of the Law of Nature; see Isaacas, The Legacy of Israel (Oxford, 1927); Benwich, The Religious Foundations of International Law (2nd ed, Akinjide, 1983).
17 This is so largely for the reason that the operation of the law must be limited to matters capable of universal application, and see UNYB, 1974, pp 106-17. South Africa took no further part in that session or in subsequent regular annual sessions of the Assembly. In 1978 South Africa tried to take part in the Special Session on Namibia, but the credentials of its representatives were again rejected and they withdrew. See also Bissell, Apartheid and International Organizations (1977). In addition, in 1964 South Africa's voting privileges in WHO were suspended; in 1973 the ITU Plenipotentiary Conference decided to include South Africa from the Conference and from participation in meetings and conferences convened by the ITU; in 1974 South Africa's voting privileges in ICAO were suspended; in 1975 South Africa's membership of and voting privileges in WMO were suspended; in 1979 South Africa was expelled from the IPU; and in the same year the credentials of the South African delegation to the General Conference of the IAEA were rejected.
18 See § 3, n 3. See also Elias, Africa and the Development of International Law (2nd ed, Akinjide, 1983).
19 A notable non-member is Switzerland (see § 97). Certain small states have chosen not to become members, such as Kiribati, and Nauru and Tuvalu.
20 In 1974 the General Assembly called on the Security Council to review the relationship between the UN and South Africa in the light of South Africa's constant violation of the principles of the Charter and the Universal Declaration of Human Rights: Res 3207 (XXIX). A draft resolution to expel South Africa was presented to the Security Council, but was not adopted. The President of the General Assembly then ruled that the Assembly's rejection of the South African representatives' credentials amounted to refusal to allow South Africa to participate in the work of the 29th session, and his ruling was upheld in a vote. Several delegations, including that of the UK, voted against the President's ruling as being contrary to the terms of the Charter. See below, § 53, n 15;
These factors largely account not only for the notable degree of legal cooperation amongst American states but also for the development of international law by treaties concluded between, for example, the countries of Western Europe acting especially through the Council of Europe; and also for the tendency in recent years to regard the relations between the Communist states of Eastern Europe as governed by a special system of 'Socialist' international law. Although these various regional activities undoubtedly contribute to the development of general international law they are not a substitute for a universal system of international law. Such particular international law between two or more states presupposes the existence and must be interpreted in the light of principles of international law binding on all states.

The existence of universal rules of international law has been denied by some of the adherents to the rigid positivist doctrine who see in the express will of states the only source of obligation in the sphere of international law. It has also been obscured by the exaggerated emphasis on the so-called American (or Latin-American) International Law, by the insistence on the difference between the so-called Anglo-American and Continental Schools of International Law, and by various nationalist conceptions of international law. On examination none of these phenomena necessarily derogates from the universality of international law; they tend, on the contrary, to contribute to its development as a universal body of law and to enrich international law by introducing into it concepts and attitudes from a wider area than that in which it had its modern origins.

Thus the historical circumstances accompanying the rise of the various American republics as independent states caused them to stress certain principles like those of self-determination, the right to independence, freedom from intervention on the part of extra-continental states, freedom of emigration and immigration. Some of these doctrines, like freedom of immigration, have now been generally abandoned, even by those American states which originally upheld them. Others were substantially accepted by European nations, and then by other states throughout the world, and have become established elements of international law. In addition to having contributed such general principles to the developing body of international law, the experience of the American states, especially those of Latin America, has had great influence on many particular rules of international law. Thus aspects of the present law on recognition of states and governments, on state responsibility, on the extent of the territorial sea and other maritime zones, title to territory, and diplomatic (and other forms of) asylum, have been significantly affected by attitudes and practices of those states over the past century and a half. In the 20th century the contribution of the American states has in many ways become more formalised, through their joint activities within the framework of various regional organisations, such as the Pan-American Union and the Organisation of American States, and numerous sub-regional groupings. The American states have adopted a number of general conventions codifying inter se various topics of public and private international law, which have in some cases initiated developments in international law which were followed later by the international community generally. The principles underlying these conventions do not, insofar as they have secured the consent of all American states, differ essentially from those binding on states in other parts of the world, and are recognisably part of the wider system of international law governing the actions of all states alike. The assertion, sometimes made, that there exists a separate body of 'American international law' is almost certainly erroneous if intended to convey that the international legal system applicable on the American continent is a different system from that applicable in other parts of the world.

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8 Eg in relation to governments coming to power in revolutionary circumstances: see § 44.
9 Eg in relation to the so-called 'Calvo clause': see § 408, nn 21, 22.
10 See §§ 196, 314H, 329H.
11 Eg in relation to the doctrine uti possidetis: see § 235.
12 See §§ 402, 445. It may be noted that in the Asylum case between Colombia and Peru (see § 10, n 10 and § 49) the ICJ showed no disposition to attach decisive importance to some of the apparent consequences of the institution of asylum which, because of the relative frequency of internal commotions, acquired a certain prominence among Latin-American countries. It preferred to base its judgment upon general principles of international law—including that of prohibition of intervention which, it held, required a restrictive interpretation of the right of a state to shelter, in its S legitations, fugitives from justice in the receiving country.
13 See § 665, n 15.
14 See § 1, n 12, § 27, nn 11 and 13; and § 31, n 5.
15 In the Military and Paramilitary Activities case the ICJ referred to 'customary international law', whether of a general kind or that particular to the inter-American system, thus acknowledging a certain separateness in principle — for the latter, although for the issues before the Court it found the rule to be the same in both kinds of customary international law: ICJ Rep (1986), p 105.
16 The existence of an American international law has been asserted in particular by Alvarez in a series of able writings beginning with his Le Droit international américain (1909); AJ, 3 (1909), pp 269—353, and RG, 20 (1913), pp 48—52; Preface to Strupp, Éléments du droit international public, universel, européen et américain (1927); La Reconstruction du droit international et sa codification en Amérique (1928). However, it appears that Alvarez, far from denying the existence of universal rules of international law, stresses 'the existence of particular rules relating to special American problems with regard to matters which have not yet been regulated by general international law': Institut Américain de Droit International, Historique, Notes, Opinions (1916), p 111.
17 The term 'American International Law' was adopted in the Draft Code of American International Law which was presented by the Pan-American Union to the governments of all the American states. In Project 2 of this Code (AJ, 20 (1926), Supplement 2, p 302), American international law was defined as 'all of the institutions, principles, rules, doctrines, conventions, customs, and practices which, in the domain of international relations, are proper to the Republics of the New World', thus giving a very wide significance to the term law, and comprising apparently principles of policy such as the Monroe Doctrine, which is not a rule of law (see § 330). This Project was not amongst those adopted by the International Commission of
trovery, and it is important not to magnify either the extent or the significance of the regional variations in particular rules which may be seen in the practice of American states compared with states in other regions.

Similarly, differences in the notions and methods of various systems of national law are not obstacles to the existence of rules of international law of universal application. Such differences may be substantial, as for example are the differences between the so-called Anglo-American and Continental attitude towards, in particular, such matters as pleadings and forms of judicial reasoning. But these differences are essentially irrelevant to the universality of the international legal order. There are no fundamental differences on essential questions of international law, either in the law of peace or of war, resulting from such differences in national legal systems. In such limited international practice as there has been in this area, apparent differences in basic notions and methods of approach resulting from divergencies in national systems and traditions have been satisfactorily bridged by an assimilation and mutual approximation of apparently opposed concepts. This is shown, for instance, in the manner in which the practice of the Permanent Court of International Justice and its successor have combined formal disregard of the doctrine of judicial precedent with constant and fruitful regard for their previous decisions. Moreover, a comparative study of the principal systems of private law tends to show that the differences between them lie often in the domain of terminology, language, and procedure rather than of substantive law. Insofar as substantive differences exist they affect rules of conduct lying specifically within the field of municipal law and are not, therefore, of a nature likely to render impossible or difficult a uniform development and administration of international law.

More substantially inimical to the universality of international law have been some national conceptions of international law. Thus writers in the Soviet Union denied for a time the possibility of a permanent and general international law; they spoke of an international law of transition, based on particular as distinguished from general agreements, pending the extension of the Russian system to other countries.

After coming to terms with the rest of the international community and international law, in practice, a permanent feature of international society, writers in the Soviet Union have endeavoured to see it in notably restricted terms. Thus they continued to regard states, and to a limited extent international-
CODIFICATION OF INTERNATIONAL LAW


Codification of international law


§ 24 Movement in favour of codification

The lack of precision and elaboration which is found in some parts of international law and the large part played by custom in its development created a movement for its codification. That movement was early strengthened by the desire to put at the disposal of international tribunals a body of ascertained and agreed rules and thus, it was thought, to stimulate the willingness of states to submit disputes to judicial determination.

The idea of a codification of international law in its totality was first suggested by Bentham at the end of the 18th century. A similar project was made by the French Convention which resolved in 1792 to proclaim a Declaration of the Rights of Nations as a pendant to the Declaration of the Rights of Man.

"Codification" has at least two distinct meanings: (1) the process of translating into statutes or conventions customary law and the rules arising from the decisions of tribunals with little or no alteration of the law; this is equivalent to what the English lawyer means when referring to a consolidating statute, such as the Sale of Goods Act 1893; (2) the process of securing, by means of general conventions, agreement among states upon certain topics of international law, these conventions being based upon existing international law, both custom and conventions, but modified so as to reconcile conflicting views and render agreement possible. See Brierly, BY, 12 (1931), pp 1-6, and Politis, Les Nouvelles Tendances du droit international (Eng trans, 1928), p 70. In relation to international law the two aspects are in practice inseparable; furthermore, there is no clear borderline between codes and ordinary multilateral conventions: see § 31.

1789, and the Abbe Grégoire was charged with the drafting of such a declaration. In 1795 he produced a draft of 21 articles, which, however, was rejected by the Convention, and the matter was dropped. After the middle of the 19th century attempts to draw up codes of international law increased notably, although these were still a matter of private endeavour rather than governmental action. In 1873 the Institute of International Law was founded at Ghent in Belgium. This association of jurists of many nations meets periodically, and has produced a number of drafts concerning various parts of international law. In 1873 was founded the Association for the Reform and Codification of the Law of Nations, which also meets periodically and which now styles itself the International Law Association. Even after governments began to undertake major activities in the field of codification at the turn of the century, private work has continued to play an important part in the elaboration and systematisation of nearly all aspects of international law, based on careful research into the practice of states.

§ 25 Work of the first Hague Peace Conference At the end of the 19th century, in 1899, the so-called Peace Conference at The Hague, convened on the personal initiative of the Emperor Nicholas II of Russia, showed that parts of international law might be codified. In addition to three declarations of minor value, and the convention concerning the adaptation of the Geneva Convention to naval warfare, this conference succeeded in producing two important conventions which may well be called codes – namely, first, the Convention for the Pacific Settlement of International Disputes, and, second, the Convention with respect to the Laws and Customs of War on Land.

§ 26 Work of the second Hague Peace Conference The second Hague Peace Conference of 1907 produced no less than 13 conventions, some of which are codifications of parts of maritime law. Three of the 13 conventions, namely, that for the pacific settlement of international disputes, that concerning the laws and customs of war on land, and that concerning the adaptation of the principles of the Geneva Convention to maritime war, took place the three corresponding conventions of the first Hague Peace Conference. But the other ten conventions were new. Apart from the conventions on the limitation of the employment of force for the recovery of contract debts and the opening of hostilities, they were devoted to the regulation of rules of warfare and neutrality in war on land and sea.

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7 Particular reference may be made here to a series of draft conventions prepared at the Harvard Law School in the mid-1930s under the direction of Professor Manley Hudson. The comment accompanying these draft conventions is based on comprehensive and painstaking research. These publications are enumerated in the List of Abbreviations at the beginning of this work. The Harvard Law School has, since the Second World War, also produced a draft Convention on the International Responsibility of States for Injuries to Aliens (by Sohn and Baxter, AJ, 55 (1961), pp 545–84).

8 As to the codification of private international law, see § 1, n 11.


10 Shortly after the Hague Peace Conference of 1899, the USA published on 27 June 1902, a body of rules for the use of its navy under the title, The Laws and Usages of War at Sea – the so-called United States Naval War Code – which was drafted by Captain Charles H Stockton, of the US Navy. Although, on 4 February 1904, this code was by authority of the President of the US withdrawn, it provided the starting-point of a movement for codification of maritime international law.

11 For an enumeration of these conventions see vol ii (7th ed), § 68.

12 See § 408.

13 See vol II of this work (7th ed), § 94.

14 See vol II of this work (7th ed), § 68.
Codification in the period after the First World War

In the domain of international law, the period after the First World War produced a series of conventions on the treatment of prisoners of war and sick and wounded, and, in 1925, on the use of poisonous and asphyxiating gases. In the law of peace that period produced important partial codification through general instruments like the Covenant of the League of Nations, the Statute of the Permanent Court of International Justice, the General Act of the Pacific Settlement of International Disputes of 1928, and the General Treaty for the Renunciation of War. Some of the major multilateral treaties of this period concerned air navigation and inland and maritime navigation, and a great number of conventions of a scientific, economic, and humanitarian character, including the imposing series of conventions concluded under the aegis of the International Labour Organisation, contained elements of codification, although not primarily codification treaties in the usual sense.

Notable progress in codification was made in this period by means of regional codification on the American continent. The Sixth Pan-American Conference held in 1928 adopted seven codifying conventions on the status of aliens, treaties, diplomatic officers, consular agents, maritime neutrality, asylum, and the duties and rights of states in the event of civil strife. The Seventh Pan-American Conference in 1933 adopted five further conventions, on the nationality of women, nationality, extradition, political asylum, and rights of duties of states.

Codification under the League of Nations

To stress what they believed to be the close connection between the judicial settlement of international disputes and codification, the Committee of Jurists, who in 1920 drafted the Statute of the Permanent Court of International Justice, adopted a resolution urging the calling of an international conference charged with reconciling divergent views on particular topics of international law and the consideration of those which were not adequately regulated. In 1924 the Council of the League of Nations appointed a committee of 16 jurists to report on the codification of international law. The Committee was not instructed to prepare codes, but to report to the Council on the questions which it regarded as ripe for codification, and how their codification could best be achieved. The Committee then considered a number of reports prepared by its sub-committees on various topics, examined the replies of the governments on these reports, and in April 1927 reported to the Council that the following seven topics were ripe for codification: (1) nationality; (2) territorial waters; (3) responsibility of states for damage done in their territory to the person or property of foreigners; (4) diplomatic privileges and immunities; (5) procedure of international conferences and proceed.
dure for the conclusion and drafting of treaties; (6) piracy; (7) exploitation of the products of the sea.2

In 1927 the Assembly decided that a conference should be held at The Hague for codifying the subjects mentioned under (1), (2), and (3). The Council then instructed a preparatory committee to consider and recommend to the Council what action it should take in execution of the Assembly's Resolution. The Committee examined the replies made by the governments to questions covering the principal topics of the three proposed subjects of codification and drew up bases of discussion for the use of the Conference. The replies of the governments, the bases of discussion and the Committee's final report are printed in three separate volumes.3

§ 29 The Hague Codification Conference of 1930 The first Conference on the Progressive Codification of International Law was held at The Hague from 13 March to 12 April 1930. It resolved itself into three committees for each of the three chosen topics. As the result of the work of the First Committee the Conference adopted: (a) a Convention concerning Certain Questions relating to the Conflict of Nationality Laws; (b) a Protocol relating to Military Obligations in certain cases of Double Nationality; (c) a Protocol relating to a Certain Case of Statelessness; and (d) a Special Protocol concerning Statelessness.4 These treaties, although falling short of a comprehensive codification of international aspects of nationality, covered important questions and have subsequently been ratified by a number of states, including Great Britain.5 With regard to territorial waters, the Conference was unable to adopt a convention as no agreement could be reached on the question of the breadth of territorial waters and the problem of a 'contiguous zone' adjacent thereto. There was, however, some measure of agree-

2 For the Report of the Committee see Doc C/196/M/70/1927/V. As to topics (5) and (7) the Committee recommended a procedure more technical than an international conference. In June 1928 the Committee reported two more topics as being ripe for codification, namely, the legal position and functions of consuls and the competence of courts in regard to foreign states.

3 The Committee, after examining reports upon nationality of commercial corporations and their diplomatic protection, and the recognition of the legal personality of foreign commercial corporations, reported to the Council that these topics were ripe for regulation by international agreement, and might usefully be left to a conference upon private international law.

4 The Committee examined and reported as not being ripe for international regulation the following topics: criminal competence of states in respect of offences committed outside their territory; extradition; interpretation of the most-favoured nation clause. (The Committee also studied, and considered to be ripe for international regulation, the legal status of government ships employed in commerce; but, in view of the conferences which had already been held under the direction of the International Maritime Committee and the Convention preparatory body (see § 565), recommended the Council to take no further action at that time.)


The Convention and the three Protocols came into force in 1937 following upon the receipt of the tenth ratification.

6 As to all these see §§ 395 and 398.

7 For the Report of the Committee see Doc C/196/M/70/1927/V. As to topics (5) and (7) the Committee recommended a procedure more technical than an international conference. In June 1928 the Committee reported two more topics as being ripe for codification, namely, the legal position and functions of consuls and the competence of courts in regard to foreign states.

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9 The Committee examined and reported as not being ripe for international regulation the following topics: criminal competence of states in respect of offences committed outside their territory; extradition; interpretation of the most-favoured nation clause. (The Committee also studied, and considered to be ripe for international regulation, the legal status of government ships employed in commerce; but, in view of the conferences which had already been held under the direction of the International Maritime Committee and the Convention preparatory body (see § 565), recommended the Council to take no further action at that time.)

Assembly decided, in 1947, to set up an International Law Commission charged with the task of codifying and developing international law. At the same time the Assembly adopted a statute of the Commission, defining its functions and regulating the periodic election of its members by the General Assembly. The Statute provides that the Commission shall consist of 34 members who shall be persons of recognised competence in international law. The whole Commission is elected at the same time, for a five-year period. The Statute also lays down that there shall be assured in the Commission as a whole the 'representation of the main forms of civilisation and of the principal legal systems'. The Commission, which was first elected in 1948, meets yearly. It possesses no permanent organs of its own, although it is provided with supporting services by the Secretariat of the United Nations. By setting up the Interna-


4 GA Res 36/39 (1981). When first established the Commission had 15 members (GA Res 174 (II) (1947)); this was later increased to 21 (GA Res 1103 (XVI) (1956)), and then to 25 (GA Res 1674 (XVI) (1961)).

5 The Commission is now elected on the basis of an express geographical distribution of seats, as follows: nationals from African states - 8; Asian states - 7; East European states - 3; Latin-American states - 6; Western European and other states - 8; together with one African or East European national in rotation, and one Asian or Latin-American national in rotation. See GA Res 36/39 (1981). Before the adoption of that resolution the allocation of seats was governed by a series of understandings and gentleman's agreements: see paras 4-6 of the Secretary-General's Memorandum of 24 July 1981 (UN Doc A/36/371).

6 The Statute of the Commission provides that with regard to the final drafts proposed by it in the matter of codification (and, apparently also of development) the Commission may recommend to the General Assembly: (a) to take no action, the report having already been published; (b) to take note of or adopt the report by resolution; (c) to recommend the draft to members with a view to the conclusion of a convention; (d) to convene a conference for the purpose of concluding a convention (Art 22). It is also laid down that whenever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting. The effective fulfilment of these important and intricate tasks by the General Assembly must depend upon the existence - within, or in conjunction with, the General Assembly - of organs of a competence and permanence enabling them to cope with the legislative output of an ILC functioning on a scale commensurate with the tasks entrusted to it by the Charter. Similarly, any expansion of the work of the Commission in conformity with the object of the Charter must depend to a large extent upon the development, within the governments and foreign offices of the members of the United Nations, of requisite machinery for a detailed examination of the drafts of the Commission.

7 The Secretariat has also prepared extensive background material and studies to assist the ILC in its work, and also in preparation for conferences held to draw up conventions on the basis of draft articles prepared by the ILC. See also the collections of national laws on various topics

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Codification of international law

In summary, the International Law Commission has been established to codify and develop international law. It is composed of 34 members who are chosen for their competence in international law. The Commission is charged with the task of codifying and developing international law. It has the power to make recommendations to the General Assembly, which may then take action on these recommendations or convene a conference for the purpose of concluding a convention. The Commission is currently composed of members from different regions, with African, Asian, East European, Latin-American, and Western European and other states having representation. The Commission has added additional topics to its work programme, and it is currently working on a number of topics, including the recognition of states and governments, succession, jurisdictional immunities, and crimes committed outside national territory. This work is ongoing and is expected to continue in the future.
(5) Regime of the high seas and (6) Regime of territorial waters: on the basis of draft articles prepared by the Commission, the Geneva Law of the Sea Conference 1958 adopted conventions on the high seas, on fishing and conservation of the living resources of the high seas, on the continental shelf, and on the territorial sea and contiguous zone.13

(7) Nationality, including statelessness: the Commission considered this topic to include two other items subsequently referred to it, namely the nationality of married women and the elimination of statelessness, and in 1951 initiated work on the whole subject.14 Its work on statelessness led to two draft Conventions15 on the basis of which a Convention on the Reduction of Statelessness was concluded in 1961,16 but as regards other aspects of nationality the Commission refused to deal with the nationality of married women separately from the broad subject of nationality, including statelessness, on which it decided in 1954 to defer further action.17

(8) Treatment of aliens: the Commission has not begun work on this topic.

(9) Right of asylum: the Commission has not begun work on this subject either. In 1977 it concluded18 that the topic did not appear to require active consideration in the near future, particularly in view of the holding of a UN Conference on Territorial Asylum in 197719 with the possibility of a further conference being convened later, and in view of the decision of the General Assembly, in GA Res 3497 (XXX) (1975), to give further consideration to the question of diplomatic asylum.20

(10) Law of treaties: on the basis of draft articles prepared by the Commission, the Vienna Convention on the Law of Treaties was concluded in 1969;21 see also items (21), (22), (28), and (29) below.

(11) Diplomatic intercourse and immunities: on the basis of draft articles prepared by the Commission the Vienna Convention on Diplomatic Relations was concluded in 1961;22 see also items (24) and (31) below.

(12) Consular intercourse and immunities: on the basis of draft articles prepared by the Commission, the Vienna Convention on Consular Relations was concluded in 1963.23

(13) State responsibility: the Commission has this subject under active consideration.24

(14) Arbitral procedure: in 1958 the Commission adopted Model Rules of Arbitral Procedure, which were 'taken note of' by the General Assembly.25

(15) Rights and duties of states: in 1949 the Commission formulated a Declaration of Rights and Duties of States.26

(16) The Nuremberg principles were formulated by the Commission to re-examine the subject, and the Commission now has it under active consideration.27

(17) International criminal jurisdiction: the Commission discussed reports by its Special Rapporteur on this topic in 1950,28 but further consideration was deferred.29

(18) Availability of evidence of customary international law: in 1950 the Commission considered ways and means of making such evidence more readily available, and submitted a report on the matter to the General Assembly.30

(19) Offences against the peace and security of mankind: the Commission formulated a code on such offences in 1954,31 and deferred further consideration of the matter in 1957.32 With the completion of work on the definition of aggression (see the next item) the Commission suggested that it might look again at its draft code.33 The General Assembly, after seeking comments on the draft from member states,34 in 1981 requested the Commission to re-examine the subject, and the Commission now has it under active consideration.35

(20) Definition of aggression: the Commission considered this in 1951 as part of its consideration of the previously mentioned item.36 Although its 1954 formulation of a code of offences against the peace and security of mankind included the offence of any act or threat of aggression, this did

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24 See § 145.
26 See GA Res 178 (II) (1947); YBILC (1949), pp 286–90; GA Res 375 (IV) (1949) and 596 (VI) (1951). See also § 145.
31 YBILC (1949), ii, pp 149–52; and see vol II of this work (7th ed), § 582, and Johnson, ICLQ, 4 (1955), pp 445–67.
33 YBILC (1977), ii, pt 2, p 130, para 111.
36 See YBILC (1951), ii, pp 131–7.

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not include a definition of aggression. The Commission deferred further consideration of the matter in 1957.\(^{37}\)

(21) Reservations to multilateral conventions: the Commission completed a special report on this subject in 1951.\(^{38}\)

(22) Participation in general multilateral treaties concluded under the auspices of the League of Nations: the Commission submitted a report on this subject to the General Assembly in 1963.\(^{39}\)

(23) Special Missions: on the basis of draft articles prepared by the Commission, a Convention on Special Missions was adopted by the General Assembly in 1969.\(^{40}\)

(24) Prevention and punishment of crimes against internationally protected persons, including diplomatic agents: on the basis of draft articles prepared by the Commission a convention on this matter was adopted by the General Assembly in 1973.\(^{41}\)

(25) Relations between states and inter-governmental organisations: in 1966 the Commission divided the subject into two parts, namely (a) the relations between states and inter-governmental organisations, and (b) the status, privileges and immunities of international organisations, their officials, experts and other persons engaged in their activities not being representatives of states. On the first part that Commission completed its work in 1971 by adopting draft articles which formed the basis for a convention drawn up at Vienna in 1975.\(^{42}\) The Commission now has the second part of the topic under active consideration.

(26) Most-favoured nation clauses: the Commission approved final draft articles in 1978, but no substantive action has yet been taken on them.\(^{43}\)

(27) Historic waters and bays: the Commission decided in 1967 that the time was not yet ripe to proceed actively with this subject.\(^{44}\) In 1977 the Commission considered it better to await the outcome of the Third UN Conference on the Law of the Sea.\(^{45}\)

(28) Treaties concluded between states and international organisations or between two or more international organisations: on the basis of draft articles prepared by the Commission a convention on this subject was concluded at Vienna in 1986.\(^{46}\)

(29) Review of the multilateral treaty process: in 1979 the Commission transmitted its observations on this matter to the Secretary-General of the United Nations for inclusion in his report prepared pursuant to General Assembly Resolution 32/48.\(^{47}\)

(30) Non-navigational uses of international water courses: the Commission has this topic under active consideration.

(31) International liability for injurious consequences arising out of acts not prohibited by international law: under active consideration.

(32) Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: the Commission approved final draft articles in 1989, and the General Assembly has still to decide what action to take on them.\(^{48}\)

The Commission’s methods of work are based on the provisions of Articles 16–23 of its Statute. Generally speaking, for any particular topic, the Commission’s method comprises:

‘the formulation by the Commission of a plan of work on the topic concerned, the appointment of a Special Rapporteur, the request for data and information from Governments and for research projects, studies, surveys and compilations from the Secretariat, the discussion of the reports submitted by the Special Rapporteur of the Commission at plenary meetings and of the proposed draft articles in plenary and within a Drafting Committee established by the Commission, the elaboration of draft articles with commentaries and their submission to Governments for observations, the revision of provisional draft articles in the light of the written and oral observations from Governments and the submission of final drafts with recommendations to the General Assembly.’\(^{49}\)

But the Commission has applied this method flexibly, making adjustments to it so that the specific features of the topic concerned demand. In addition, when entrusted with special tasks, the Commission has adopted special methods of work suitable thereto.\(^{50}\)

The International Law Commission is empowered by Article 26 of its Statute\(^{51}\) to consult with any international or national organisation, official or non-official, on any subject entrusted to it; and paragraph 4 of that Article recognises the advisability of consultation by the Commission with inter-governmental organisations whose task is the codification of international law. The Commission has established cooperative relationships with the Arab Comm-
mission for International Law, the Asian–African Legal Consultative Committee, the European Committee for Legal Cooperation, and the Inter-American Juridical Committee.

The 14 major conventions concluded on the basis of the work of the International Law Commission by 31 December 1989, 10 of which were by then in force, constitute a major contribution to the development of a significant portion of international law. For that alone the work of the Commission can be regarded as successful. But it would be wrong to assess the achievement of the International Law Commission solely in terms of the number and scope of conventions concluded as a result of its work. By the scholarly and realistic way in which it has studied the topics on its agenda its work has had an effect on the rules of customary international law quite apart from the direct effects which the various conventions may have inter partes, and even if no convention is eventually drafted or before it enters into force. More generally, it has contributed greatly to the development of the law and to an increase in the respect in which it is generally held by members of the international community.

§ 31 Codification and development of international law. The distinction between codification and development of international law has been adopted both in the Charter of the United Nations and in the Statute of the International Law Commission. In the latter the expression 'progressive development of international law' is used — for convenience — for 'the formulation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'. The expression 'codification of international law' is used similarly 'for convenience' — as meaning 'the more precise formulation and systematization of international law in fields where there already has been extensive State practice, precedent and doctrine'. However, the theoretical value of the distinction is limited and its practical application insignificant. The Statute of the Commission provides for different procedures for these two kinds of activity, but such differentiation of procedure has proved unworkable and has been disregarded in practice. Subjects — such as the limit of territorial waters — on which there is 'extensive state practice, precedent and doctrine' are often so similar that nothing but a legislative innovation, by way of a formulation of new rules, can meet the exigencies of the case. Moreover, it may happen that with regard to the subjects, which are of some rarity, where there is apparently full agreement in existing practice and doctrine, circumstances may call for a modification of the existing rule. Conversely, principles relating to topics of distinct novelty — such as the regime of the continental shelf — can be formulated by way of 'development' only by taking into account, and to that extent 'codifying', an established principle of international law. Thus the regime of the continental shelf, as formulated by the Commission, was based on the full recognition and preservation, subject to reasonable modifications, of the principle of the freedom of the seas. In fact, the usefulness and justification of the entire process of codification, in its wider sense, must, as a rule, depend upon the combination, in relation to the same subject, of the processes of restatement of existing principles with the formulation of new principles. It is desirable that in each case the codifying agency should leave no doubt as to the proportion in which rules formulated by it amount to a statement of the existing law or a change thereof.

There is now considerable experience of codification: the Hague Conference of 1930, the very important work of the International Law Commission since 1945, and also certain measures of codification adopted on an American or European basis. In the light of this experience certain conclusions may be drawn as to its desirability and prospects. First, the Hague Conference of 1930 showed that the entire procedure may be required for codification conceived of as a systematisation and unification of agreed principles and for codification regarded as agreement on hitherto divergent views and practices; and that, in particular, the securing of agreement on existing differences is primarily a matter of policy and cannot well be settled by conferences of legal experts. In this respect the experience of the International Law Commission has proved different; by its composition and methods of work it has been able to deal in a generally satisfactory way with questions of policy which have inevitably arisen in the course of formulating legal rules. Secondly, so long as international conferences were governed by the rule of unanimity, there was a danger that

4 See § 284.
5 American activity has been the work of the Inter-American Council of Jurists and its permanent body, the Inter-American Juridical Committee. Under Art 105 of the Charter of the OAS as amended by a protocol of 1967 (ILM, 6 (1967), p 341) the Inter-American Juridical Committee, one of the main organs of the OAS, is given the task, inter alia, 'to promote the progressive development and the codification of international law'; the Inter-American Council of Jurists has now ceased to exist.
6 Conventions adopted since 1945 on an Inter-American basis which may be regarded as at least in part codificatory include the Conventions on the Political Rights of Women and the Civil Rights of Women concluded at the Ninth Inter-American Conference, 1948, the Convention on Diplomatic Asylum and the Convention on Territorial Asylum concluded at the Tenth Inter-American Conference, 1954, and the Inter-American Convention on Extradition 1981; note also the Third Inter-American Conference on Jurisdictional Questions, 1956, and the Task Force on Inter-American Juridical Committee in 1983. In addition a number of studies and reports have been made relating to the codification of various aspects of international law. See generally the statements made by the representative of the Inter-American Juridical Committee to the International Law Commission, and recorded in the Commission's annual Report to the General Assembly.
7 Activities of the Council of Europe in this field are coordinated by the European Committee on Legal Cooperation. Among the conventions concluded which involve a significant element of codification are the European Convention on Extradition 1967, the European Convention on Consular Functions 1967, and the European Convention on State Immunity 1972. In 1960 a Report on the Privileges and Immunities of International Organisations was considered by the Committee of Ministers: Res (60) 29. See generally on the legal programme of the Council of Europe, l'Europe des Lois, JCLQ, 13 (1964), pp 673–80; JCLQ, 14 (1965), pp 646–53; the relevant sections of the European Year Book; and the statements made by the representative of the European Committee on Legal Cooperation to the International Law Commission, and recorded in the Commission's annual Report to the General Assembly.
8 On the voting procedure in international codification conferences from 1864 to 1930, see Sohn in Jus et Societas (ed Wilmer, 1979), pp 278–96.
international law which are sufficiently developed for that purpose. It is true that the absence of codified rules has not seriously impeded the work of the International Court of Justice or of other tribunals, and that, on the contrary, their work has shown that international law may be developed indirectly and given a degree of certainty through decisions of international tribunals. But there is no doubt that the codification of suitable portions of international law may add both to its clarity and authority and, to a small extent, to the willingness of states to submit disputes to obligatory judicial or arbitral settlement. The danger of failure, or even of retrogression, in consequence of the operation of the unanimity rule is being circumvented by the adoption of conventions by, usually, a two-thirds majority of the states represented at the Conference. The procedures by which the codification of international law is at present being achieved are generally such as to secure that the resulting conventions are both politically acceptable and scientifically sound. The International Law Commission is composed of lawyers of high repute, and their background and the manner of their selection should generally ensure that they are fully aware of prevailing international political realities. The extensive consultation with governments on the draft articles prepared by the Commission and the role of the Sixth Committee of the General Assembly in relation to the work of the Commission tend to make it less likely that the final result of the Commission's labours is wholly unacceptable to the generality of states. The scope of conventions adopted, even if only by a two-thirds majority vote, after such preparatory procedures have been followed is likely to become enlarged as the result of subsequent accessions. The very fact of their continued validity among large groups of states cannot fail to exercise considerable influence, quite apart from the possibility of the convention giving rise to rules of customary international law.

While the International Law Commission plays a very important part in the codification of international law, its role is not exclusive. Treaties which, even if not expressly designated as codification treaties, nevertheless have the effect of

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8 Even before the Hague Conference met, the Preparatory Committee which drafted the Bases of Discussion uttered a warning to that effect. See Doc C/73/M/38/1929/IV. See generally, Baxter, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 146–66, and also Wolfke in *Essais in International Law in Honour of Judge Manfred Lachs* (ed Makarczyk, 1984).

9 The Commission itself needs only a simple majority for its decisions, since as a subsidiary organ of the General Assembly, and in the absence of any contrary decision, it is subject to the Rules of Procedure of the Assembly: see YBILC (1949), pp 10–11, and Rule 125 of the Assembly's Rules of Procedure.

10 Eg the Convention on Special Missions, GA Res 2530 (XXIV) (1969), and (for treaties not based on the work of the ILC) the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (see § 440).

11 This was evident, for example, in the failure of the 1958 and 1960 Geneva Conferences to agree upon the breadth of territorial waters; and in the results of the Mexico City Conference of 1964 of the UN Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States: of the four superficially self-evident principles of international law which were being studied – abstention from the threat or use of force, peaceful settlement of disputes, non-intervention in matters of domestic jurisdiction, and the sovereign equality of states – agreement was reached only on the last. Agreement on the other principles was eventually reached at a later session. See § 105.

12 On certain procedural aspects of such codification conferences see Limpert, *Verfahren und Völkerrecht* (1985).

13 See § 13.

14 Several of the conventions concluded on the basis of the work of the ILC have optional protocols on the compulsory settlement of disputes. These conventions include the four Conventions on the Law of the Sea (1988), the Convention on Diplomatic Relations (1961), the Convention on Consular Relations (1963), and the Convention on Special Missions (1969), and all of the optional protocols have entered into force. On the first six of these protocols, see Briggs, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 628–41. The Convention on the Law of Treaties (1969) contains, in Art 65, special provisions for the settlement of disputes.

15 These include the trend towards a new international legal order, reflecting the changing balance of states within the international community compared with that which existed during the formative years of much of contemporary international law. See, eg, Briggs, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 286–95, and works cited at § 5, n 3, as to the attitude of 'new' states to existing international law. The Commission may have a part to play in this process. There is, however, a danger of the Commission becoming too great a degree a body receptive to diplomatic and political trends at the expense of being a body composed of independent legal experts. The fact that it now has 34 members, expressly elected so that its composition reflects the principal geographical voting groups in the General Assembly (see § 30, n 4), and able to take its own decisions on the basis of a simple majority (see § 9), increases the risk of it becoming a body whose work may less readily command widespread support as a juridically sound basis for action by the international community.

16 See § 11.
codifying significant parts of international law may be concluded by groups of
states, whether acting within the framework of an international organisation
(particularly the United Nations) or on a regional basis or through an ad hoc
conference. Thus the Declaration on Principles of International Law concerning
Friendly Relations and Cooperation among States,17 and the International
Covenants on Economic Social and Cultural Rights and on Civil and Political
Rights18 adopted by the United Nations General Assembly can properly be
regarded as instruments of codification. There is in fact no clear borderline
between a codification convention19 and what may be regarded as an ordinary
multilateral treaty. While codification tends in the direction of law-making, the
consensual element in the acceptance of its results remains strong; conversely a
multilateral treaty, while predominantly contractual in nature and origin, may
nevertheless prescribe general rules governing in a systematic manner a matter of
concern to all states. Nor, furthermore, does codification necessarily imply the
conclusion of a treaty. A resolution of an international organisation may involve
the codification of a branch of the law; and although formal codification incor-
porating its results as part of positive international law is desirable, a systematic
restatement of the law by an authoritative body may in certain cases constitute a
valuable form of codification.

§ 32 The revision of international law The primary object of codification and
development of international law as envisaged in Article 13 of the Charter is to
give clear expression to those branches of international law with regard to which
there is already either a common measure of agreement or a sufficient amount of
practice to warrant attempts at improvement. From the codification and de-
velopment of international law thus conceived there must be distinguished the
deliberate revision and change of existing law with a view to adapting it to
changed conditions. The distinction, however, is no longer clear-cut: not only is
the process of codification in practice inseparable from a measure of progressive
development of the law, but it may involve — as negotiations within the
framework of the Third United Nations Law of the Sea Conference demon-
strated — conscious attempts to make radical changes to existing law. Neverthe-
less, there is no machinery of international legislation1 for effecting changes of
this nature against the dissent of a minority of interested states.2 The establish-
ment of such machinery would amount, to a substantial degree, to setting up an
international legislature.2 That development is not one which governments are at

17 See § 105.
18 See § 440.
19 On the nature and role of codification treaties generally see Gekk, ZiV, 36 (1976), pp 96-144.
1 On the metaphorical use of that term, see § 11, n 9. See also § 16 as to the 'law-making' powers of
international organisations.
2 On the existing and possible substitutes for international legislation, see H Lauterpacht, The
Function of Law, pp 245-347. See also Sepulveda, Germ YBIL, 33 (1990), pp 432-59. As present
a treaty adopted and concluded by a majority of states will result in rules binding even the
dissenting minority only indirectly, by virtue of those treaty rules acquiring the status of
customary international law — a process which does not necessarily take very long: see § p 30.
3 This is not always realised by those who speak of the necessity of providing effective institutions
of peaceful change as a condition of progress in other fields of international organisation.

4 See, however, on the development of consensus procedures, § 575, n 13.
The subjects of international law
Chapter 2

International persons

SOVEREIGN STATES AS INTERNATIONAL PERSONS


§ 33 The concept of international person

An international person is one who possesses legal personality in international law, meaning one who is a subject of international law so as itself to enjoy rights, duties or powers established in international law, and, generally, the capacity to act on the international plane.

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1 The ICJ has regarded the essential test where a group is claimed to be a legal entity distinct from its members as being whether it is in 'such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect': *Reparation for Injuries CASE, ICJ Rep* (1949), at p 178, and *Western Sahara CASE, ibid* (1975), at p 63. As to the enjoyment by a state of certain rights in the law of other states, see § 47. See generally *Quadri, Hag R*, 113 (1964), iii, pp 373–452; *Kupper, Hag R*, 179 (1983), i, pp 157–70.

2 This idea of a subject of the law may be contrasted with an object of the law: thus in a municipal system of law there will be many legal rules relating to animals, but since they do not themselves have rights and duties they are objects, not subjects, of the law.
either directly, or indirectly through another state (as in the case of a protected state). The concept of international person is thus derived from international law. This law is the body of rules legally binding on states and sovereign independent states are the principal (although not the only) international persons. They are, moreover, the typical international persons in the sense that it is the rights, duties and powers normally possessed by states which are together regarded as constituting international personality of the fullest kind.

However, the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community; an international person need not possess all the international rights, duties and powers normally possessed by states. Some states only possess some of those rights and duties; they are therefore only in those limited respects subjects of international law and thus only possess limited international personality. International organisations also possess only international rights and duties appropriate for their particular situation and they are similarly only to a limited extent subjects of international law and international persons. Nevertheless, such possessors of limited international personality are real international persons. The possession of international rights and duties may, however, be so limited in extent, or the result of such exceptional circumstances, that while the possessor must be regarded as pro tanto enjoying a degree of international personality, it would be unrealistic to regard it as a member of the international community or as an international person in anything other than a strictly limited sense. Such are, for example, confederations of states and insur- 

§ 34 Concept of the state A state proper is in existence when a people is settled in a territory under its own sovereign government. There are therefore four conditions which must obtain for the existence of a state.

1. See § 7.
4. See §§75, 82.
5. See § 7.
6. See § 74.
7. See § 49.
11. As to the Baltic States, see Rutenberg, Die baltischen Staaten und das Völkerrecht (1928); Monfort, Les Nouveaux États de la Baltique (1933); Graham, The Diplomatic Recognition of the Border States, Finland (1935); and §§ 46, 4 and 55, 511ff.

There must, first, be a people. A people is an aggregate of individuals who live together as a community though they may belong to different races or creeds or cultures, or be of different colour.

There must, second, be a territory in which the people is settled, although there is ‘no rule that the land frontiers of a State must be fully delimited and defined;’ they may indeed be disputed. But it matters not whether the country is small or large; it may consist, as in the case of city states, of one town only.

On the question whether Yugoslavia as enlarged after the First World War was a new state, see Kaufmann, I, 31 (1923–24), pp 211–51. US appellate courts have held that US treaties with Serbia continued to apply to Yugoslavia, but as much on the basis of state succession as of continuation. Thus, suzerainty and protection treaties with Montenegro (Ivanić v Artuhonic, ILR, 21 (1954), p 66; Artuhonic v Riston (1986), ILR, 79, pp 383, 395. See also DC v Public Prosecutor (Netherlands Supreme Court) (1972), ILR, 73, p 38 and see Tomich, L'Annuaire de l'Europe (1927).

Several other specific instances involving the creation of new states are considered in the text below on recognition of states and governments, especially §§ 40, 41, 46 and 56; and see §§ 63 and 64. See also § 65, as to the accession to independence of former dependent territories.

Article 1 of the Montevideo Convention on the Rights and Duties of States (1933), sets out the qualifications for international statehood as follows: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other states; LNTS, 165, p 19. The definition given in the text, like that given in the Convention, serves to establish the concept of a state in general terms. See also § 46, as to the criteria adopted by states when according recognition to a new state.

The question whether or not a community constitutes a state often arises in connection with applications for membership of international organisations. These will be determined in accordance with the rules of the organisation.

An entity which is not a state in the true sense may nevertheless be regarded as a state for a particular purpose, or within the meaning of the term ‘state’ as used in a treaty or other document. This is less a matter of acknowledging statehood than of construing the document. This is less a matter of acknowledging statehood than of construing the document. There must, first, be a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other states.

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As to the Indian tribes of North America, see § 22, n 7.

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There must, third, be a government—that is, one or more persons who act for the people and govern according to the law of the land. A state calls for a community organised as a political unit (polis) as distinguished from, say, a tribe. But once a state is established, temporary interruption of the effectiveness of its government, as in a civil war or as a result of belligerent occupation, is not inconsistent with the continued existence of the state.

There must, fourth and last, be a sovereign government. Sovereignty is supreme authority, which on the international plane means not legal authority over all other states but rather legal authority which is not in law dependent on any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country.


In its Advisory Opinion in the Western Sahara case, the ICJ said that 'no rule of international law, in the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today': ICJ Rep (1975), pp 43-4.

See n 2.

In the Sambagzo case the Umpire rejected the proposition that Venezuela, because it had been subject to frequent revolutions, was in some respects a lesser form of state to which the normal rules of international law did not apply: (1953), RIAA, 2, p 110-21. See also §89 ff. The absence of their own sovereign governments will normally prevent territories under trusteeship from being states for purposes of international law generally, although for certain purposes, especially in municipal law, they may sometimes be treated as such (see eg Morgan Guaranty Trust Co v Republic of Palau, AJ, 81 (1987), p 220. See generally §89f.

6 'Toute nation qui se gouverne elle-même, sous quelque forme que ce soit, sans dépendance d'aucun étranger, est un État souverain': Vattel, BK 1, ch 1, § 4. 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State': per Huber, Island of Palmar Arbitration (1928), RIAA, 2, p 829, 838. See also §§ 117, 118. The undertaking of obligations under a treaty does not necessarily involve any abandonment of sovereignty, even though it may place restrictions on the exercise of a state of its sovereign rights: see North Atlantic Coast Fisheries Case (1910), RIAA, 11, pp 167, 188; The Wimbeldon (1923), PCJ, Series A, No 1, at p 25. See also §121, n 10. The PCJ's Advisory Opinion in the Austro-German Customs Union Case (1931), Series A/B, No 41, suggests that treaty obligations will amount to a surrender of sovereignty if they are such as to cause a state to lose its independence or modify it by subordinating its will to that of another state or replacing its will by its text: see also §118, n 2. See also §40, and §120 as to restrictions upon independence. See § 7, n 27, § 19, sect (3), and § 37, n 6, as to the limitation of sovereign powers involved in membership of the European Communities.

Of these four elements needed before a community may be regarded as a state, some may at times exist only to a diminished extent, or may even be temporarily absent, without the community necessarily ceasing to be a state. Thus the existence of a civil war may affect the continued effective existence of a government, or relations with other states may affect the degree to which sovereignty is retained, while the state nevertheless continues to exist. In some extreme cases it may do so in only a very attenuated form.

§ 35 States less than sovereign

A state normally possesses independence, and therefore sovereignty. Yet there are states which are not legally independent. All states which are under the suzerainty or protectorate of another state, or are member states of a federal state, belong to this group. All of them possess supreme authority and independence with regard to part of the functions of a state, whereas with regard to other parts they are under the authority of another state. Hence the doubt whether such partially independent states can be international persons and subjects of international law at all.

That they cannot be full, perfect, and normal subjects of international law there is no doubt. But it is inaccurate to maintain that they have no international position whatever. Once it is appreciated that it is not so much the possession of sovereignty which determines the possession of international personality but rather the possession of rights, duties and powers in international law, it appears that a state which possesses some, but not all, of those rights, duties and powers is nevertheless an international person. In fact such states often enjoy in many respects rights, and fulfill in other points duties, established by international law. They frequently send and receive diplomatic envoys, or at least consuls.
They often conclude commercial or other treaties. Their Heads of State enjoy the privileges which, according to international law, the laws of the different states must grant to the heads of foreign states. These and similar facts establish that these partially independent states are international persons and subjects of international law, although the extent to which they are such is a question of degree depending on the circumstances of particular cases.

§ 36 Divisibility of sovereignty contested The distinction between full sovereign states and partially sovereign states implies that sovereignty is divisible, so that the powers connected with sovereignty need not necessarily be united in one hand. But some writers have maintained that sovereignty is indivisible, a state being either sovereign or not. Although in the century and a half after the term sovereignty was introduced into political science by Bodin in his celebrated work De la République (1577) writers, while differing in their definition, were generally agreed that sovereignty was indivisible, in the 18th and 19th centuries attitudes changed. Particularly influenced by the experience of the member states of the German Empire after the Westphalian Peace, and the establishment of the United States of America, Switzerland and Germany as federal states with sovereign powers divided between the federal state and the constituent member states, the need to distinguish between absolute and partial sovereignty became widely (although not universally) accepted. The controversy is somewhat theoretical. It is a fact that partially independent states exist, and are accepted as such by the international community in general. It accordingly seems preferable to maintain the practical, though abnormal and possibly illogical, view that sovereignty is divisible.  

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Before Bodin, at the end of the Middle Ages, the word souverain was used in France for an authority, political or other, which had no other authority above itself. Thus the highest courts were called Cours Souveraines. Souverain is derived from the late Latin superans: see further van Kleeft, Hag R., 82 (1953), i, pp 8–12.

For a fuller account of the historical development of the concept of sovereignty, see 8th ed of this vol, §§ 67–9.

2 Thus the indivisibility of sovereignty was defended by Rousseau, Le Contrat social (1762), and Calhoun, A Disquisition on Government (1851).

3 On the divisibility of sovereignty with regard to territory see § 170.

§ 37 The problem of sovereignty in the 20th century The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, a matter of internal constitutional power and authority, conceived as the highest, derived power within the state with exclusive competence therein. The 20th century has seen the attempt, particularly through the emergence in some instances of extreme nationalism, to transpose this essentially internal concept of sovereignty on to the international plane.

In its extreme forms such a transposition is inimical to the normal functioning and development of international law and organisation. It is also inappropriate. Sovereignty as supreme legal power and authority is inapplicable to the position of states within the international community: no state has supreme legal power and authority over other states in general, nor are states generally subservient to the legal power and authority of other states. Thus the relationship of states on the international plane is characterised by their equality and independence and, in fact, by their interdependence. Although states are often referred to as 'sovereign' states, that is descriptive of their internal constitutional position rather than of their legal status on the international plane.

Despite the deficiencies in international law which at present make it an imperfect legal order – deficiencies which are in some respects gradually being overcome – the very notion of international law as a body of rules of conduct binding upon states irrespective of their internal law, implies the idea of their subjection to international law.

A number of states in their constitutions have made express provision for limitations on their national sovereign powers in the interests of international cooperation. These provisions are to the effect that certain sovereign rights and powers of the state may be limited in connection with international organisation.
tions, or may be conferred upon or transferred to international organisations. This has particularly become necessary in some states whose constitution provides for certain rights and powers, for example the power to legislate, to be exercised only by organs of the state: by becoming a member of an international organisation which can in some degree be said to be exercising such powers, the state, in the absence of a provision envisaging a transfer of those powers, could be said to be exercising unconstitutionally and the resulting exercise of the powers by the organisation could be said to be ineffective within the state. Although constitutional provisions of this kind assume particular importance in connection with membership of an organisation such as the European Economic Community,9 those provisions have in some cases been made independently of such membership. Whether the transfer of such rights and powers is so extensive as to affect the continued existence of the state depends on the circumstances of the individual case, and perhaps in particular on the scope of the rights and powers transferred and on the revocability of the transfer. The most extensive transfer of this kind currently existing is that in membership of the European Communities, but the continued international statehood of its member states is not in question.

RECOGNITION OF STATES AND GOVERNMENTS


§ 38 Recognition in general

In a broad sense recognition involves the acceptance by a state of any fact or situation occurring in its relations with other states. In the context of recognition of states and governments,1 however, recognition is of particular significance. It is of great importance both as a device of international law and as a political act of the state granting recognition. Because of its important legal and political consequences, recognition in this particular sense must be distinguished from a looser use of the term conveying mere acknowledgement or cognizance of an existing situation.2 Recognition is accorded to a particular body in a particular capacity. Thus usually a community is recognised as a sovereign state, or an administration is recognised as the government of such a state. But circumstances may call for recognition only in some special capacity: for example, a regime may be recognised only as the government of that part of the territory of the state which it controls,3 or a community may be recognised as something else than a sovereign state.4

1 As to recognition of belligerents and insurgents, see § 49; as to recognition of territorial changes, see § 54, n 10 and § 55. As to the operation of recognition as an estoppel, see Schwarzenberger, International Law (1957), p 127.

2 Similarly to be distinguished is 'recognition' by an authority, such as a court, which does not represent the political intentions of the state: see Whiteman, Digest, 2, pp 600–1; and see § 46, n 2. See also § 55, as to implied recognition.

3 See §§ 46, 46. See also Carl Zwei Stiftung v Rayner and Keeler [1967] AC 853, holding the Administration of the German Democratic Republic not to be the government of a state but only a subordinate agency of the Soviet Union; and see comment by Greig, LQR, 83 (1967), pp 96–145, and McNair, TLR, 93 (1967), pp 270–99. Similarly, in GUR Corps v Transvaal Bank of Africa Ltd [1986] 3 All ER 449, the 'Republic of Ciskei' was held to be a subordinate body set up to act on behalf of the Republic of South Africa (on which see Warbrick, MLR, 50 (1987), pp 84–9). Cf Federal Republic of Germany v Elecon (1973) II R, 61, p 143, holding an agency of the German Democratic Republic not to be an agency of the Soviet Union. As to the recognition by the UK and USA of the Free French National Committee during the Second World War, see Whiteman, Digest, 2, pp 129–30, 360; see also Re Naturalisation of Bouche (1959) LIR, 28, pp 277, 282–4.

4 Thus, in 1950, the UK recognised Vietnam as 'an Associated State within the French Union'; see
The grant of recognition is an act on the international plane, affecting the mutual rights and obligations of states, and their status or legal capacity in general. Recognition also has consequences at the national level, as where the application of rules of municipal law is affected by a decision to recognise a new state or government. Furthermore, the rules of international law relating to recognition are rules of customary international law, and their application in particular circumstances may be modified by treaty obligations.\(^5\)

§ 39 Recognition and membership of the international community. The international community is composed primarily of states. Any changes in the composition of the international community are of immediate concern to existing states, whether those changes involve members of that community (usually states) or the authorities (usually governments) through which they act.\(^1\) The matter is of legal importance because it is when an entity becomes a member of the international community that it thereupon becomes bound by the obligations, and a beneficiary of the rights, prescribed by international law for states and their governments.

There is, however, no settled view whether recognition is the only means through which a new state becomes part of the international community.\(^2\) On the one view if a new state comes into existence as a matter of fact, it thereupon enters into the international community and becomes of right an international person regardless of whether it has been recognised.\(^3\)

\(^5\) See also § 40 nn 28 and 30, and to special characteristics of the recognition accorded by the UK (and others) to the Federal Republic of Germany and the German Democratic Republic.

\(^1\) The onus of showing that a new state is to be recognised as a member of the international community is on the state seeking recognition.\(^4\) The onus of demonstrating that the new state has the elements of the international personality may also be relevant to the non-recognition of the new state. See Kelsen, R, § 42 (1923), iv, pp 108-11; Chen, The International Law of Recognition (1951), p 4; Kidd, MLR, 33 (1970), pp 99-102; Restatement (Third), § 1; and others noted in Whiteman, Digest, p 21. See also Deutsche Kontinentalkongress zu Polnischer Staat, decided by the Germano-Polish Mixed Arbitral Tribunal, AD, 5 (1929-30), No 5, for a pronouncement in favour of the declaratory view. See also Herz, R, 3rd series, 17 (1936), pp 564-90.

\(^2\) The Montevideo Convention on Rights and Duties of States 1933, provided that 'the political existence of the State is independent of recognition by the other States' (Art 3); and that 'the recognition of a State means signifies that the State which recognises it accepts the personality of the other with all the rights and duties determined by International Law and that the recognition of a State merely signifies that the State which recognises it accepts the personality of the other with all the rights and duties determined by International Law'. The Charter of the OAS 1948, as amended in 1967, Art 2, p 12, provides in Art 3 of the Montevideo Convention, and in Art 13 provides that 'Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States'.

\(^3\) For example, H Lauterpacht, Recognition in International Law (1947), Ch 5; Quincy Wright, AJ 49 (1955), pp 320ff; Mill, p 325; 8th ed of this vol, p 121; and others noted in Whiteman, Digest, p 21. For a trenchant criticism of the concept of recognition as a legal duty, see Kunz, AJ 44 (1950), pp 713-19. See also Brown, ibid, pp 617-40 and Briggs, ibid, 43 (1949), pp 113-21.

\(^4\) For example, H Lauterpacht, op cit, p 61, asserts that practice supports the constructive theory, whilst Kunz, AJ 44 (1950), p 713, among others, asserts the contrary.

\(^5\) This is distinct from, although it may include diplomatic relations, and signifies only that the relationship between the two states takes place on the basis of international law. As to the 'all states' form of recognition arising out of problems of recognition arising in connection in multilateral treaties, see § 595, n 11. Current practice is to refer to states being members of the UN or a specialised agency, so making the attainment of membership of at least one such organisation the criterion for effective membership in the international community in general.
Recognition of states and governments

The existence of a state, as the legal organisation of a community, is determined by the state's internal constitutional order. The grant of recognition establishes that the new state, in the opinion of existing states, fulfils the conditions of statehood required by international law, so that the new state can be regarded, a quo dat, the recognising states, as an international personality. Recognition is in no sense a member of the international community in general; it is a unilateral act affecting the relations of the recognised community with the recognition-giving states, and is a matter of legal duty when the appropriate factual circumstances exist. Since the recognition of a new state by only one state will make it an international person to the limited extent of its relations with that state, but such limited personality cannot realistically be regarded as membership of the international community in general. That is the result of recognition by a significant number of existing states, for example by a sufficient majority to secure admission to the major multilateral organisations. Such a degree of recognition is usually present when, but is unlikely to be present unless, the new state is in effective existence in fact.

The overwhelming practice of states does not accept that the mere claim of a new state to be an independent state automatically gives it a right to be so regarded, or that an existing state is justified in recognising or refusing to recognise a new community as a state in disregard of whether it fulfills the factual requirements of statehood. While the grant of recognition is within the discretion of states, it is not a matter of arbitrary will or political concession, but is given or refused in accordance with legal principle. That principle, which applies alike to recognition of states, governments, belligerents, or insurgents, is that, when certain conditions of fact (not in themselves contrary to international law) are shown to exist, recognition is permissible and is consistent with international law in that it cannot (as may recognition accorded before those facts are clearly established) be considered to constitute intervention; and that, while recognition is accordingly declaratory of those facts, it is also constitutive of the rights and duties of the recognised community in its relations with the recognising state.

§ 40 Recognition of states The existence of a state, as the legal organisation of a community, is determined by the state's internal constitutional order. The grant of recognition establishes that the new state, in the opinion of existing recognising states, fulfils the conditions of statehood required by international law, so that the new state can be regarded, a quo dat, the recognising states, as an international person possessing the rights and duties which international law attributes to states. Thus the absence of an effective government has been regarded as a bar to recognition as a state, as has lack of real independence. However, a state may be considered to constitute a state, if it is a matter of legal duty when the appropriate factual circumstances exist. Since the recognition of a new state by only one state will make it an international person to the limited extent of its relations with that state, but such limited personality cannot realistically be regarded as membership of the international community in general. That is the result of recognition by a significant number of existing states, for example by a sufficient majority to secure admission to the major multilateral organisations. Such a degree of recognition is usually present when, but is unlikely to be present unless, the new state is in effective existence in fact.

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Thus Biafra was recognised by five states during its attempted secession from Nigeria, but was in no sense a member of the international community in general; see § 41, n. 7. The same can be said of the 'Turkish Federated State of Cyprus', despite its recognition as an independent state by Turkey; see n 3 and § 53, n 15.

There is an instance of a state, after its independence had become firmly established, claiming compensation on account of losses suffered as the result of being refused belligerent rights during the struggle for independence. See the claims of the USA against Denmark in connection with the Bergen Prize; Moore, p. 169; International Arbitrations, v, p 4572. See also the case of the Macedonians, a claim by the USA against Chile: Lapradelle-Politis, ii, pp 215–17.

The UK, in its observations on the Panamanian draft Declaration on Rights and Duties of States which was under consideration by the ILC, expressed the view that recognition was a matter of legal duty when the appropriate factual circumstances existed: Whitman,Digest, 2 pp 16–17; UN Doc A/44/491, 15 December 1984, pp 186–7.

See § 54.

See §§ 41 and 128.

See supra.

The UK Government's change of policy on the recognition of governments in 1980 (see §44, n 3) did not involve a change in respect of recognition: they are still 'recognised[d]'... in accordance with common international doctrine' (Parliamentary Debates (Commons), vol 984, col 279, 25 April 1980), and the Foreign and Commonwealth Office continues to provide certificates on such matters for use in judicial proceedings. The government's view is that to the requirements to be satisfied before recognition of a state is appropriate has been set out in the following terms: 'The criteria which normally apply for the recognition of a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory and independence in their external relations. There are, however, exceptional cases where other factors, including relevant United Nations resolutions, may have to be taken into account'. The view of the US Government was stated in 1976 to be that: 'International law does not require a state to recognize another entity as a state; it is a matter of judgment for each state whether an entity merits recognition as a state. In reaching this judgment, the United States has traditionally looked to the establishment of certain facts. These facts include effective control over a clearly-defined territory and population; an organized governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfill international obligations. The United States has also taken into account whether the entity in question has attracted the recognition of the international community of states.' (US Digest (1976), pp 19–20).

As in the case of the refusal by the US to recognise Cuba in 1875: Moore, p. 108. But in 1919 Albania was recognised as a State even in the absence of a government: RG, 28 (1921), p 236; and in 1962 the US recognised Algeria nearly three months before recognising the government of Algeria: Whitman, Digest, 2, p 445. See also the remarks of the Committee of Jurists on the Aaland Islands question, § 45, n 2, final para. A new state may properly be recognised as a state even though its effective government is only a provisional government, as was the case when Israel was established in 1948.

Note also the declaration by the Palestine National Council (the 'parliamentary' assembly of the Palestine Liberation Organisation), meeting in Algiers in November 1988 of a State of 'Palestine': ILM, 27 (1988), p 1660ff. See also Florio, RG, 93 (1989), pp 385–415; Salman, AFID, 34 (1988), pp 37–62. Many states recognised this new state; but many others have not done so, including the UK (Parliamentary Debates (Commons), vol 146, col 436 (written answers, 3 February 1989)); in relation to two General Assembly resolutions adopted soon after the Algiers declaration, the UK representative made an explanation of vote so as to avoid the use of the term 'Palestinian' in the resolutions being taken to imply recognition of a State of Palestine (UKMIL, BY, 59 (1988), p 439). Since no government (even in exile) of the alleged new state was formed (although it is asserted by the PLO that the Executive Committee of the Palestine Liberation Organisation, meeting in Algiers in November 1988, since no government (even in exile) of the alleged new state was formed, since its territorial extent was problematical, and since it was in no position to exercise governmental authority over the general area which might potentially form part of the new state, continuing difficulties over its recognition are likely (quite apart from political problems associated with the matter). Attempts to secure the admission of 'Palestine' to UN specialised agencies have not succeeded (eg in May 1990 in relation to the WHO). See Kirgis, AJ, 84 (1990), pp 218–30. The Palestine Liberation Organisation continued its observer status in the UN, but under the name of 'Palestine' (GA Res 43/177); this decision was taken on a basis not precluding the position of those states not willing to recognise a state of that name.

Once recognised as a state, its government may go near to disappearing (written answers, 25 April 1980), and that, in no position to exercise governmental authority over the general area which might potentially form part of the new state, continuing difficulties over its recognition are likely (quite apart from political problems associated with the matter). Attempts to secure the admission of 'Palestine' to UN specialised agencies have not succeeded (eg in May 1990 in relation to the WHO). See Kirgis, AJ, 84 (1990), pp 218–30. The Palestine Liberation Organisation continued its observer status in the UN, but under the name of 'Palestine' (GA Res 43/177); this decision was taken on a basis not precluding the position of those states not willing to recognise a state of that name.

Once recognised as a state, its government may go near to disappearing; accordingly, the UK recognises no government in Kampuchea (Cambodia), but still acknowledges its continuation as a state.
not fully meet all the conditions of statehood, or its status may otherwise be in some way anomalous, but still merit general recognition. Thus its sovereignty may remain subject to certain restrictions. There is often no sharp line to be drawn between statehood and its absence. This is particularly evident of a community in the process of attaining independence, where it may first have some international status as an ‘advanced’ dependent territory, a party to a civil war, or in some other way. The circumstances of each situation have to be assessed by the recognising state which in thus acting is performing, in the full exercise of its discretion, a quasi-judicial function.

Although not always consistent, the bulk of state practice probably supports the view that governments do not deem themselves free to grant or refuse recognition to new states in an arbitrary manner, by exclusive reference to their own political interests, and regardless of legal principle. Undoubtedly, quite apart from the element of discretion left to states in assessing the facts concerning the existence of a new state and in determining the timing of an act of recognition, it is unavoidable that political considerations from time to time influence the grant or refusal of recognition; some states, indeed, go further and assert that recognition is essentially a matter within their political discretion. It may be, however, that it is largely a matter of degree, since there probably are no states which do not allow some role to considerations of policy, while those states which treat recognition as a matter of policy do not usually in practice disregard the imperatives to which a new state’s effective existence gives rise. These variations do not affect the essential legal nature of the process of recognition. Recognition, while declaratory of an existing fact, is constitutive in its nature, at least so far as concerns relations with the recognising state. It marks the beginning of the effective enjoyment of the international rights and duties of the recognised community.

Because the decision to recognise a new state is one for each existing state to make for itself, it can happen that a new entity will be recognised as a state by some existing states but not by others. Although such differences are usually temporary, they are sometimes prolonged, particularly where in addition to difficulties of law and fact the situation is one of fundamental political confrontation. Thus, although Israel was established in 1948, some Arab states have withheld recognition of Israel as a state.

Korea

Divided views on recognition in relation to Korea also remained for


In particular, the recognising state must exercise care not to wrong the parent state by a precipitate act of recognition. See above, § 89ff.

Apart from such cases involving, at best, apparent, but not real, independence, recognition will also be withheld where a state claiming independence has not effectively established its independence from the state to whose control it has been subject. Thus, neither Biara (see § 39, n 7) nor the Turkish Federated State of Cyprus (see § 46, n 2, and § 55, n 15) existed as effectively independent states. Similarly, the declaration of independence by Lithuania on 11 March 1990, and similar declarations by Latvia and Estonia later that year, were not accompanied by the establishment in fact of effective independence, and did not result in immediate recognition of their independent statehood by other states. The position regarding those Baltic States is complicated by the absence of full recognition of their absorption into the Soviet Union in 1940:

see § 55, nn 43 and 44.

§ 55, n 21, as to the Transkei, and as to Bophuthatswana, see eg Parliamentary Debates (Commons), vol 74, col 305 (written answers, 1 March 1985), and ibid, vol 75, col 532 (written answers, 20 March 1985). The receipt of external economic, military or other assistance does not necessarily negate the existence of the requirements for statehood (ibid), although a government which maintains control only because of the active assistance of foreign troops in its country may be considered not to be in effective control (see § 45, n 6). As to the position of protected states, see § 82; and as to Trust Territories, see § 89ff.

Apart from such cases involving, at best, apparent, but not real, independence, recognition will also be withheld where a state claiming independence has not effectively established its independence from the state to whose control it has been subject. Such differences are usually temporary, they are sometimes prolonged, particularly where in addition to difficulties of law and fact the situation is one of fundamental political confrontation. Thus, although Israel was established in 1948, some Arab states have withheld recognition of Israel as a state.
many years. At the end of the Second World War the independence and unity of Korea were the declared aims of the United Nations. In 1948 the Republic of Korea was established in the south of the country and the Democratic People's Republic of Korea in the north. An independent and united Korea became the avowed aim of the United Nations, but has not yet been achieved. The Republic of Korea was recognised by most states and became a member of many international organisations. The Democratic People's Republic of Korea was recognised by most Communist states and by some others; it became a member of some specialised agencies. Both Korean states became separate members of the United Nations in 1991.

After more than 20 years differing views on recognition in relation to two other so-called 'divided States' have now been largely resolved. In each case


14 As to the views of the UK, see the certificate given to the court by the Foreign Office in Re Harshaw Chemical Company's Patent [1965] RPC 97 (and ILR, 41, p 15), and in Re Al Fan Corporation's Patent [1970] Ch 160 (with comment on the latter by Brownlie, BY, 44 (1970), pp 213–15). The British Government continued, until 1991, not to recognise northern Korea as a separate state; see eg n 15 below. As to the practice of the US in connection with the recognition of the Republic of Korea, see Whitman, Digest, 2, pp 172–82; and Myers, AJ, 59 (1961), pp 76–9. As to the presence of international organisations in the Korean peninsula, see The New Nations and Diplomacy (1956); Hackey, Die Rechtslage der sowjetischen Besatzungszone (1963). See also § 50, n 7, as to dealings between the US and North Korean authorities in connection with the 'Pueblo' incident. See also the decision of a Japanese court in Go Man v Municipality of Tokyo, ILR, 32, (1957), p 185.

15 Korean territory. At the end of the Second World War American forces occupied the southern part of Korea and Soviet forces the northern part. In the Peace Treaty with Japan, 1951, Japan renounced sovereignty over Korea, but without it being stipulated in whom sovereignty was to vest: Art 2(a).

16 Although the UN Committee for the Unification and Rehabilitation of Korea (UNCURK), with which the Organisation International de la Paix was associated, GA Res 376 (V) (1950), was dissolved by decision of the General Assembly on 28 November 1973 (UNYB (1973), p 158), the UN retained an institutional presence in Korea originating in decisions taken in pursuit of the aim of a unified Korea; thus the Unified Command, established under SC Res 84 (1950), continued to exist, with the Military Armistice Commission in which the United Command participated, set up under the armistice agreement of 27 July 1953. The British Government has stated that UN involvement in the Korean question, and the exceptional circumstances in the Korean peninsula, made it in- appropriate to recognise the Democratic People's Republic of Korea: see eg Parliamentary Debates (Commons), vol 22, col 31 (written answers, 15 November 1982), and ibid, vol 67, col 388 (written answers, 16 November 1984). Its membership of the UN in 1991 carried with it widespread recognition as a state, including by the UK.

17 In GA Res 112 (II) (1947) the General Assembly had recommended the holding of elections in Korea. In GA Res 195 (III) (1948) the General Assembly gave its approval to the Government of the Republic of Korea, as the lawful government having effective control and jurisdiction in the southern part of the country, and the only government based on free elections. The Korean conflict of 1950–53 did not substantially alter the position of North and South Korea: the armistice agreement which terminated the hostilities was concluded between military commanders and did not involve recognition of their respective authorities as governments or states. See also GA Res 296 (IV) D (1949). Both the Democratic People's Republic of Korea and the Republic of Korea maintained Permanent Observer Offices at the UN in New York. Thus Iceland, Denmark, Finland and Sweden announced their recognition of North Korea in April and May, 1973, which is also a member of several UN specialised agencies.


Among many judicial decisions see Occupation of Germany Case (Zurich), AD, 13 (1946), No 86; Achever v Wohlmuth, ILR, 19 (1952); German Civil Service Case, ILR, 22 (1955), p 943; decisions of the German Federal Supreme Court of 24 May 1955 (AJ, 52 (1958), pp 541 and 18 December 1959 (AJ, 55 (1961), pp 574–5) and 24 December 1960 (AJ, 56 (1961), p 407; Nagel v Germany, C-80/81 (1983) ECR 273; Wilsch v Germany, C-179/81 (1983) ECR 273; and Marini v Germany C-67/84 (1985) ECR 1525, n 8, and C-86/85 (West Germany) v Comite des Auto- routes, C-178/85, ECR 1079, n 3, the latter case on the domestic law of West Germany: see ibid, n 119; and Wilsch v Germany, C-179/81 (1983) ECR 273, n 9, the latter case on the domestic law of East Germany: see ibid, n 121.

20 See also § 59, n 8, and § 63, nn 4 (as to treaties), and 10 (as to German debts).

21 Cmnd 1522, p 38.

22 See the UK–USA–USSR Protocol of 12 September 1944, as amended on 14 November 1944, and as further amended by the three powers and France on 26 July 1945; Cmnd 1552, p 27, n 45; UNTS, 227, p 279. It was later agreed at the Potsdam Conference that the northern part of East Prussia should be placed under Soviet administration and that the rest of Germany lying east of the Oder–Neisse line should be placed under Polish administration (both areas having formed
As the result of the Declaration, as well as of the various measures taken to implement it, the exercise of the internal and external prerogatives and rights of the German State was vested, with full effect in international law, either jointly with the Four Powers or with any one of them in respect of the part of German territory under its administration. The Four Powers expressly disclaimed any intention to annex Germany; it therefore continued to exist, within its frontiers of 31 December 1937 (that is, less the territories acquired by the Reich in the period immediately preceding the outbreak of war).

In 1949 the British, American and French authorities agreed to the establishment of the Federal Republic of Germany on the territory of the three Western zones of occupation, and the Soviet Union similarly permitted the creation on its zone of occupation of the German Democratic Republic. Since Germany still existed as a state in international law, and in order to preserve the possibility of both the eventual reunification of Germany and a peace treaty with Germany as a whole, the recognition accorded the two German states had special characteristics. France, the United Kingdom and the United States in 1955 recognised the Federal Republic as having the 'full authority of a sovereign State over its internal and external affairs', rather than as a sovereign state; and that the authority of the Federal Republic of Germany was subject to the reserved rights and responsibilities of the three Western powers relating to Germany as a whole and to Berlin.

In February 1973 the same language was used by the British Government in informing Parliament of recognition of the German Democratic Republic. While the Federal Republic of Germany was, after 1949, quickly recognised by most states, the German Democratic Republic was at first only recognised by the Soviet Union and other Communist states; some other states recognised it later, but general recognition of the German Democratic Republic only came after the signature in 1972 of a General Relations Treaty between the Federal Republic of Germany and the German Democratic Republic. Both became members of the United Nations in 1973.
Developments in Eastern Europe in 1989 and 1990 opened up the possibility of German unification, with the Federal Republic of Germany, the German Democratic Republic and Berlin uniting in a single German state. A series of steps were taken by the two German states which led to their unification at midnight on 2-3 October 1990. Formally, the German Democratic Republic acceded to the Federal Republic of Germany, which remains the full name of the unified State (although it will be generally known as 'Germany') and the Basic Law of which (as amended by the unification arrangements) remains its constitution.

The rights and responsibilities relating to Berlin and to Germany as a whole, which had been held by the Four Powers since 1945, were terminated by Article 7 of the Treaty on the Final Settlement with respect to Germany, signed on 12 September 1990, and pending its entry into force on 15 March 1991, were not wholly or solely a matter of public international law. The FRG treated agreements concluded between it and the GDR as distinguishable from treaties in the strict sense, and as rather being Innerstaatliche agreements between the two parts of the single German nation. The FRG–GDR Protocol of 14 March 1974 on the Exchange of Permanent Missions avoided the usual terminology applied to diplomatic missions exchanged between foreign states: ILR, 13 (1974), p 878. The judgment of the Federal Constitutional Court in Re Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic 1972 (1973), ILR, 78, p 156, concerning the constitutional validity of the 1972 General Relations Treaty, contains important pronouncements on the legal status of the GDR and FRG, and the continued existence in law of Germany within its frontiers of 31 December 1937 (ILR, 78, p 150; see also the same court's judgment of 21 October 1987 in the Teso case, with comment by Hofman, ZÖV, 49 (1989), pp 257–96; and East German Inheritance Case (1966), ILR, 57, p 95. In Re Honacker (1984), ILR, 80, p 365, the Federal Supreme Court did not have to treat the GDR as a state.

As to the legal nature of trade agreements concluded between the FRG and the GDR in the earlier stages of their separate existence, see joetze, Yb of World Affairs, 16 pp 1186. In addition to the arrangements made with respect to the termination of Four Powers' rights and responsibilities, other arrangements needed to be made to the new situation earlier arrangements.

Principal among these were the treaty providing for monetary, economic and social union between the two German states which was signed on 18 May 1990 and entered into force on 30 June 1990 (ILM, 29 (1990), p 1108), and a treaty providing for their unification which was signed on 31 August 1990 and entered into force on 29 September 1990. As to the changes in Eastern Europe, see RG, 94 (1990), pp 498–503, 788–91. See articles by Frowein, Oster, Giegerich, Stein and Wilms, and selected documents, in ZÖV, 51 (1991), pp 333–528.

In 1984 the British government certified to a court in Berlin, and the US Constitution applied to proceedings before it. For the circumstances giving rise to this case, see RG, 83 (1979), p 808–81. For a trial by a French military court in Berlin in 1969, also arising out of the hijacking of an aircraft see Ruiz, AFDI, 15 (1969), pp 784–92. In 1984 the British Government certified to a court that Germany was a state and that the Allied Commandant of Berlin, including the Commandant of the British Sector, was part of the government of Germany, and on that basis an attempt to bring proceedings against the Commandant failed under the State Immunity Act 1978: Trawnik v Lenin (1983) 2 All ER 368 (with comment by Crawford, BY, 56 (1988), pp 311–15; see also Heidelmeyer, ZEv, 46 (1988), pp 519–36; Mann, Foreign Forces in European Courts (1990), p 507; and the terms of the certificate are given in UKML, BY, 55 (1984), p 525. For proceedings before the European Commission of Human Rights (the Varmcombe Case) see Neule, ZEv, 49 (1989), pp 499–519, and F A Mann, ICLQ, 39 (1990), pp 698–707.

See also the Tripartite Agreement of 11 November 1944 on Control Machinery in Germany, as amended by the Three Powers and France on 1 May 1945; Cmnd 1552, pp 31 and 35. See the Declaration of the Western Commandants, 21 December 1948: Cmnd 1552, p 114.
comparable manner, so far as the special situation of Berlin allowed.39 the (West) Berlin authorities were given extensive legislative powers, subject to certain rights reserved to the Western powers on matters affecting their responsibilities for Berlin, and arrangements were also made for laws made in the Federal Republic of Germany,40 and treaties concluded by it, to be applicable in the Western Sectors of Berlin, subject to similar reservations to preserve the special status of Berlin and the position of the Western powers. These arrangements did not terminate the occupation of Berlin, or the ultimate authority of the Four Allied Powers over Berlin deriving from the supreme authority assumed by them on the surrender of Germany in 1945. While the Western Sectors of Berlin developed in this way, the Eastern (Soviet) Sector, after being in practice administer—

39 See the Statement of Principles for Berlin, 14 May 1949 (Cmd 1552, p 117); Convention on Relations between the Three Powers and the Federal Republic of Germany, 1952–54, Art 2 (TS No 10 (1959)); Declaration on Berlin, appended to the Memorandum of 26 May 1952, which became effective on 5 May 1955 (Cmd 1552, p 159); Letter of 26 May 1952 from the Western High Commissioners to the Federal Chancellor, as amended on 23 October 1954 (Dept of State, Documents on Germany 1944–45, p 437).

40 Although Greater Berlin is stated to be a Land of the Federal Republic of Germany (Basic Law, Art 23) its status as such was effectively suspended by the continuing existence of the rights and responsibilities of the Western powers reserved in the Convention on Relations (see previous note) with which the Basic Law is consistent (Art 142a). Federal legislation did not extend to Berlin unless expressly adopted by the Berlin legislature, which could only do so to the extent permitted by the Allied Kommandatura. In its decision of 21 May 1957 the Federal Constitutional Court held itself incompetent to decide on the compatibility of a Berlin law with the Basic Law (AJ, 52 (1958), p 398); although it was competent to consider acts of an agency of the Federal Republic, located in Berlin (jurisdiction of Federal Constitutional Court over Berlin Case (1966), ILR, 57, p 113). The Arbitral Commission on Property, Rights and Interests in Germany has held that Berlin was not part of the territory of the Federal Republic of Germany: New York Hapag-Lloyd Corporation v Federal Republic of Germany (1965), ILR, 34, p 270. See also Haebel v FFIP (1975), ILR, 74, p 113. The Quadripartite Agreement of 3 September 1971 (see n 42) provides that 'the tie between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that these Sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it'.

41 See ILM, 10 (1971), p 899; TS No 111 (1972). See Schiedemair, AfDfI, 19 (1973), pp 171–87. occupation,43 and that no part of Berlin formed part of the FRG44 or GDR.45 In the Soviet view, the Eastern (Soviet) Sector was part of the GDR while the three Western Sectors remained subject to Four Power control and were regarded as a 'separate political entity'. The Soviet Union continued to protest about certain aspects of the ties between Berlin and the Federal Republic, and about Berlin's position in the European Communities.46 The Quadripartite Agreement was expressly stated to be without prejudice to the respective legal positions of the Four Powers.

The arrangements made in 1990 for the unification of the two German states also put an end to the special status of Berlin, which became a part of the unified state of Germany.47
The DRV continued to fight against France to establish control over Vietnam. The Geneva Conference of 1954, at which both the State of Vietnam and the DRV were represented, affirmed the unity of Vietnam and made arrangements for the restoration of peace. These arrangements did not, however, lead to a lasting peace, and further extensive fighting developed, involving the two competing Vietnam authorities, large numbers of American forces in support of the Republic of Vietnam (which the State of Vietnam had become in 1955), and the National Front for the Liberation of South Vietnam which was set up in 1960 and fought in the southern part of the country as an insurrectionist force against the Republic of Vietnam, later setting up the 'Provisional Revolutionary Government of the Republic of South Vietnam'. Negotiations between the United States of America and the three Vietnamese parties eventually led to a cease-fire agreement signed in Paris in January 1973. This was acknowledged, approved and supported by the Act of the International Conference on Vietnam, signed in Paris in March 1973, which also recognised 'the independence, sovereignty, unity, and territorial integrity of Vietnam and the right of the South Vietnamese people to self-determination'. This settlement did not last. Further fighting broke out, and in April 1975 the government of the Republic of Vietnam surrendered to forces supported by North Vietnam. In July the former two parts of Vietnam became a single state, the Socialist Republic of Vietnam. This state has been recognised by a number of other states, including the United Kingdom, and became a member of the United Nations in 1977.

§ 41 Precipitate recognition Recognition is of special importance in those cases where a new state tries to establish itself by breaking off from an existing state in the course of a revolution. Foreign states must then decide whether the new state has really already safely and permanently established itself, or only makes efforts to this end without having already succeeded. That in every case of civil war a foreign state can recognise the insurgents' as a belligerent authority if they succeed in keeping a part of the country in their hands, set up a government of their own, and conduct their military operations according to the laws of war, there is no doubt. But there is a fundamental difference between recognition as a belligerent authority and the recognition of the insurgents and their part of the country as a new state. The question is precisely when recognition as a new state may be given as distinguished from recognition as a belligerent authority. For an untimely and precipitate recognition as a new state is more than a violation of the dignity of the parent state. It is an unlawful act, and it is frequently maintained that such untimely recognition amounts to intervention. Similarly, where the authorities organisation a secessionist movement establish a provisional government for the prospective new state, perhaps in exile in a friendly state,
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The recognition of such a government carries with it implications as to the attainment of independence by the prospective new state and may accordingly be an unlawful act as regards the parent state.

The recognition of Israel by the United States on 14 May 1948 has been regarded as precipitate. It was granted on the same day that the Israeli Act of Independence became effective, notwithstanding that the existence of the State of Israel was not yet firmly established. So too, the recognition of Bangladesh by India in early December 1971, being granted at a time when practically all of East Pakistan was still under the control of Pakistani authorities, and the Bangladesh foothold on East Pakistan territory (secured with extensive Indian armed support) was meeting heavy resistance from Pakistan forces. After the rebellion proved successful a few weeks later, Bangladesh then quite properly received general recognition.

There is no hard and fast rule as regards the time when it can be said that a state created by revolution has established itself safely and permanently: it is a question of fact in each case. Indication of such safe and permanent establishment may be found, for example, in the revolutionary state having defeated the parent state, or in the parent state having ceased to make efforts to subdue the revolutionary state, or even in the parent state, in spite of its efforts, being apparently incapable of bringing the revolutionary state back under its sway. In such circumstances other states are free to recognise the new state if the necessary conditions are satisfied, even before the parent state does so. Where a dependent

5 The USA granted full recognition to the State of Israel and de facto recognition to its provisional government; de jure recognition was extended on 31 January 1949. See Brown, AJ, 42 (1948), pp 620–27; Alexander, ILQ, 4 (1951), pp 423–30; Myers, AJ, 55 (1961), pp 709–11; Whitman, DI, 29 (1962), pp 167–9. It may be noted that as the USA had at that time a large military presence over Palestine, there was no immediately apparent 'parent state' in respect of Israel. On 10 June 1948 a suggestion for recognition of Israel by the UK was rejected as being 'a positive act of political intervention favourable one side'; Parliamentary Debates (Commons), vol 451, cols 2664–6. As to the mandate for Palestine and the circumstances of its termination in 1948, see Ribbens, AJ, 42 (1948), pp 217–19; and as to the participation of the Provisional Government of Israel in deliberations of the Security Council in July 1948, with consequential implications for recognition, see Rosemb, Israel Year Book on Human Rights, 13 (1983), pp 295–300.


7 When, in 1903, Panama seceded from Colombia, the USA immediately recognised the new republic as an independent state and prevented Colombia from asserting its authority over the rebellious province. Whatever may have been the ultimate justification of that step, there is no doubt that it amounted to intervention. For the motives of this action see Moore, 34, pp 44–56 and following, and Scott, AJ, 15 (1921), pp 430–39. The controversy between the USA with Colombia was finally settled by a treaty negotiated in 1914 and ratified in 1922. The Treaty provided, inter alia, for a payment of $50,000,000 to be made to Colombia. For an account of the history of the controversy, see Jones, The Caribbean since 1900 (1936), pp 314–38.

The recognition of Baiau by five states during its attempted secession from Nigeria took place at a time when the eventual success of the secession was far from established (and it did in fact fail); see Fidler, Proceedings of the Nigerian Society of International Law (1969), and AJ, 65 (1971), pp 351–9.

8 Thus after Bangladesh had asserted its independence from Pakistan in 1971, many states recognised Bangladesh before Pakistan did so in 1974; similarly with Guinea-Bissau, which proclaimed its independence from Portugal in September 1973 but was not recognised as such by Portugal until September 1974; see GA Res, 3061 (XXVIII) (1973), and ILR, 13 (1974), p 1244; and §53, n 18. See also Deutscher Internationale Gesellschaft v Poland, AD, §529–30, No 5.

9 As to the declaration of independence by the French territory of the Comoros in July 1975 and its admission to the UN later that year (without French participation in the vote either in the Security Council or the General Assembly), followed by a later French law purporting to regulate certain consequences of independence within part of the Comoros Islands, see Its Law Relating to the Consequences of the Self-Determination of the Comoros Islands (1975), ILR, 74, p 91.


11 See generally §49.

12 The breaking-off of the American states from their European parent states furnishes many illustrative examples. Thus the recognition of the USA by France in 1778 was premature. But when in 1782 Great Britain itself recognised the independence of the USA, other states could accord recognition too without giving offence to Great Britain. Again, when the South American colonies of Spain declared their independence in 1810, no power recognised the new states for many years. Where, however, it became apparent that Spain, although still keeping up her claims, was not able to restore its sway, the USA recognised the new states in 1822, and Great Britain followed the example in 1824 and 1825. See Gibbes, Recognition: A Chapter from the History of the North American and South American States (1863), Moore, ii, §§28–36; Smith, i, pp 115–70. See, in particular, for invaluable information, Manning (ed), Diplomatic Correspondence of the United States concerning the Independence of the Latin-American Nations, (3 vols, 1925), and Webster (ed), Britain and the Independence of Latin America, 1812–30 (2 vols, 1938). See also Robinson, France and Latin-American Independence (1939).


13 See §5, n 21.

14 As to the recognition by the USA of Burma and Iceland, see Whiteman, Digest, 2, pp 136–9 and 156–61, and (as to Iceland) §73, n 2. Southern Rhodesia, while still a dependent territory of the
a separate member of the League of Nations before formally attaining full independence in 1947, and the Philippines, which became an original member of the United Nations in 1945 although not formally independent until the following year.

§ 42 Recognition of new heads and governments of old states  Recognition of a change in the headship of a state, or in its government, or in the title of an old state, are matters of importance. But such recognition must not be confused with recognition of the state itself. If a foreign state refuses to recognize a new Head of State or a change in the government of an old state, the latter does not thereby lose its recognition as an international person, although no formal official intercourse is possible between the two states as long as recognition is not given either expressly or tacitly. Recognition of a government as the government of a state presupposes, and will normally imply, recognition of a state. If no state is recognised, the ‘government’ cannot be recognised as the government of a state, although it may be recognised in some other capacity.

The position of governments in exile may be considered in this context. A government will usually establish itself in a friendly state either because its state is temporarily occupied by invaders or by usurpers and the government has had to flee to a friendly state pending its return to its own state, or because it represents a rebel community which has not yet succeeded in establishing itself in the territory of which it aspires to be the government. The former situation often occurs in time of war. During the Second World War many governments of countries occupied by Germany fled to other countries where they were able to operate as governments in exile until it was possible for them to return to their own states. The belligerent occupation of those states did not destroy their existence, and their governments, even while in exile, could still be recognised as the government of the state in question.

UK, enjoyed a degree of international position, until it was withdrawn upon its illegal ‘declaration of independence’ in 1965: see § 55, n 7.

§ 43 When coming into power normally and constitutionally  On the accession of a new Head of State, other states are as a rule notified and usually recognise the new Head of State by some formal act such as a message of congratulation; in the case of a normal constitutional change of government there is usually no such formal notification or recognition. In practice, when a new Head of State has come into his position in a normal and constitutional manner, such as succession to the throne on the death of the reigning monarch or at a presidential election, recognition is a matter of course; as it also is where a state changes its constitutional form from, for instance, a monarchy to a republic, in a constitutional manner and without anything in the nature of a revolution.


5 See § 41.

6 See § 129.


9 See RG, 66 (1962), pp 623–33; and 67 (1963), pp 118, 121–6; and Whitman, Digest, 2, pp 74–5. See generally on the Algerian civil war, Charpentier, AFDI, 3 (1959), pp 799–816; Florly, ibid, pp 817–44; and Flade in The International Law of Civil War (ed Falk, 1971), pp 179–241. Governments in exile are often established, perhaps only provisionally, in states which believe to be sympathetic to their aims, or at least tolerant of their activities: see eg, RG, 86 (1982), p 379, as to the establishment in France of a provisional government in exile of Iran. Even where the host state has not gone so far as to recognise such a government, the foreign state may protest; but the host state may not be in a position to take any action so long as the self-proclaimed government in exile breaks no laws, and in particular comports itself in accordance with the requirements attaching to enjoyment of the right of asylum. See eg RG, 90 (1983), p 215; and § 402, as to territorial asylum.

As to the situation which arose in Greece in 1967 when the King was in effect deposed although in theory remaining Head of State, his functions being carried out by a regent, see RG, 71 (1967), pp 1107–12 and 72 (1968), pp 811–15. The King was formally deposed, and Greece ceased to be a monarchy and became a republic, in 1973: see RG, 78 (1974), pp 835–9.
Nor would there be any question of withholding recognition of the new government after a change in the government following elections. In such cases recognition causes no difficulties and often takes place informally and by implication from a continuation of normal bilateral diplomatic dealings in such a way as to leave no doubt as to the intention to continue recognition.

§ 44 When coming into power abnormally and in a revolutionary manner
When, however, the new Head of State or government comes into power not in a constitutional manner but after a coup d'état, a revolution (which need not involve bloodshed), or any other event involving a break in legal continuity, the determination by other states of the attitude to be adopted towards the new Head of State or government is often difficult. They are called upon to decide whether the new authority can be properly regarded as representing the state in question.

Such a decision is unavoidable, since states act through their governments and most if not all aspects of international relations depend upon acceptance of a government's right to act and speak for the state. The decision that a new government may properly represent the state concerned is, however, one which needs to be formally or publicly announced, and a number of states, including since 1980 the United Kingdom, now follow the policy of not doing so. Instead, the nature of their relations with an authority claiming to be the government of a state is determined by and deduced from the circumstances of each case: recognition will be more a matter of implication than of express declaration. In deciding whether formally to recognise a new government, or whether the circumstances are such that relations with it should be those which normal between governments, the recognising state exercises a discretion which, although necessarily wide, is not arbitrary.

That discretion inevitably allows for certain variations over the timing of the grant of recognition, but prolonged divergences over the recognition of a new government are the exception rather than the rule. A notable situation of this kind concerned the Government of China. In 1949 the Government of the People's Republic of China proclaimed itself the Government of China, and conducted a civil war against the existing Nationalist Government. The latter was eventually driven on to the island of Formosa, the Government of the People's Republic of China taking effective control of the mainland of China. Many states nevertheless refused to recognise that government and continued to recognise the Nationalist Government as the Government of China. The Government of the People's Republic of China did not receive general recognition until 1971, when its representatives were admitted as representatives of China in the United Nations.

It must be emphasised that the effect of a revolution resulting in a government which for a time fails to secure any recognition from foreign states, does not destroy the international personality of the state or free it, permanently at any
rate, from existing treaty obligations; though it involves an interruption in that state's ability to exercise its legal capacity for international purposes.  

§ 45 Criteria for recognition of governments  
As with recognition of new states, 1 so also with recognition of governments the decision is not one determined solely by political considerations on the part of the recognising state. A government which is in fact in control of the country and which enjoys the habitual obedience of the bulk of the population with a reasonable expectancy of permanence, can be said to represent the state in question and as such to be deserving of recognition. The preponderant practice of states, in particular that of the United Kingdom, 2 in the recognition of governments has been based on the principle of effectiveness thus conceived.  

8 See remarks by the Committee of Justices in the Aaland Islands case, Off J, Special Supp, No 3, p 18. See also, for decisions asserting the continued effect of treaties notwithstanding the non-recognition of the current government, the Russian Rubles (Attempted Counterfeiting) Case, AD, 1 (1919-22), No 15; Hopkins v Chile, AD, 6 (1931-32), No 17; Re Lepsennik, AD, 2 (1923-24), No 189; Arduff v Bodie, Clunet, 48 (1921), p 229; Tsarkhanov v Batter, Clunet, 50 (1923), pp 833-5. As to the treaty-making authority of revolutionary governments see Blis, Treaty-Making Power (1960), pp 113-46. As to the position of a depositary for a treaty if an unrecognised authority purports to accede to it, see § 661.  

Failure by the UK to recognise the Tinoco regime in Costa Rica was held not to raise an estrangement with the UK in claiming that the subsequent regime in Costa Rica was responsible for acts of its predecessor: Tinoco Arbitration (1923), RIAA, 1, p 369. Failure by the USA to recognise regimes in Chile did not prevent them from being held entitled to exercise rights conferred by the previous 'government of Chile'. Coentral and South American Telegraph Co v Chile (1948), Moore, International Arbitration, p 2938. See also Lehigh Valley Railroad Co v Russia, AD, 2 (1923-24), No 20; Hopkins Claim (1927). RIAA, 4, p 41. 

See generally Marek, Identity and Continuity of States in Public International Law (1954), pp 24-51. See also § 56.  

1 See § 40.  

2 The British Government, which no longer formally accords recognition to foreign governments (see § 44, n 3), continues to decide the nature of its dealings with regimes coming into power unconsciously ‘in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so’ (Parliamentary Debates (Commons), vol 983, col 279 (written answers, 25 April 1980). Previously, when recognition was formally accorded to governments, the British Government’s consistently expressed criteria for the recognition of a new government were that it should enjoy, with a reasonable prospect of permanence, the obedience of the mass of the population and the effective control of much the greater part of the territory of the state concerned: see eg Parliamentary Debates (Commons), vol 485, cols 2410-11 (21 March 1951); v 811, col 850 (written answers, 19 February 1971); and v 890, col 664 (18 April 1975).  

The practice of the USA has been summarised as follows: 

'In fairly recent years in the United States, in determining whether or not to extend recognition to de facto governments, has considered the following three criteria (not always uniformly described): (1) whether the government is in de facto control of the territory and in possession of the machinery of the State; (2) whether it is administering the government with the consent or consent of the people, without substantial resistance to its authority, i.e. whether there is public acquiescence in the authority of the government; and (3) whether the new government has indicated its willingness to comply with its international obligations under treaties and international law.’  

Whiteman, Digest, 2, pp 72-3. The USA has traditionally held recognition of governments to be essentially a matter of policy: see eg the 1958 Memorandum by the State Department on Non-Recognition of the Communist Government of China (State Department Bulletin, 1958, No 2, p 12).
support in its territory from the armed forces of another state may with justification be regarded as not deserving of recognition.\(^6\)

Occasionally states have refused to recognise foreign governments on the ground of their revolutionary origin and the degree of violence accompanying the change.\(^7\) The consequences of revolutionary changes of regime have been a concern of American states in particular. The five Central American Republics concluded in 1907 and 1923 treaties embodying the so-called Tobar doctrine in which they bound themselves not to grant recognition to any government coming into existence by revolutionary means 'so long as the freely elected representatives of the people ... have not constitutionally reorganised the country'.\(^8\) The view that non-recognition because of the unconstitutional origins of a government was an interference in its domestic affairs led to the so-called Estrada doctrine enunciated in 1930 by the Mexican Foreign Minister, which affirmed the duty of continuing diplomatic relations, so far as possible, without regard to revolutionary changes.\(^9\) Neither the Tobar doctrine nor the Estrada doctrine has proved of lasting value. In 1965 the Second Special Inter-American Conference adopted a resolution\(^10\) recommending the member states, immediately after the overthrow of a government and its replacement by a de facto\(^11\) government, to exchange views on the situation, giving due consideration to the extent of any foreign complicity in the overthrow of the government, to the likelihood of elections being held by the new government, and to its agreement to fulfil the state's international obligations: but after such an exchange of views, it is for each government to decide whether to maintain diplomatic relations with the de facto government. It is in practice impossible to insist on the perpetuation of any existing regime by the refusal to recognise its revolutionary successor which is effectively established, nor does state practice deny recognition to governments with unconstitutional origins once they are effectively established, and constitutional legitimacy cannot be regarded as an established requirement for the recognition of governments.\(^12\)

Willingness to observe international obligations is frequently a factor referred to both by the new government itself in seeking recognition and by other states when granting it;\(^13\) sometimes a government has been refused recognition because of its supposed unwillingness to fulfil international obligations. Many states refused to recognise the Government of Soviet Russia on account of its unwillingness to fulfil obligations contracted by the former Russian governments and to give assurances of abstention from subversive propaganda abroad.\(^14\) The actions of the Government of the People's Republic of China at the time of the Korean hostilities (in which that government was condemned by the United Nations as an aggressor),\(^15\) and in certain other matters involving an

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\(^{12}\) For an emphatic repudiation of the view that constitutional legitimacy is a condition of recognition of governments in international law see the award in the Tinoco arbitration between Great Britain and Costa Rica in 1923: RIAA, 1, pp 369, 381. See also Republic of Peru v Peruvian Guano Co (1887) 36 Ch D p 497; Republic of Peru v Dysius Brothers Co (1888) 38 Ch D 348, where, it appears, the court refused to consider as relevant the circumstances that the Peruvian Government, recognised by Great Britain, was a revolutionary de facto dictatorship.

\(^{13}\) See Parliamentary Debates (Lords), vol 205, col 423 (21 November 1956) and Whitehead, Digest, 2, pp 395-400 as regards the Hungarian Government in 1956 (and generally on that situation see \$53, n 14), and \$45, n 3, in connection with the lack of independence of the German Democratic Republic. The UK has refused to recognise the Heng Samrin regime in Kampuchea because of its total dependence on the presence in that country of the Vietnamese army: Smith, i, pp 80-98. See also ibid, pp 229-33, on the British refusal from 1903-06 to recognise the new Syrian Government following upon the assassination of the Syrian King and Queen.

\(^{14}\) For an early example see the refusal of Great Britain to recognise in 1792 the French revolutionary government: Smith, i, pp 80-98. See also ibid, pp 229-33, on the British refusal from 1903-06 to recognise the new Syrian Government following upon the assassination of the Syrian King and Queen.


\(^{18}\) Semble; a government in actual control, not necessarily one which has received recognition as a de facto government.
apparent unwillingness to observe international obligations, was a major factor in the refusal of many states to recognise it.\textsuperscript{16}

Acceptance of willingness to fulfil international obligations as one of the requirements for recognition of governments has sometimes been thought to receive some support from Article 4 of the Charter of the United Nations, which makes willingness to carry out the obligations of the Charter a condition for the admission of a state to membership of the United Nations. This, however, is a different matter from the recognition of a government as entitled generally to represent a state in the international community. In the long run it is not practicable to make recognition dependent upon a government's willingness to fulfil international obligations. Those obligations are the obligations of the state and are not avoided by a change of government;\textsuperscript{17} to make the government's acceptance of them a condition for its recognition wrongly suggests that in law it has some choice in the matter. Where a government is effectively established, withholding recognition is usually ineffective as an indirect means of compelling the fulfilment of international obligations: sooner or later the facts of continued effective existence will require other states to have dealings with it and eventually to recognise it. However, so long as international law provides only limited sanctions for breaches of international obligations it is perhaps unlikely that states will altogether forego using non-recognition as a form of pressure intended to secure from a new government performance of obligations owed to the recognising state.\textsuperscript{18} This has happened sufficiently often to make it difficult to say that the practice—which is to be distinguished from conditional recognition in the strict sense—\textsuperscript{19} is contrary to international law.

§ 46 De facto recognition States granting recognition often distinguish between de jure recognition and de facto recognition.\textsuperscript{1} These terms are convenient but elliptical: the terms de jure or de facto qualify the state or government recognised rather than the act of recognition itself. Those terms are in this context probably not capable of literal analysis, particularly in terms of the jure to which recognition de jure refers.\textsuperscript{2} The distinction between de jure and de facto recognition is in essence that the former is the fullest kind of recognition while the latter is a lesser degree of recognition, taking account on a provisional basis of present realities. Thus de facto recognition takes place when, in the view of the recognising state, the new authority, although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not as yet offer prospects of complying with other requirements of recognition.\textsuperscript{4}

\textsuperscript{16} See literature cited at § 44, n 6; and Kiss, Répertoire, 3, p 57.

\textsuperscript{17} See § 56, nn 4–6.

\textsuperscript{18} Thus in 1911 the USA required, before recognising the Haitian Government, written assurances that American interests in that country would be safeguarded and also required a settlement of claims resulting from the revolution (Whiteman, Digest, 2, p 69); in 1922 the USA secured certain trade advantages when recognising Albania (Hackworth, i, p 192). As to the requirement by the UK for satisfaction in regard to the treatment of British property by Mexico, before granting recognition of its government in 1918, see Parliamentary Debates (Commons), vol 115, col 1472; as to the similar attitude of the USA, see Whitean, Digest, 2, p 122. In 1942 the USA required written assurances about the rights of the USA and its nationals, particularly as set out in a prior treaty, before granting 'full and unconditional recognition' of the independence of Lebanon: ibid, p 196. See also Kiss, Répertoire, 3, p 108, as to French conditions for recognition of Belgium's annexation of the Congo.

\textsuperscript{19} See § 51.

Thus, after the First World War, the governments of various new states, such as Finland, Latvia and Estonia, which formerly constituted part of the Russian Empire, were recognised in the first instance as de facto governments pending the final territorial settlement in that part of the world. The Government of the Soviet Union, although, to all appearances, firmly and effectively established, was recognised for a number of years after its establishment by many states de facto only on the ground that, in their view, it was unwilling to fulfil its international obligations in such matters as compensation for the confiscated property of foreign subjects and acknowledgement of liability for financial obligations incurred by its predecessors. Recognition of a government de facto may be limited to such areas as are actually under its control. Such recognition will often in time be replaced by the grant of de jure recognition. While de facto recognition usually falls to be considered in the context of new states or governments, it may also be relevant in other circumstances such as the extension of a state's territory or its absorption of another previously independent state.

It is inherent in de facto recognition that the requirements for recognition are incompletely satisfied; it is therefore essentially provisional pending their complete satisfaction. If that is long delayed or withdrawn, recognition de facto remains the same whether it is ruled by a de facto or a de jure government. It is not, however, correct to assume that no legal consequences follow from the distinction between de jure and de facto recognition, particularly so far as concerns external aspects of the conduct of the recognised community. Thus, at a time when, in 1937, the United Kingdom recognised de facto the Italian rule over Abyssinia, but still recognised de jure the previous government of Abyssinia, it was held that Italy could not be regarded as entitled, by virtue of state succession, to the overseas assets of Abyssinia. The legal position underwent a change in this respect after the annexation of Abyssinia had been recognised de jure. According to the practice of some countries, including the United Kingdom, de facto recognition does not, as a rule, bring about full diplomatic intercourse with the result that the representatives of the de facto government will not normally enjoy diplomatic immunities, but if a state does decide to establish diplomatic relations with a regime which is recognised only de facto its representatives will then enjoy the appropriate diplomatic status. It is recognition of a new government or state de jure, and not merely de facto, which implies withdrawal of recognition from the previous authority.

Finally, where it is some particular addition to a state's territory which is recognised de facto rather than de jure, official dealings with that state in relation to its additional territory, and official visits to it, are probably consistent with the de facto character of the recognition and do not necessarily imply de jure recognition of that territorial extension, but as a matter of political choice such dealings and visits may be kept to a minimum or avoided altogether.

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5 For a list of states which recognised the Soviet Government in that way, see AJ, 28 (1934), p 97. See also Appendix XXIV in Taracouzi, The Soviet Union and International Law (1933); Toynbee, Survey (1924), pp 228–62.  
7 The UK recognised the Soviet Government de facto in 1921 and de jure in 1924, and the Spanish Nationalist Government de facto in 1937 and de jure in 1939. The Communist Government of China was recognised as a de facto government from 1 October 1949 until 5–6 January 1950, when it was recognised as the de jure government.  
8 See eg §§ 55, 411f and nn 50–2, as to (respectively) the Baltic States and Jerusalem.  
9 As to withdrawal of recognition, see § 52. Both de jure and de facto recognition are liable to withdrawal if the required conditions for recognition disappear, but the revocability of the latter is inherent in the situation as it exists at the time when recognition is granted, and it can therefore be withdrawn more easily, whereas for the cessation of recognition de jure stringent proof is required of the final disappearance of the essential elements of statehood or of governmental capacity.  
10 Luther v Segor [1921] 3 KB 532. The rule laid down in this case is that there is no distinction between de facto and de jure recognition for the purpose of giving effect to the internal acts of the recognised authority — but not necessarily for other purposes — has since been applied in numerous cases. Thus in Bank of Ethiopia v National Bank of Egypt and Lipu the court held that, in view of the fact that the British Government recognised the Italian Government as being the de facto government of the area of Abyssinia then under Italian control, effect must be given to an Italian decree in Abyssinia dissolving the plaintiff bank and appointing a liquidator: [1937] Ch 513. For a criticism of this decision see McNair and Watts, Legal Effects of War (4th ed, 1966), pp 396–8. See also Banco de Bilbao v Sancho and Roy, where it was held that the decrees of the de jure Spanish Government had no effect, so far as English courts were concerned, in the territory under the control of the Nationalist Government recognised de facto: [1938] 2 KB 176. To that extent even in respect of legislative measures there is thus a distinction between a de facto and a de jure government where both are recognised simultaneously in respect of the same territory.

11 The Gogara [1919] P 95. In the Aranzatsuzi Mendi it was held that the Nationalist Government of Spain, which was recognised as a de facto government of the part of Spain under its control, was entitled to juridical immunity in an action brought against it by the de jure Government of Spain: [1938] P 233; [1939] P 37; [1939] AC 256. For a criticism of the decision see H Lauterpacht, MILR, 3 (1939–40), pp 1–20, and Briggs, AJ, 33 (1939), pp 689–99. See also Baty, AJ, 45 (1951), pp 166–70.  
13 Haile Selassie v Cable and Wireless Ltd (No 2) [1939] Ch 182. But see § 47, n 7, as to gold in the UK belonging to the former Baltic States.  
14 Ibid.  
15 See the statement of the Foreign Office in the course of the proceedings in Fenton Textile Association v Krasin (1922) 38 TLR 260. See also Parliamentary Debates (Commons), vol 139, col 2198, for the statement that the representatives of the Soviet Government, subsequent to its recognition de facto, would not be recognised as diplomatic representatives.  
16 It appears from the language used by Scrutton and Acton LJJ in the above case that the matter might have been open to doubt but for the fact that the Trade Agreement with Soviet Russia of 1921 excluded, by implication, the grant of diplomatic immunities. According to the practice of the USA, representatives of a government recognised de facto enjoy diplomatic immunities. In 1949 the British Foreign Secretary said that 'there is no reason under international or constitutional law why His Majesty should not receive as a Minister Plenipotentiary the representatives of a state which has been recognised de facto only': Parliamentary Debates (Commons), vol 466, cols 17–18 (written answers, 22 June 1949). France established diplomatic relations with Israel after granting only de facto recognition to the Government of Israel; Kiss, Répertoire, 3, pp 6–7.  
17 See § 52, n 5.  
18 If the de jure authority of another state over the territory is still recognised, dealings with the...
§ 47 Consequences of recognition of new states and governments Generally, recognition of a state signifies acceptance of its position within the international community and the possession by it of the full range of rights and obligations which are the normal attributes of statehood; and recognition of a government enables the recognising state to conduct the complete range of international relations with the new government, and signifies its acceptance that the new government represents the state concerned in its international relations and that its acts may be regarded as binding the state in international law.

Among the more important consequences which flow from the recognition of a new government or state are these: (1) it thereby acquires the capacity to enter into diplomatic relations with other recognising states and to make treaties with them; (2) where a new government of a state is recognised, former treaties concluded between that state and another state, the operation of which may in part of the government being necessary, non-recognition of the government will not prevent the state recognised having de facto authority over the territory will, if a more extended degree of recognition is to be avoided, have to be consistent with that continuing de jure recognition. Subject to any limitations appropriate to the particular case. See also § 57.

There may be room for the operation of normal rules of treaty law as regards such matters as fundamental change of circumstances (see § 651) in cases where the content of a treaty concluded with a previous government makes it wholly inappropriate for it to continue to apply to relations with the newly recognised government. Either party may, of course, avail itself of such rights to terminate the treaty as it may possess. Special considerations may also apply where the former government retains effective control over a portion of the state's territory and treaties concluded with it are still capable of applying to that territory. When the USA recognised as the Government of China the Government of the People's Republic of China in place of the Government of the Republic of China (see § 44, n 7) the USA terminated its 1954 Mutual Defence Treaty with the latter, but regarded other treaties and executive agreements as remaining applicable as between itself and the new no-longer-recognised, but still effective, authorities in Formosa (Taiwan); see Scheller, Harv LLJ, 19 (1978), pp 931–1009.

Similar problems arise in connection with contracts concluded with a previous government, it being primarily a matter of interpretation of the contract whether it is still in force for the newly recognised successor government, perhaps on the basis that it is to be regarded as concluded on behalf of the state (which continues unchanged) or that the relevant party is whatever government for the time being of the state rather than the particular government which happened to be in power when the contract was concluded: see eg American Bell International Inc v Islamic Republic of Iran (1979) 474 F Supp 420; US Practice (1979), p 139. City of Berne v Bank of England (1804) 9 Ves Jun 347; Jones v Garcia del Rio (1823) Turn and Russ 297, p 57; Taylor v Barclay (1828) 2 Sim 213 (the last two are cases of new and unrecognised states whose governments were consequently unrecognised, but much of the reasoning is relevant. See as to these cases Bushe-Fox, BY, 12 (1931), pp 63–75; and see Sipropoulos, Die de facto-Regierung im Völkerrecht (1926), pp 128–140, who contrasts the attitude of the English courts with that of the French courts. The American law appears to be the same: Russian Socialist Republic v Cibario (1923) 235 NY 255; Government of France v Isbrandtsen-Moller Co, AD, 12 (1943–45), No 113; Republic of China v Pang-Tsun Mow, ILR, 18 (1951), No 26; Varga v Credit

acquires for itself and its property immunity from the jurisdiction of the courts of law of the state recognising it and the ancillary rights which are discussed later – an immunity which, according to English law at any rate, it does not enjoy before recognition; (5) it also becomes entitled to demand and receive posses-

Swiss (1957–58), ILR, 26, p 70; Federal Republic of Germany v Elchofin, ILM, 12 (1973), p 1163 and 14 (1975), p 806; Republic of Vietnam v Pfzer, AJ, 72 (1978), p 152; Pfzer v Government of India, ILM, 17 (1978), p 93. See also AJ, 82 (1988), pp 567, 568–9, as regards proceedings by the unrecognised government of Panama. But note GuR Corp v Trust Bank of Africa Ltd (1986). All ER 449, allowing an unrecognised 'state' to be a party to proceedings in England on the basis that it was a subordinate body set up to act on behalf of a state which was not granted recognition. See also: where some of the American literature is cited. Note, however, Digg v Dent, ILR, 14 (1975), p 797, where a US court held that the plaintiffs, who included the South West Asia People's Organisation and its 'unrecognised representative plenipotentiary', had standing to bring the action in question: the question of recognition of SWAPO by the US Government does not appear to have been raised. In National Petrochemical Co v Iran v The M/T Stolt Sheaf, AJ, 83 (1989), p 368, a US Court of Appeals concluded that, in view of the lessened emphasis on recognition of governments, a non-recognised government should be allowed to sue, if the executive branch of government was ready to permit it to do so. Extreme unfriendliness towards another state, falling short of withdrawal of recognition, does not deprive it of the right to institute proceedings: Brie Nacional de Cuba v Cuba (1964) 376 US 398. Nor does absence of diplomatic relations: see Republic of Cuba v Malta Lines SA (1962), ILR, 33, p 36; P S & E Shipping Corp v Banco Para el Comercio Exterior de Cuba (1962), ILR, 33, p 41 and 1964, ILR, 35, p 37; Transportes Aereos de Angola v Ronair Inc, ILR, 21 (1982), p 1081; National Oil Corp v Libyan Sun Oil Co, ILM, 29 (1992), p 716; el Dade Drydock Corp v The M/T Kar Caribe (1961), ILR, 32, p 70. And a national of a foreign state whose government is not recognised is not precluded from instituting proceedings: Iran Handicraft and Carpet Export Center v Marian International Corp, AJ, 81 (1987), p 954.

For judicial decisions in other countries, see Soviet Government v Ericsson, AD 1 (1919–22), No 30 (Sweden); Société Despa et Fils v USSR, AD, 6 (1931–32), No 28 (France); Republic of the South Moluccas v Netherlands New Guinea, ILR, 21 (1954), p 48 (holding that an unrecognised entity can be a party to legal proceedings); Spanish Government v Campomanzo, AD, 9 (1938–39), No 27 (Norway); Cibario v Russian Trade Delegation in Italy, AD, 6 (1931–32), No 26 (Italy). See also § 56, n 7.

As to the status of unrecognised states before the PCIJ, see Sipropoulos, RJ (Geneva), 5 (1927), pp 35–45. And see Cypres v Turkey, YBECHR, 18 (1975), pp 82, 112–16, and 21 (1978), pp 100, 224–30, for the ability of the Government of the Republic of Cyprus to bring proceedings against Turkey before the European Commission of Human Rights, even though not recognised by Turkey. See also § 109.


American courts have granted certain immunities to an unrecognised government, the ground being that immunity ought not to depend on recognition but on the nature of the action: see Wolfsone v Russian Socialist Republic (1923) 234 NY 372, 138 NE 24; Underhill v Anson (1897) 168 US 250; Nankivel v Omsk All Russian Government, AD, 2 (1923–24), No 70; Vovodina v Government of the Commander-in-Chief of the Armed Forces in the South of Russia, AD, 6 (1931–32), No 25; see also Sokoloff v National City Bank (1924) 239 NY 158, 145 NE 917, for a discussion of the same point, and Borchard, Yale LJ, 31 (1922), pp 534–37; Dickson v Bank of England (1923), p 131 and AJ, 19 (1925), pp 263–72. In the Protection of Diplomatic Agents Act 1971 the USA provides for the protection of foreign officials and newswomen of foreign governments, 'foreign government' being defined as 'the government of a foreign country, irrespective of recognition by the United States' (§ 1116(c)(1)) - ILM, 11 (1972), p 1405.
sion of property situate within the jurisdiction of a recognising state, which formerly belonged to the preceding government at the time of its supersession; (6) its executive and legislative acts will, in the courts of the recognising state, be entitled—as before recognition they usually are not—to the acceptance which is due to another state's official acts; consequently certain transfers of property and other transactions which, in the absence of recognition, would have been treated as invalid by those courts, are, particularly as a result of the retroactive effect of recognition, treated as valid.

See also Sections 12 and 15 of the Headquarters Agreement 1947 between the UN and the USA as to privileges and immunities to be accorded by the USA to representatives of governments not recognised by it. Similarly, under Art 82 of the Convention on the Representation of States in their Relations with International Organisations of a Universal Character 1975 (UN Juridical YB (1975), p 87), the rights and obligations of the host state and sending state thereunder are not affected by the non-recognition by one of those states of the other or its government, and the establishment or maintenance of a mission, or the sending or attendance of a delegation or an observer delegation does not by itself imply recognition by the host state of the sending state or its government; or vice versa: see also the ILC's Commentary on draft Art 79 for this Convention, which became Art 82, YBILC (1971), ii, pp 1–30.

A government recognised de facto is not entitled to property abroad as against the de jure government (see § 46, n 13); even if no government is recognised de jure it may still be doubted whether a government recognised de facto is entitled to such property. But note that the UK accepted from the Soviet Union a renunciation of claims relating to gold in the UK which belonged to the former central banks of the Baltic States, whose incorporation into the Soviet Union was recognised de facto but not de jure: see § 30, n 14, and § 55, n 42. When France recognised the Government of the People's Republic of China in place of the Government of the Republic of China, the French authorities in March 1966 forcibly ejected the latter's Permanent Representative to UNESCO, and his staff, from the offices and residential quarters of the Chinese mission on the ground that they had become 'occupants without title' of the premises and that the premises belonged to the Chinese State: RG, 70 (1966), pp 740–3; YBILC (1967), ii, pp 202–3. See also the inconclusive discussion by the High Court of Australia in Chong v Registrar of Titles (1976), ILR, 55, p 61.

The newly recognised government may have difficulty in claiming the return of state property situated in the recognising state if that state is a federal state and the property is in the control of a member state of the federation which is itself unwilling to recognise the new government: for the position in this respect of Polish property in Canada in 1945–46 see Dufour, Can YBIL, 11 (1973), pp 123, 125–7, and 12 (1974), pp 2–37. But see § 36, n 27, as to the legal consequences of laws of unrecognised authorities.

Luther v Sagor [1921] 3 KB 532. See Fachiri, BY, 12 (1931), pp 95–106.

§ 48 Retroactivity of recognition

According, at least, to the practice of British and American courts, recognition, whether de facto or de jure, is retroactive in the sense that courts treat as valid the acts of the newly recognised state or government dating back to the time when the authority thus recognised established itself. The retroactivity of recognition, for which there appears to be no direct international authority, is a rule of convenience rather than of principle. Retroactive effect is normally only accorded to acts of the new government within those areas which were under its control at the time of the act; recognition does not therefore retroactively validate its acts in respect of areas then outside its control or invalidate the acts of the previously recognised government in such areas.

§ 49 Recognition and civil wars: recognition of belligerency and insurrection

Although a rebellion will involve a breach of the law of the state

Banque Commerciale Arabie SA v Popular Democratic Republic of Algeria (1974), ILR, 75, p 81. The matter is treated fully in works on private international law.

See also 8th ed of this vol, p 138, n 2, particularly regarding consequences flowing from the recognition of the Greek government by various states after the 1917 revolution.


See the observations of the PCJ in the case of Certain German Interests in Polish Upper Silesia (1926), Series A, No 7, pp 28, 29, 84, and of Erich, Hâg R, 13 (1926), iii, pp 499–502. See also the comments by Mervyn Jones, BY, 16 (1935), pp 51, 52, on the Andrew Allen case which came in 1799 before the British–American Mixed Commission under the Jay Treaty. See also Moore, International Adjudications, (vol iii, 1931), pp 238–52.

In the Western Sahara case Mauritania expressly disclaimed any retroactivity for its present statehood: ICJ Rep (1975), p 57.

See Civil Air Transport Inc v Central Air Transport Corp [1953] AC 70; Boguslawski v Gdynia-Ameryka Linie (1953) Report. It has been held by the Supreme Court of the United States that the principle of retroactivity is not applicable to transactions, in the USA, between American nationals and the predecessor or the newly recognised government: Guaranty Trust Company v United States (1938) 304 US 126; AJ, 32 (1938), p 948; AD, 9 (1938–40) No 69. In the absence of some such qualification of the principle of retroactivity, nationals of a state could not safely deal with the predecessor of the newly recognised government during the period when the former was still recognised. However, the Supreme Court, in United States v Pink (1942) 315 US 203, gave a comprehensive and highly controversial extension to the principle of retroactivity. It laid down that, in some cases, recognition endows with legal effect such acts of the recognised government outside its territory as have hitherto been treated as invalid by the lex fori for reasons not connected with non-recognition. For a criticism of that decision see Borchard, AJ, 36 (1942), p 275, and Jessup, ibid, p 282.
concerned, no breach of international law occurs through the mere fact of a rebel regime attempting to overthrow the government of the state or to secede from the state.\(^1\) If the rebellion is quickly put down, or is quickly successful, problems of recognition are unlikely in practice to arise. But it may happen that the revolutionary regime's struggle against the established government may last for some time, perhaps years. Its international status within that period calls for consideration.\(^2\)

While a rebel regime does not normally possess international rights or duties, it may nevertheless in certain circumstances enjoy a degree of international personality, and may be recognised accordingly. Thus the rebel regime may become so well established in part of the national territory that, although it has not overthrown the established government, it is entitled to recognition as a *de facto* government, at least in respect of that part of the national territory under its effective control.\(^3\)

Under the influence of the movement towards decolonisation and the principle of self-determination, there has emerged in recent years a tendency to treat as a special category of civil wars those involving organised rebels who represent an indigenous population seeking, usually by armed force, to assert its separate national identity against an alien, often colonial, administration. Such rebel communities are usually referred to as national liberation movements.\(^4\) They may attempt to establish a government (perhaps in exile) for the territory which they seek to 'liberate'; it will depend on the particular circumstances of each case whether recognition of such a government is justified or is premature.\(^5\) Even without a government, national liberation movements may have a limited degree of international status (apart from any they may otherwise have as a contesting party in a civil war). Both the League of Arab States and the Organisation of African Unity\(^6\) have procedures for giving official status to national liberation movements, and the United Nations General Assembly has treated such 'recognition' of a movement by those organisations as a sufficient condition for admitting it to certain United Nations' activities, such as participation in the discussion of certain items by the Assembly and attendance at certain conferences convened by the United Nations\(^7\) (in both cases, without the right to vote). The General Assembly has itself acknowledged the Palestine Liberation Organisation as the representative of the people of Palestine, and has granted it permanent observer status in the United Nations;\(^8\) and also recognised the South

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\(^1\) But action by the Security Council may declare the act illegal: as to the situation regarding Southern Rhodesia, see § 55, n 8.


It may be noted that 'civil war' is not a term of art in international law, with a clearly defined meaning and giving rise to identifiable and consistent legal consequences. It will not often, therefore, be appropriate for a court to seek from the executive branch of government a certificate as to the existence or otherwise of a 'civil war' in a foreign country: see eg *Spinney's (1968) Ltd v Royal Insurance Co Ltd* (1980) 1 Lloyd's Rep 406; and § 460.

See above, § 46, n 6.


Associated aspects of the same issue include (1) the right of a liberation movement to use force to achieve its aims (see § 127, n 10, and § 85, at nn 25–8); (2) its right to seek assistance from third states (see §§ 85, at nn 25–8; § 131 (4)); and (3) their right to respond positively to such requests (ibid); (4) the right of the parent state to use force to resist the liberation movement (see § 127, n 10, and § 130, at nn 20–2); (5) its right to seek assistance from third states (see § 130, at nn 20–2), and (6) their right to respond positively to such a request (see § 130, at nn 18–22). As to the unlawfulness of aiding rebels in another state, and the possibility of encouragement of civil strife in another country constituting indirect aggression, see *Novogrod in International Criminal Law*, (eds Baistourni and Nanda, vol 1, 1973), pp 198–237; and § 130, at nn 18–19, and § 122.

See § 41, and § 42.

In 1963 the OAU established a committee to have regard to the liberation of African territories under alien rule. The committee determines which groups striving for the liberation of their territories are to be recognised as eligible for official aid and support from the OAU: this recognition is given ideally for liberation purposes only, and does not pre-judge the eventual recognition of the government of the territory once it has been liberated. To be recognised a liberation movement must usually be politically and militarily united and conducting effective military operations within its country. Generally, the committee has sought to avoid recognising 'splinter' groups, and has urged rival liberation movements within a single territory to unite. But where a united movement has not been possible, more than one liberation movement may be recognised in a single country, as with the recognition of ZANU and ZAPU in Southern Rhodesia (those two movements becoming known together as the 'Patriotic Front'). The recognition of liberation movements in exile has generally been avoided.

\(^4\) National liberation movements recognised by the OAU are now regularly invited to participate as observers in the proceedings of the 4th Committee relating to their respective countries: thus in 1973 there was such participation by the FNLA in relation to the discussion of Angola, FRELIMO (Mozambique), ZANU and ZAPU (Southern Rhodesia) and SWAPO (Namibia). See GA Res 2908 (XXVII), 1972, and 3280 (XXIX), 1974; and generally on the representation of national liberation movements in UN organs, UN Juridical YB, 1975, pp 149–56, 167–71; UN Juridical YB, 1975, pp 164–7; Lazarus, *ADFG*, 20 (1974), pp 173–200; *Thomas, International Law and the Use of Force by National Liberation Movements* (1988), pp 138–46. As to participation by the PLO in the UN regional economic commissions, see UN Juridical YB (1977), pp 217–19; Meron, *ICLQ*, 28 (1979), pp 52–64.

Eg the third UN Conference on the Law of the Sea 1973–82, and the Geneva Conference on Humanitarian Law Applicable in Armed Conflicts 1974–77. Eleven national liberation movements were represented at the latter (para 3 of the Final Act of the Conference, Cmnd 6927); three of them signed the Final Act of the Conference, although separately from the signatures of representatives of governments.

\(^5\) GA Res 3210 and 3237 (XXIX), 1974; GA Res 3375 (XXX), 1975. See also Gross, AJ, 71 (1977), pp 470–91; and UN Juridical YB (1975), p 164; *ibid* (1979), pp 169–70; *ibid* (1980), pp 188–9; *ibid* (1982), pp 156–9. Permanent observers had previously been confined to non-member states and to regional organisations of states, consistently with the view that the UN was an organisation of sovereign states. As to the removal of the OAU's decision to the United Nations, see the statement by the UN Legal Council, 28 November 1988 (UN Doc A/C/6/43/7); *United Nations and International Personalities*.

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West Africa People's Organisation as the 'authentic representative of the Namibian people'.

The General Assembly has requested the specialised agencies to enable representatives of duly recognised national liberation movements to participate in their work, and some of them have done so.

During a civil war, and particularly during its later stages, negotiations with the rebel regime often take place. Although recognition may follow upon or form part of whatever settlement the negotiations may lead to, the mere holding of negotiations will not in itself necessarily—or even usually—involve any degree of international recognition of the rebel regime, particularly where the negotiations take place only between that regime and the parent state but also if they involve third states.

Where a rebel regime is recognised as a de facto government, it is a separate question whether it is entitled to exercise as against third states any of the rights which international law accords to a belligerent. This will depend on the cir-


A number of states have purported to recognise the PLO, but the significance of that recognition is unclear. It can hardly operate as recognition of the PLO as a state or as a government. The PLO neither being nor claiming to be either; nor would it appear to affect the recognition is unclear. It can hardly operate as recognition of the PLO as a state or as a representative role in relation to the people of Palestine, as acknowledged in UN resolutions), in

Recognition of insurgency

The practice of states has recognised that in some situations it is not appropriate for third states which have to take up a position as regards the status of rebels to


15 See the Santissima Trinidad (1822) 7 Wheaton 340; The Prize Cases (1862) 2 Black 635; Oriental Navigation Company Case, AD, 4 (1927-28), No 361. For a claim for compensation by successful rebels on account of losses suffered as a result of being refused belligerent rights during the struggle for independence, see § 39, n 8.


17 It is therefore discussed more fully in vol ii (7th ed), §§ 55, 76 and 76a. See also McNair, International Law Opinion (vol 1, 1956), pp 138-51; Duculesco, RG, 79 (1975), pp 125-51; Crawford, The Creation of States in International Law (1979), pp 252-5. In 1956 the UK stated that it did not recognise a state of belligerency to exist between the Chinese Nationalists and Chinese Communists: E Lauterpacht, ICLQ, 5 (1956), pp 437-8.

18 When recognition of belligerency is appropriate, the rebels may often be sufficiently established as to merit, quite apart from the extent of the hostilities, recognition as a de facto government. However, state practice has tended to treat the situation as one of belligerency without expressly granting de facto recognition to the rebels. Even if not formally recognised as a government, rebels with belligerent status will be regarded as having a degree of local governmental authority: see n 27f.

19 The need for third states to define their position as regards the rebels is important, since in its absence action by third states may amount to an improper intervention in the affairs of the parent state. In many civil wars third states have accorded no recognition to the rebels because there was no need for them to do so.
treat them as having the full rights and obligations of a belligerent, or to regard third states as subject to the obligations of neutrality. This may occur, for instance, when the rebel forces do not act under the command of an organised authority in possession of considerable territory or when they do not by their conduct offer the necessary guarantees of complying with the accepted rules of war. Nevertheless, the civil war may have such scope, and be accompanied by a sufficient degree of organisation on the part of the rebels, that they can no longer be treated as private individuals committing unlawful acts. Accordingly in such cases third states, without making a formal pronouncement and without conceding to the rebel forces belligerent rights affecting foreign nationals, refrain from treating them as law-breakers (so long as they do not arrogate to themselves the right to interfere with foreign subjects outside the territory occupied by them), consider them as the de facto authority in the territory under their occupation, and maintain with them relations deemed necessary for the protection of their nationals, for securing commercial intercourse and for other purposes connected with the hostilities. When that happens the rebels possess as against third states the status of insurgents.

Apart from such specific recognition of rebels as belligerents or insurgents, they may have some international rights and obligations, and thus a degree of international personality, under treaties on the laws of war. Thus by Article 3 of each of the 1949 Geneva Conventions, and Protocol II to those 1949 Conven-

20 See eg the Message of President Grant of 7 December 1875, justifying, on these grounds, the refusal to recognise the belligerency of Cuban insurgents: Moore, i, p 196.

21 For consideration, and rejection, of the argument that the Patriotic Front for the Liberation of Palestine was an insurrectionary force see Pan American World Airways Inc v Aetna Casualty and Surety Co, ILM, 13 (1974), p 1376, considering the meaning of 'insurrection' at pp 1403–5; see also Beckman Instruments Inc v Overseas Private Investment Corp, ILM, 27 (1988), p 1260; and n 23 of this §.

22 See § 50, n 15.

23 On insurgency, see H Lauterpacht, Recognition in International Law (1947), pp 270–310; Hall, § 5a; Lawrence, § 142; Hyde, § 50; Fauchille, § 199; Wilson, International Law (9th ed, 1935), § 28, and AJ, 1 (1907), pp 46–60; Woolsey, AJ, 44 (1950), pp 350–56; Crawford, The Creation of States in International Law (1979), pp 268–9; The Three Friends (1897) 166 US 1. The characteristic feature of the status of insurgency, so far as third states are concerned, is the refusal to recognise fully a state of belligerency with the concomitant grant of belligerent rights as against neutrals. Care must accordingly be taken not to commit the mistake of implying such recognition from the fact that third states maintain close contact with insurgents and otherwise recognise their effective authority in the territory occupied by them. See Spanish Government v North of England Steamship Company, where it was held that a 'blockade' instated by the insurgent Spanish authorities which, though recognised as a de facto Nationalist Government, were not recognised as belligerents, was not a blockade in the legal sense: (1938) 54 TLR 852; see also Tatam v Gambou (1938) 3 All ER 135. As to the Spanish Civil War generally, see § 130, n 16, para 4.

Recognition of insurgency should be distinguished from the existence of an insurrection, or a state of insurrection, in the factual sense that there exists a violent civil uprising: see eg for use of the term in this latter sense, KMW International v Chase Manhattan Bank NA, cited in US Practice (1979), p 135. See also n 14 of this §.


26 Article 1.4. Article 96.3 provides that the authority representing the people in question may, by unilateral declaration to the depositary, secure the application of the Protocol to the conflict. Article 4 provides that the application of the Protocol does not affect the legal status of the parties to the conflict. Article 1.4 of Protocol I gave effect to the third of the 'basic principles' regarding the legal status of persons struggling against colonial and alien domination and racist regimes, proclaimed in GA Res 3103 (XXVIII) (1973). Other such principles affirmed the legitimacy and full accordance with the principles of international law of the struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence, and the incompatibility with the Chuter and certain other instruments of any attempt to suppress such struggles. See also Art 12 of the International Convention against the Taking of Hostages 1979 (AJ, 74 (1980), p 277); on which see Verwey, AJ, 75 (1981), pp 69–92, and Art 7.4 of the Convention on Restrictions on the Use of Certain Conventional Weapons 1980 (ILM, 19 (1980), p 1523).

To an extent therefore the acts of rebels may be assimilated to acts of unrecognised governments, as to the consequences of which see § 56. It is often maintained that so long as the position is one of insurgency as distinguished from belligerency, the lawful government is in principle responsible for damage to aliens occurring in the territory occupied by the insurgents. However, this must be understood in the light of the principles limiting the responsibility of the state for the acts of rioters and rebels in civil war: See § 167.
de jure government of the state, the rebel regime may be regarded (although possibly not by the existing government) as competent to perform local acts of administration, such as levying taxes and imposing customs duties, and may be regarded as entitled to exercise the powers of the de jure government in relation to contracts requiring performance in the territory under the control of the rebels. Representations may be made to them where the rights of third states and their nationals in the territory under rebel control are affected, and their acts in territories under their control may be regarded as acts for which the state may be held responsible even if the revolution is ultimately overthrown.

Rebels recognised only as insurgents but not as belligerents would seem to have no right as regards the shipping of 'neutral' states on the high seas, since for them to possess such rights as may be exercised by a belligerent in time of war would by definition make them cease to be insurgents and would involve recognition of belligerency. The rights of insurgents in territorial waters depend on the extent of their effective territorial control within the state. They would seem in principle to have the right to close ports under their control merely by an order to that effect without the need to impose a blockade; contrariwise, the parent government is not entitled to close by decree ports which insurgents control (as it is entitled to do in respect of ports under its own control) but must establish an effective blockade in order to do so, as must the insurgents if they wish to close ports under the control of the incumbent government (although establishing an effective blockade meeting the requirements of international law would transform the situation into one of belligerency rather than mere insurgency, certainly where the blockade affects neutral shipping on the high seas and possibly also where it does so merely in territorial waters).

§ 50 Implied recognition Recognition can be either express or implied. Express recognition takes place by a notification or declaration clearly announcing the intention of recognition, such as a note addressed to the state or government which has requested recognition. Implied recognition takes place through acts which, although not referring expressly to recognition, leave no doubt as to the intention to grant it. Implied recognition has taken on greater significance with the adoption by several states, including the United Kingdom, of a policy of no longer expressly recognising a new government, but instead leaving the answer to the question whether it qualifies to be treated as a government to be inferred from the nature of their dealings with it, and in particular whether those dealings are on a normal government-to-government basis.

As recognition is a matter of intention and as important legal consequences follow from the grant or refusal thereof, care must be taken not to imply

28 See the cases referred to at § 55, n 7, regarding the attitude of UK courts to acts of the rebellious regime in Southern Rhodesia. In cases arising out of the American Civil War, American courts accepted the validity of transactions executed within the rebel area of control and under rebel 'laws' if they were part of the routine administration of government and if they were not hostile to the lawful government in intent: see Texas v White (1868), 7 Wall 700, 733; Ford v Surget (1878) 97 US 594, 604; Bald v Hunter (1898) 171 US 388, 400. See to similar effect the decision of the Nigerian Supreme Court in relation to judicial proceedings in rebel areas during the rebellion and attempted secession of Biafra: Oguchi v Odowoke (1979), ILR, 70, p 17. See generally, McNair and Watts, Legal Effects of War (4th ed, 1966), pp 399-408.

29 Thus where insurgents in Mexico, and later in Nicaragua, were in effective control of territory and had exacted payment of certain taxes, the British and American governments respectively protected when the legitimate government later tried to exact payment of the same taxes: Moore, i, pp 49–51. As to the right of the unrecognised government in China to levy taxes on US nationals in China, see Whitemen, Digest, 2, pp 645–7. See also the Gaastini Case (1903), RIAM, 10, p 561; Santa Clara Estates Co Case (1903), ibid, 9, p 455; Bilang v Rigg (1971), ILR, 48, p 30. See E Lauterpacht, BPLI, 1965–6, pp 123–5.

30 Central and South American Telegraph Co v Chile (1894), Moore, International Arbitrations, p 2938.

31 As happened in the Spanish Civil War: see Walker, Grotius Society, 23 (1938), p 207. See also Whitemen, Digest, 2, pp 525, 530–31, 578–79 and 650–52, as to similar incidents in Cuba in 1958–59, Liberia in 1932, and China in 1954. See also E Lauterpacht in ICLQ, 6 (1957), p 507–8, in connection with a British protest to the unrecognised Chinese authorities in Formosa. In 1973 the British Foreign Secretary communicated with the rebel regime in Southern Rhodesia in connection with the trial there of Mr Nieuwend: Parliamentary Debates (Commons), vol 854, cols 934ff (9 April 1973). And see § 50, n 14.

32 See § 167.

33 The Ambrose Light (1885) 25 Fed 408. See also Kiss, Répertoire, 3, p 94. The question can arise whether maritime acts by rebels are to be regarded as piracy (see § 299ff) or whether because the rebels may properly be regarded as insurgents, their acts are free of the taint of piracy. The point received consideration in connection with the seizure at sea in 1961 of the Portuguese ship Santa Maria by persons out of sympathy with the regime in Portugal: see Green, BY, 37 (1961), pp 496–505; Fenwick, AJ, 56 (1961), pp 426–8; Goyard, RG, 66 (1962), pp 123–42.


35 For a detailed discussion see H Lauterpacht, BY, 21 (1944), pp 123–50, and Recognition in International Law (1947), ch XX; Meissner, Formen stillschweigen der Anerkennung im Völkerrecht (1966); Higgins, The Development of International Law through the Political Organs of the United Nations (1963), pp 140–44. Article 7 of the Montevideo Convention on Rights and Duties of States 1933, provides: 'The recognition of a State may be express or tacit. The latter results from any act which implies the intention of recognizing the new State.' (LNTS, 165, p 19).

36 On acts falling short of recognition see generally Hackworth, i, pp 327–64; Whitemen, Digest, 2, pp 524–604.

37 See § 54, n 3.
recognition from actions which, although amounting to a limited measure of intercourse, do not necessarily reveal an intention to recognise; nor is recognition de jure necessarily to be implied from actions which may be consistent only with fact recognition. In the absence of an unequivocal intention to the contrary, no recognition is implied in participation in an international conference in which the unrecognised authority takes part; in the conclusion of a multilateral treaty to which that authority is a party, or even of a bilateral agreement with that authority for limited purposes; in the retention (as distinguished from fresh appointment) of diplomatic representatives for an interim period; in the retention, replacing, and (probably) sending and reception of consuls; even if the latter is not accompanied by a request for or issue of an exequatur; in the fact and manner of communication with foreign authorities,  

4 See § 46.

5 In its instruction to the delegation of the USA to the Conference on the Supervision of the international trade in arms and ammunition the Department of State expressed in 1925 the view that the participation of the USA at a conference attended by delegates of the Soviet Government, at that time not recognised by the USA, would, in the matter of recognition, 'signify nothing': Hackworth, i, p 348. See also Whitehead, Digest, 2, pp 546–57. At the Geneva Conference of 1961–62 on the settlement of the Laotian question, the British Foreign Secretary, Lord Home, stated that neither the invitations to the Conference nor the holding of the Conference nor signature of the Declaration and Protocol resulting from it, should be deemed to imply diplomatic recognition in any case where it has not already been accorded: Cmd 1828, p 11. A similar statement was made regarding the Geneva Conference of 1954 on Indo-China: see § 40, n 54. In order to facilitate attendance at a conference by parties who do not recognise each other, various devices have been adopted. Thus at the Geneva Conference on Laos which began in 1954 representatives of the three competing groups in Laos were regarded as attending on behalf of the three political parties in Laos and not on behalf of any government of Laos (see Conference Record 91), while at the Geneva Conference on Laos after the fall of the Saigon government, the two German delegations sat at tables separate from the main conference table and had the status of advisers to the principal delegations (Whitehead, Digest, 2, pp 556–7).

6 Occasionally, a declaration is attached, ex abundante cautela, to the effect that participation in a multilateral treaty does not amount to recognition, or that the declarant state does not regard the unrecognised authority as a party to the treaty or as a beneficiary of rights under it. See eg the Declaration of the USA in signing the International Sanitary Convention of 21 June 1926 (Hudson, Legislation, iii, p 1975). For other instances see H Lauterpacht, BY, 21 (1944), p 126; and, as to the attitude of the British Government to participation in certain conventions by Byelorussia and the Ukraine (not recognised by the UK), UKMIL, BY, 49 (1978), pp 339–40. On other occasions no such declaration has been deemed necessary; see Hudson, AJ, 23 (1949), p 30. See also Hackworth, i, p 353; Whitman, Digest, 2, pp 53–56, 80, and 86–9, and AJ, 58 (1964), pp 171–5. For examples of texts adopted to avoid implications of recognition arising from participation in treaties see Blix and Emerson, The Treaty-Makers Handbook (1973), pp 267–9. See also § 40, n 58, as to Art 9 of the Act of the International Conference on Vietnam, Paris, 1973. It may sometimes be necessary to distinguish between a multilateral treaty which requires positive inter-governmental cooperation between the parties and one which does not, an express provision as to non-recognition being understood with the former in order to avoid any implication of recognition: see Whitman, Digest, 2, pp 563–5.

A state acting as the depositary of a treaty may circulate to other parties to the treaty documents or notifications received by it in its capacity as depositary from a regime not recognised by it, without implying recognition by it of that regime: see eg the communication by the Belgian Government in 1957 regarding the purported accession of the German Democratic Republic to the Universal Postal Union, and by the UK in 1958 regarding the German Democratic Republic's application of the International Load Line Convention: Whitman, Digest, 2, pp 57–9. See also ibid, pp 533, 561–2; and ICLQ, 7 (1958), p 93. In part to meet the difficulties which can arise in this matter the device of having more than one depositary has sometimes been adopted, thus avoiding the necessity for a depositary to receive communications from a regime which it does not recognise but which is recognised by one of the other depositaries: however, the resulting legal relationships are not without complication; see, as to the signature of the Nuclear Test Ban Treaty by the German Democratic Republic, the communiqué issued after discussions between the Foreign Ministers of the UK and Federal Republic of Germany: E Lauterpacht, Contemporary Practice of the UK (vol II, 1963), p 90. And see § 661, n 2.

7 See eg the Agreement between the British and Russian Governments of 12 February 1920, for the exchange of prisoners of war (LNTS, 1, p 264), notwithstanding which in November 1920 the Foreign Office stated, in connection with the proceedings in Luther v Sagor, that 'His Majesty's Government have never officially recognised the Soviet Government in any way': [1921] 1 KB 456. France concluded a similar agreement with the Soviet Union in 1920, but did not recognise the Soviet Government until 1924: see Kiss, Répertoire, 3, pp 81, 40–41. See also ibid, p 84, as to economic and cultural relations with an unrecognised regime. The conclusion of a bilateral payments agreement between France and the Democratic Republic of Vietnam in 1955, together with various other dealings between them, were not inconsistent with the latter's non-recognition by France: see Clerget v Banque Commerciale pour L'Europe du Nord (1969), ILR, 52, p 310. In 1955 the USA and Chinese Communist Governments made an 'agreed announcement' regarding the repatriation of each other's civilian nationals, the form of 'agreed announcement' being adopted in order to avoid implications of recognition: see Whitman, Digest, 2, pp 552–3, and Cohen, AS Proceedings (1972), pp 110–11. See similarly as to a Postal Agreement between the USA and the Vatican being regarded as having 'no political significance': Whitman, Digest, 2, pp 567–8. In 1968 the USA reached an agreement with the (unrecognised) North Korean authorities for the release of the crew of the vessel Pueblo which had been seized by those authorities; see § 155, n 12. As to treaty relations between the USA and the authorities in Formosa, the latter's non-recognition of them as the government of China had been withdrawn in 1979, see § 47, n 3.

Armistice agreements signed between Israel and various Arab states have not precluded the latter from continuing to withhold recognition of Israel as a state. As to agreements concluded between the two states in Germany, see § 40, n 31, and particularly Re Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic 1972 (1973), ILR, 78, pp 150, 165–6. See generally on treaty relations notwithstanding non-recognition, Bot, Non-recognition and Treaty Relations (1968), and Lachs, BY, 35 (1959), pp 252–6.

Most states in case of a revolutionary change of government in a foreign country instruct their diplomatic representatives to remain at their posts and to maintain necessary (and usually unofficial) contacts with the new regime without, however, officially recognising it as a government. Continuation of official diplomatic dealings with the new authority is often an informal and unobtrusive way of signifying that recognition has been granted. See Whitman, Digest, 2, p 398, as to the circumstances relating to the withdrawal of the person appointed as US Ambassador to Hungary in 1956 who had resisted presenting his credentials to the Hungarian regime which had been established with outside support after the Hungarian uprising in 1956. In 1962 the Republican Government of the Yemen required the British Legation in Taiz to be closed as the UK had not recognised that government: BPIL (1963–1), pp 5–9. As to the position where the Dean of the Diplomatic Corps is the ambassador of a state which does not recognise or is not recognised by another state with an ambassador in the same capital, see Whitman, Digest, 2, pp 525–6. In relation to Afghanistan the UK, which did not recognise the puppet government of that state after 1979, withdrew its ambassador at that time, but left a Chargé d'Affaires, which continues to have the status of an accredited ambassador in Kabul. While the latter is not a consul, administrative and technical matters (UKMIL, BY, 52 (1981), pp 376–7, and BY, 53 (1982), p 356), but not on political matters (UKMIL, BY, 57 (1986), p 508).

8 See also n 19. For a survey of earlier British and American practice see a Foreign Office Memorandum 873, printed in Smith, i, pp 251–7; also Hall, §§ 26, 105. For the practice of the USA, see Moore, §§ 30, 72, and w, §§ 689; Hackworth, iv, pp 684ff; and Whitman, Digest, 2, pp 62–3, 584–90. See also Hare Research, Consuls (1932), Art 6, pp 238–41; Kiss, Répertoire, 3, pp 77–8, 105; and Zorek, HAG R, 106 (1962), ii, pp 488–90.

In the opinion of the Advisory Committee of the Assembly of the League of Nations set up in connection with the non-recognition of Manchukuo, the replacing of consuls did not imply
reconciliation: OfJ, Special Suppl No 113, p 3. In connection with the maintenance of consular relations with the illegal regime in Southern Rhodesia during the early stages of that country's rebellion, it was asserted on behalf of the British Government that 'the maintenance of consular relations in no way implies recognition', it being pointed out that the UK maintained consular missions to regimes which the UK did not recognise. Parliamentary Debates (Commons), vol 797, cols 532-3 (29 March 1970). See also § 56, n 16. Thus the UK had consular missions in Formosa and in North Vietnam at a time when the UK did not recognise either as a state or the authorities there as a government: see Formosa and in North Vietnam at a time when the UK did not recognise either as a state or the authorities there as a government; as to Formosa see BPIJ, 1964-4-1965, pp 123-5. Spain maintained a Consulate-General in Israel while not at the time recognising Israel: Rosell v Consul-General of Spain in Spain, 24 (1957), p 532; see also Note at p 535. India appointed consuls in Saigon and Hanoi, but continued to refuse recognition of both South and North Vietnam: Misra, AJ, 55 (1961), p 420. For a consideration of some problems which can arise in cases of consular missions to unrecognised regimes, see Lee, BY, 32 (1955-56), pp 295-300; Briggs, AJ, 44 (1950), pp 243-59. There may, however, be a specific obligation not to continue consular relations with, or an obligation to cease such relations with, a regime which has been incorporated into the Soviet Union: US v USSR, 1956, p 514-15. In particular, Whiteman, Digest, 2, pp 63-4, 578. As to dealings by the UK with the Free French authorities prior to their recognition in 1944 see ibid, pp 371-6. See also the Note addressed by the UK to the US in the course of the conflict between Russia and China, persons: see Aetna Casualty and Surety Co v International Compensation Co, ILR, p 140-41. Recognition of some which can include direct negotiations with them, the establishment of representative offices with something less than full diplomatic character, and even the exchange of visits of high ranking persons; in the maintenance of protests against an authority's actions affecting interests of the protesting state; having recognised the State of Palestine: Parliamentary Debates (Commons), vol 146, col 436 (written answers, 3 February 1989). A state may also reflect its intention not to imply recognition by limiting informal contacts to its officials, rather than allowing them to involve ministers, although this is often more a matter of political emphasis than a strict legal requirement.

15 Eg the series of Sino-American meetings in Geneva in 1954 and subsequently, which were not regarded as implying American recognition of the Communist regime in China; Whiteman, Digest, 2, pp 50-1, 205-50. Similarly in the talks with Paris in 1970-72 between the USA, the Republic of Vietnam, the Democratic Republic of Vietnam and the Provisional Government of South Vietnam, which led to the Paris Agreement on the restoration of peace in Vietnam: see § 40, nn 57, 58. For Germany, see the matter of the presence of the Pope which is not necessarily mean that that body is being treated as a government: governments may and did deal with private persons: see Pan American World Airways Inc v Argentina Casualty and Surety Co, ILR, 13 (1974), pp 1376, 1397.

16 As to the dealings by the USA with Lebanon and Syria prior to the grant of recognition, including the appointment of a 'Diplomatic Agent', see Whiteman, Digest, 2, pp 191-5, 569-70. As to contacts between the unrecognised Algerian rebel authorities — the FLN — and other states after 1954, in the course of FLN offices in certain countries (notably Lebanon and Syria in the USA), see Fralfitch in International Law of Civil War (ed Falk, 1971), pp 208-13. France, while not recognising the Democratic Republic of Vietnam, permitted the establishment by it of a 'Commercial Representation' in Paris in 1958, which became a 'Delegation General' in 1966, and which granted certain privileges and facilities: see Clerge v Représentation commerciale de la République démocratique de Vietnam, Clunet, 95 (1968) p 55; 1967 MLR, p 310. See similarly, as regards the: Delegation General of the Democratic Republic of Vietnam in Korea, RG, 89 (1985), pp 418-19 and AFDL, 32 (1986), p 1020. In 1973, when the USA did not recognise the Government of the People's Republic of China, the two countries announced the establishment of liaison offices in each other's capitals: for the status of the Chinese Liaison Office in Washington, see AJ, 68 (1974), p 507.

17 As to visits of state and government leaders between India and the Democratic Republic of Vietnam (which India continued not to recognise), see Misra, AJ, 55 (1961), pp 420-21. In 1972 President Nixon made an official visit to the People's Republic of China for talks with government leaders, at a time when recognition of China was not being by the USA: for the joint communiqué issued at the end of the visit see ILM, 11 (1972), p 443. The President's special adviser, Dr Kissinger, subsequently visited both Peking (see ILM, 13 (1974), p 431 and Hanoi, while still without US recognition of those regimes being implied. But cf n 10, as to consequences foreseen if the President of the USA visited the Pope. See § 40, n 12 and § 55, n 51, as to the visit of President Sadat of Egypt to Israel in November 1977, and, as to the audience given to the leader of the PLO by the Pope, see RG, 87 (1983), p 450.
ence of contact with the insurgents in a civil war and conducting negotiations with them; or in admission, so far as states opposed to such admission are concerned, to an international organisation such as the United Nations.

Legitimate occasions for implying recognition of states or governments are:

(a) the conclusion of a bilateral treaty, such as a treaty of commerce and navigation, regulating comprehensively the relations between the two states;
(b) the formal initiation of diplomatic relations; (c) probably, the issue of a consular euxequator; (d) in the case of recognition of belligerency, a proclamation

15 See § 49, n 13, and § 49, n 31. In connection with the Treaty case Earl Russell insisted on the right of neutral states to receive from unrecognised governments special agents not possessing diplomatic character for the purpose of protecting British subjects: US Diplomatic Correspondence (1862), vol 1, pp 575. A similar request was made by Jefferson for the purpose of ‘reforming the unfriendly restrictions on our commerce and navigation’: Moore, p 120. As to dealings between the UK and Soviet rebels in 1919, see Luther & Sagar (1921) 1 KB 456, 477. In 1937, during the Spanish Civil War, Great Britain sent to and received from the insurgents, at that time not recognised as a government, agents for the protection of commercial and financial interests. The British Foreign Secretary stated on 8 November 1937, that ‘the reception of such an agent in London will not in any way constitute recognition by His Majesty’s Government of the authorities of the territories under the control of General Franco’; Parliamentary Debates (Commons), vol 328, col 1386 (1937–38).

As to the position of the USA in the matter see Whitman, Digest, 2, pp 571–7. In 1984 British officials held meetings with UNITA rebel forces in Angola, who were holding captive some British nationals: UKMIL, BY, 55 (1984), p 421.

16 See n 21, and § 53, n 4 and 9. Thus the UK does not recognise as separate states any of the constituent states of the USSR, notwithstanding their separate membership of the UN (see Parliamentary Debates (Commons), vol 94, cols 340–41 (written answers, 24 March 1986)) and the UK’s separate membership of the Security Council (ibid, vol 57, col 301, 8 July 1984); see also UKMIL, BY, 49 (1978), p 339–40. The establishment or maintenance of a mission to an international organisation, or the sending of a delegation to a meeting of an organisation, do not of themselves imply recognition by the sending state of the host state or its government, or vice versa: Convention on the Representation of States in their Relations with International Organisations of a Universal Character 1975, Art 82 (2 UN) 1975, p 72; and see the ILC’s commentary on draft Art 79 for this Convention, which became Art 82, YBILC (1971), ii, pt 1, pp 320–32. Note also n 12 of the UN Headquarters Agreement with the USA: UNTS, 11, p 31; GA Res 169 (11) (1957).

17 Thus, for instance, France recognised the independence of the USA by concluding with it a Treaty of Amity and Commerce in 1778. This mode of receiving a seceding community has often been adopted in order to spare the susceptibilities of the parent state. For an interesting despatch by Canning on the subject, written in 1826, see Britain and the Independence of Latin-America, edited by Webster (vol i, 1938), p 291. As to the special circumstances of the ‘General Relations Treaty’ of 1972 between the Federal Republic of Germany and the Democratic Republic of Germany, see § 42, n 31. As to the treaty of commerce signed in 1928 between the USA and China, Whitman, Digest, 3, p 50.

18 The sending of a telegram from the foreign minister of one state to that of another state proposing the opening of talk about the establishment of diplomatic relations may constitute recognition of the latter state: Parliamentary Debates (London), vol 338, col 961 (6 February 1973). In Macmillan & Ruckebuck, ii, 52 (1941), p 52, it was held that ‘the ground that a nation was entitled to recognition of independence ... as a matter of right, and it was not justifiable to put conditions on such a recognition simply to serve some political purpose’. See Graham, The Diplomatic Recognition of Border States (pt I, Finland, 1936), p 142.

19 See Hackworth, p 192, who points out that, since 1906, the USA have not accepted conditional recognition to any state. The same applies to the period prior to 1906.

The second World War the recognition by the major Allied Powers of governments of states liberated from German occupation was in several cases made dependent upon prior satisfaction by them of certain conditions (mostly directed to ensuring the democratic and
a condition in the accepted legal sense of the term, and failure on the part of the recognised authority to fulfil them would not justify or make legally possible the withdrawal of recognition.

§ 52 Withdrawal of recognition

The qualifications for recognition — that a foreign community or authority is in possession of the necessary qualifications of statehood, of governmental capacity, or of belligerency — are not necessarily enduring for all time. A state may lose its independence; a government may cease to be effective; a belligerent party in a civil war may be defeated. In all these cases recognition of the former state of affairs ceases to be appropriate and will usually be withdrawn or discontinued. Withdrawal of recognition is sometimes accomplished by means of an express notification to the authority from which it is withdrawn, or by express public statement. As a rule, however, it takes place by the recognition de jure of the rival government which has succeeded in establishing itself, or of the sovereignty of the state which has annexed the territory. Thus, in 1924 the United Kingdom withdrew its recognition of Abyssinia as an independent state by recognition de jure of the annexation of that country by Italy; and in 1939 withdrew recognition from what had been hitherto the de jure Government of Spain by recognising the revolutionary government, hitherto recognised de facto, as the de jure Government of the whole of Spain.

In view of the far-reaching consequences of withdrawal of recognition it must be noted: (a) that such effect can be attributed only to the de jure, and not to the de facto recognition of the new authority replacing the state or government from which recognition is being withdrawn, and (b) that it is not permissible to infer withdrawal of recognition from acts other than those which unequivocally express the intention of the state in question — in particular, severance of diplomatic relations does not result in withdrawal of recognition.

§ 53 Recognition and participation in the United Nations

Among the requirements of Article 4 of the Charter for admission to membership of the United Nations is that the new member be a 'state'. Although there is no formal requirement that an existing member must have recognised a new member if it is to vote for its admission, in practice a favourable vote is not cast in the absence of recognition already accorded or imminent. A decision to admit a new member to the United Nations represents the attitudes of the individual member states towards the new community and does not involve a collective act of the new member as a state by a central organ of the international community. Admission to the United Nations secures a new member a place in

1 See Toynebee, Surrey (1938), p 158–63. See also Hulse Selasie v Cable and Wireless Ltd (No 2) [1939] Ch 182; and Aziz Kabbeda Tesema v Italian Government, decided in 1940 by the Palestine Supreme Court, which received official information that the British recognition of the Italian conquest of Ethiopia had been withdrawn: AD 9 (1938–40), No 36. See also § 55, n 34.

2 Thus the British Government's acknowledgement that Latvia had ceased de facto to exist did not entail the consequence that it had also ceased to exist did not entail the consequence that it had also ceased to exist.

3 See, eg a statement to that effect by the US State Department, in connection with US–Cuban relations (AJ, 57 (1963), pp 409–10); and P & E Shipping Corp v Banco Para el Comercio Exterior de Cuba (1964), ILR, 35, p 52.


6 See in § 17 for the view that a resolution of the General Assembly asserting the status of a state or government under international law constitutes (if supported by most members of the UN) general recognition by the concurrence members objectively establishing the fact under customary international law, see Wright, AS Proceedings (1954), at pp 32–4.
the general international community despite possible continued non-recognition by certain states, since state practice accepts that, even though all existing member states assume rights and obligations in respect of a new member state, admission of a new member is consistent with continued non-recognition of it by some existing members; thus several Arab states are members of international organisations together with Israel which they do not recognise as a state.

Once a state is a member of the United Nations, the separate question may arise whether a particular government is entitled to appoint representatives to act for the state. There is usually no serious problem where only one regime asserts itself as the government of the state, as where a coup d'etat is quickly successful and the former regime is overthrown: the new government's representatives will usually take their places without serious questioning, even if some member states have not yet recognised it. Problems are, however, particularly likely where, as a result of civil war or some other revolutionary change, two or more authorities are in existence and power is divided as between the two governments. There is usually no serious question as to the absence of any implication of recognition where only one regime asserts itself as the government of the state, and thus entitled to appoint representatives. In such cases, even though acceptance of a representative does not necessarily imply recognition of the appointing government, the attitudes of existing members will to a considerable extent be determined by which of the competing authorities they recognise as the government of the state. Principle would suggest that a purely nominal authority, albeit continuing to be recognised as a government by a number—or majority—of the member states, is not entitled to represent the state in question. On the other hand, although a revolutionary change of government is not normally the proper occasion for reviewing the qualifications of active membership of a state, there is no obvious abuse of power involved in a member state withholding its assent to a change in the representation of a state whereby it would be represented by a government whose conduct is considered such as would disqualify its state from membership if the case were one of admission of a new state.

The General Assembly was confronted with such a situation in and after 1950, when the Government of the People's Republic of China obtained effective control over the entire Chinese territory (with the exception of the Island of Formosa whose territorial status was doubtful) and claimed to represent the State of China in the United Nations. At that time that government was recognised by a minority of the members of the United Nations. The General Assembly of the United Nations passed a resolution on the matter, with the formal withdrawal in 1950 stating that in cases of that description 'the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case'. The resolution also stated that the attitude adopted by the Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialised agencies; and that the attitude of the Assembly on the question does not affect the direct relations of individual member states with the state concerned. The representatives of the Government of the People's Republic of China eventually occupied the Chinese seat in the United Nations, and the representatives of the Nationalist Government ceased to do so, in 1971.

Rival claims to governmental authority, and associated questions of recognition, will often affect acceptance of the credentials of those seeking to represent

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7 As to the status of Formosa (or, Taiwan), see § 44, n. 5.

9 In the course of this study the Secretariat in 1950 prepared a memorandum (Doc S/1466) suggesting that the question of representation should not be linked with that of recognition; that what mattered primarily was which of the two governments was in a position to employ the resources and direct the people of the state in fulfillment of the obligations of membership—i.e., in essence, whether the new government exercised effective authority within the territory of the state and was habitually obeyed by the bulk of the population—and that it was appropriate for UN organs, through their collective action, to accord that government the right to represent the state, even though individual member states might continue not to recognise it as the lawful government for reasons valid under their national policies. The Secretariat was able to conclude that 'the members have therefore made clear by an unbroken practice that: (1) a Member should properly vote to accept the representative of a government which it did not recognise, or with which it had no diplomatic relations, and (2) such a vote did not imply recognition or a readiness to assume diplomatic relations'. Practice since then has confirmed this conclusion.


Assembly. A representative to whose credentials objection is made nevertheless seated provisionally with the same rights as other representatives until the organ in which he takes his seat has reached a decision on the matter.

In none of the matters discussed above is a state or government recognised by the United Nations, as distinct from the member states. Formally, and in the sense that recognition by the United Nations would take the place of recognition by individual states, such action is not possible. The position is as recorded by the UN Secretary-General in 1950:

'The United Nations does not possess any authority to recognise either a new State or a new government of an existing State. To establish the rule of collective recognition by the United Nations would require either an amendment of the Charter or a treaty to which all members would adhere.'

Thus a decision by the General Assembly that a community is a state or a certain body is its government is essentially a statement that a sufficient number of existing members are of that view to secure the adoption of a resolution in that sense. A state which did not form part of that majority may in the conduct of its international relations continue not to recognise the new community. However, for the internal purposes of the United Nations (and in some cases other bodies within the United Nations system), such a decision of a United Nations organ may in a true sense be regarded as an act of the organ rather than of the individual states, taking effect even for those states which dissented from it. Thus decisions of the Security Council and General Assembly admitting a new state to membership are collective acts of those organs, effective throughout the organisation. The General Assembly’s approval in 1948 of the Government of the Republic of Korea, and its decision in 1971 ‘to recognise the representatives of the People’s Republic of China as the only legitimate representatives of

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13 See Higgins, The Development of International Law through the Political Organs of the United Nations (1963), pp 159–64, as to the credentials of the representative of Iraq in 1958, of the Yemen in 1962, and of Congo (Leopoldville) in 1960; Dorfman, Hasey, Schmidt and Weil, Harv Int’l L J, 15 (1974), pp 495–513, as to the rival claims to represent Cambodia in the UN in 1973; and Ciobanu, ICLQ, 25 (1976), pp 351–81; Bailey, The Procedure of the UN Security Council (2nd ed, 1988), pp 146–50. The British representative at a meeting of the UN Trusteeship Council in 1962 when approving the Report on Credentials, said that the Report was ‘approved solely on the ground that the credentials concerned were considered as documents in order, and approval should not necessarily be considered as implying recognition of the authorities by whom the credentials had been issued’: E Lauterpacht, Contemporary Practice of the UK (1962–II), p 154. This view has been taken on many subsequent occasions: see eg UKMIL BY, 50 (1979), p 298; 51 (1980), pp 368, 370, 372 (1981), pp 377, 379; and 54 (1983), p 383. The approval of credentials by the General Assembly is not an ‘important question’ for purposes of Art 18 of the Charter, and so requires a simple majority vote; but the Assembly may decide otherwise, as it did in 1961 in respect of Chinese representation: GA Res 1668 (XVI). In the Security Council the approval or credentials is normally a ‘procedural question’ for the purposes of Art 27 of the Charter, requiring an affirmative vote of any nine members out of 15: GA Res 267 (III) (1949).

14 Similar problems have arisen over the representation of Kampuchea (where the former, and generally recognised, government of General Lon Nol was overthrown in 1975 by the Khmer Rouge regime under Pol Pot, which gained control of Kampuchea, only in turn to be overthrown in 1979 by the Popular Liberation Front regime under Heng Samrin, with the support of the Vietnamese army): see UN Juridical YB, 1979, pp 166–8; and Warbrick, ICLQ, 30 (1981), pp 214–47. See generally on the situation of Kampuchea, Isaran, RG, 87 (1983), pp 42–104.

Where credentials are issued by competing authorities within a state, other states, in deciding their attitude, will be guided by their views of the competing authorities as the government of the state in question, even though the final outcome may still be regarded as not implying recognition of the authority whose credentials are accepted. Following the landing of US forces in Panama in December 1989 (see § 130, n 14, para 4) the Security Council invited Panama to participate in its proceedings, and had to consider the question of the credentials of the competing Panamanian representatives (those of the ousted Noriega regime, and of the incoming Endara administration). In the event no decision was necessary, as the rival representatives withdrew their requests to speak. When the debate was taken up in the General Assembly a few days later, only the representative of the Endara administration sought to speak: his credentials were not challenged.


17 UN Doc S/1466.

18 The events connected with the independence of Guinea-Bissau may illustrate this. The local independence movement in that territory declared its independence from Portugal in September 1973, without Portugal’s consent. Many states, but not including Portugal, soon recognised Guinea-Bissau as an independent state. In November 1973 GA Res 3061 (XXVIII) welcomed ‘the recent accession to independence of the people of Guinea-Bissau, thereby creating the sovereign State of the Republic of Guinea-Bissau’, and in GA Res 3067 (XXVIII) Guinea-Bissau was invited to participate in the Law of the Sea Conference. In August 1974 Portugal and Guinea-Bissau concluded an agreement which provided that ‘the de jure recognition of the Republic of Guinea-Bissau, as a sovereign nation, by the Portuguese State, will take place on September 10 1974’: ILM 13 (1974), p 1244. In September Guinea-Bissau became a member of the United Nations: GA Res 3205 (XXIX). For comment see Bryant, Morrison, Schuck and Seler, Harv Int’l L J, 15 (1974), pp 482–93. For the view of the UK (shared by other states) that at the time GA Res 3061 was adopted Guinea-Bissau did not satisfy the normal objective criteria for recognition of a state and that Portugal continued to have sovereignty over the territory, see Cmd 5568, pp 16 and 57.

19 GA Res 195 (III): see § 40, n 16.

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China to the United Nations,20 may be regarded in the same way, as may decisions associated with the grant of observer status to certain national liberation movements.21

More ambiguous are some decisions of the Security Council inviting communities whose statehood is in doubt to participate in its discussions. Article 32 of the Charter allows the participation, on invitation, of "any State which is not a member of the United Nations": invitations in particular cases may be regarded as acceptance by the Security Council of the statehood of the communities in question, or as a flexible interpretation of the term 'State' for purposes of Article 32 in the interests of an overriding concern for the peaceful settlement of disputes. Thus the invitation in 1947 to Indonesia to participate in Security Council discussions, despite reservations by many members of the Security Council as to Indonesia's independent statehood, is probably better regarded as not involving any recognition by the Security Council of Indonesia as a state.22

There may be advantage in the context of decisions by United Nations' organs in avoiding the word 'recognition', the usual connotations of which are inappropriate for such actions.

Member states do not participate in certain decisions by the Secretariat of the United Nations whether a body is to be treated as a state or government. Such decisions arise notably in connection with the Secretary-General's functions in registering treaties,23 in acting as a depositary of a treaty, in issuing invitations to conferences pursuant to resolutions of the General Assembly, and also in deciding whether a communication is to be brought to the attention of the Security Council as emanating from a 'State'. The Secretary-General, in taking action in these matters, for example in deciding upon the exercise of his functions in applying an 'all states' formula in relation to an entity whose status is unclear, does not regard it as within his competence to determine whether or not an entity is a state and instead relies on guidance from the General Assembly.24 The Secretary-General also has a certain discretion in accepting the establishment of a permanent observer office to the United Nations by an authority which is not a member of the organisation: while such offices have been established by states which have not been generally recognised they have not been permitted in the case of a 'government' which is actively contending for power within a state against the established government,25 nor in the case of a seceding part of a state which has not yet established the permanence of its secession.

§ 54 The principle of non-recognition Recognition will not, of course, be granted to a state or government which does not meet the requirements for recognition. Even where those requirements are satisfied, states may nevertheless not grant recognition; for example, when the non-recognising state regards the grant of recognition as entirely a matter of policy, or where to grant it would be inconsistent with particular international obligations binding upon the non-recognising state.26 Recognition may also be withheld where a new situation originates in an act which is contrary to general international law. The principle ex immis tas non

20 GA Res 2758 (XXVI); see n 11. The following view was expressed by the Legal Service of the UN Secretariat: 'The conclusion cannot therefore be escaped that a decision on recognition of a Government was taken when General Assembly resolution 2758 (XXVI) was adopted and it is irrelevant that, in their bilateral relationships, some member States may take a different stand. By that resolution, the General Assembly determined for its own purposes that the Government of the People's Republic of China was the only legitimate Government of China and that the authorities on Taiwan had no lawful claim to that Government': UN Juridical YB (1972), p 155. See also UN Juridical YB (1974), p 158, for the conclusion that General Assembly resolutions inviting the Democratic Republic of Vietnam to certain international conferences were 'unequivocal indications' that the Assembly considered the DRV to be a state.

21 See § 49, n 7.


23 In 1955 the Secretariat issued a statement to the effect that in relation to the registration of an instrument submitted by an unrecognised regime the registration does not imply a judgment on the nature of the instrument or the status of the party concerned, and does not confer on the instrument or the party a status which it does not already have: UN Repertoire, Suppl No 1, 2 pp 400–3. See generally § 663.


25 Thus both North and South Korea have such offices in New York: see § 40, n 16. But in 1973 the 'Provisional Government of South Vietnam' was unable to realise its intention of establishing a liaison office to the UN. As to the Palestine Liberation Organisation, see § 49, n 9.


27 See § 49, n 11.

28 See eg §§ 38, n 5.
internationally

Illegality of recognition

The development from such a unilateral declaration of policy to an inter-
national legal obligation to withhold recognition of illegal conduct has been
hesitant and incomplete. States do not in practice acknowledge any general
obligation under international law permanently to withhold recognition of
illegal acts or their consequences. They more usually act on the view that, while
they may refrain from recognising the consequences of illegal conduct, the

oritur is well established in international law, and according to acts which are
counter to international law cannot become a source of legal rights for a
wrongdoer. Furthermore, where a situation is found to be illegal, states for
whom that finding is binding have an obligation to bring that illegal situation
to an end. There is, however, no settled view how far as a matter of international
law the unlawful act is to be regarded as null and void, or as voidable, or as merely
giving rise to a claim by an injured state for redress.

The recognition of an illegal act or situation will tend to perpetuate it and
be of benefit to the state which has acted illegally. A policy of non-recognition
would avoid such consequences; and states have on occasion expressly declared
their intention not in the future to validate by an act of recognition the fruits of
illegal conduct. Thus when in 1931 Japan invaded the Chinese Province of
Manchuria, and there purported to establish a separate State of Manchukuo, Mr
Stimson, United States Secretary of State, informed both Japan and China on 7
January 1932, that the United States 'cannot admit the legality of any situation de facto nor does it intend to recognise any treaty or agreement entered into between these Governments or agents thereof which may impair the treaty rights of the United States . . . and that it does not intend to recognise any situation, treaty or agreement which may be brought about by means contrary to international law and more generally prohibiting recourse to the use or threat of armed force against another state. At least where the illegality of a situation derives from a
violation of such rules, states are readier to accept an obligation of non-
recognition, although still probably less as a matter of general international
law than within the framework of particular treaty commitments. Thus in 1932 the
Special Assembly of the League of Nations adopted a resolution declaring that 'it is
incumbent upon the Members of the League of Nations not to recognise any
situation, treaty or agreement which may be brought about by means contrary to
the Covenant of the League of Nations or to the Pact of Paris.' So far as
members of the League were concerned, the obligation implied in that resolution
must be regarded as declaratory of the obligations of Article 10 of the Covenant
that members of the League agreed to guarantee the existing territorial
integrity and political independence of other members of the League.8

7 As to obligations arising under the UN Charter in relation to Southern Rhodesia and Namibia see, respectively, § 55, n 8 and § 55, n 65ff.

8 See eg the recognition in 1920 of the sovereignty of Norway over the Spitsbergen: TS No 18 (1924); the recognition in 1920 of Roumanian sovereignty over Bessarabia: Herzfeld's Commercial Treaties, xxiv, p 1024; the recognition in 1929 by the Vatican City of the existing territory of the Kingdom of Italy: see § 101; the recognition by Papua New Guinea and Australia, by Art 2 of their treaty of 18 December 1978, of sovereignty over certain islands: ILM, 18 (1979), p 291; and see the Legal Status of Eastern Greenland Case (1933) for an account of the Danish efforts to secure formal recognition of her sovereignty over Greenland: PCIJ Series A/B, No 53. For
consideration of treaties as evidence of acceptance of territorial sovereignty see the Western Sahara Case, ICJ Rep, 1975, pp 49-56.

9 See the Exchange of Notes of 18 and 19 November 1930, between the UK and Norway in which the former recognised Norwegian sovereignty over Jan Mayen Island. As the UK had no information concerning the reasons for the Danish Decree extending Danish sovereignty over the island in question, the British recognition was expressed to be 'independently of and with all due reserves in regard to the actual grounds on which the annexation may be based.' TS, No 14 (1931). See also § 256, n 3, para 4, on the recognition by Norway in 1930 of British (Canadian)
sovereignty over Sverdlov Island.

10 Off J, Special Suppl (1932), No 101, p 8; Documents (1932), p 284. See to the same effect the communication of 16 February 1932, of the President of the Council to the Japanese representatives: Off J (1932), p 383. The Resolution of the Assembly of 11 March 1932, was general in
character and not limited to the particular dispute then before the Council.

There was a disposition to question the binding character of this, as indeed of any other
resolution of the Assembly: see BY, 16 (1935), pp 157-60.

11 In fact in the resolution of the Council of the League of 16 February 1932 (see n 11), the
obligation of non-recognition is described as following from the terms of Art 10.

On the non-recognition of Manchukuo, see Toyebee, Survey (1932), pp 452-69; Ling, La
On 10 October 1933, a considerable number of American states, including the United States, signed an Anti-War Pact of Non-Aggression and Conciliation in which they undertook not to recognise territorial arrangements not obtained through pacific means or ‘the validity of an occupation or acquisition of territory brought about by armed force’. A number of European states subsequently adhered to that Convention. In 1938 the Conference of American States adopted at Lima an emphatic resolution on non-recognition of acquisition of territory by force. The Bogotá Charter of the Organisation of American States of 30 April 1948, provides that ‘no territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognised’. The illegality of resort to the threat or use of force against the territorial integrity or political independence of any state is now firmly established by Article 2 of the Charter of the United Nations and now has the character of ius cogens. The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States, adopted by the General Assembly in 1970, stated that no territorial acquisition resulting from the threat or use of force shall be recognised as legal. The General Assembly and Security Council have, in relation to a number of particular situations, passed resolutions to similar effect.

§ 55 State practice and non-recognition State practice since the 1930s has not been uniform regarding non-recognition of the consequences of illegal acts (not all of which have involved the illegal use of force). Although non-recognition has been accepted as appropriate, it has not been inevitable, particularly if the illegal act appears in practice to have become irreversible. The principles ex iniuria ius non oritur et ex facto ius oritur conflict; the former plays an essential part, but, in an international community with weak enforcement procedures, there has been little practical alternative to allowing the latter to prevail in the long term.

1 See also § 386, nn 11–13, as to non-recognition of nationality purportedly conferred in circum­stances contrary to international law, including unlawful annexations of territories of states: § 113, no treatment accorded to foreign legislation generally which is contrary to international law: § 641 as to Art 52 of the Vienna Convention on the Law of Treaties, providing for a treaty to be void if its conclusion has been procured by the threat or use of force; and § 268 as to prescriptive title to territory originally acquired unlawfully.

2 The purported establishment of the State of Manchukuo by Japan in 1931 has already been mentioned at § 54, n. 12.

3 See generally, Marek, Identity and Continuity of States in Public International Law (1954), pp 283–300. See also § 59, n. 7. As to the puppet state of Croatia set up by Germany in the territory of Yugoslavia while it was under belligerent occupation during the Second World War see Re Dues for Reply Coupons Issued in Croatia, ILR, 23 (1956), p 591.

4 See eg statement by the British Prime Minister in Parliament on 20 March 1939: Parliamentary Debates (Commons), vol 345, col 887.

5 Thus the UK gave de facto recognition to the Government of Slovakia in May 1939 (Parliamentary Debates (Commons), vol 347, col 964), and gave de facto recognition to the position in Bohemia and Moravia in June 1939 (ibid, vol 348, col 786). As to the position of Australia, see Anglo-Czechoslovak & Prague Credit Bank v Jansen, AD, 12 (1943–45), No 11; and as to France see Kiss, Répertoire, 3, p 106, and Jellinek v Loréy (1940), RG, 51 (1947), p 250; and as to the USA, see Whitman, Digests, 2, pp 346–52. See also AJ, 33 (1939), pp 570, 761; AJ, 34 (1940), p 133; Re Larwain’s Claim, ILR, 22 (1955), p 152; and Slovak National Internment Case (1970), ILR, 70, p 691.

6 The incorporation of the ‘protectorates’ of Bohemia and Moravia into Germany was accom­panied by legislation conferring German nationality on ‘ethnic Germans’ in those territories. Courts have reached differing conclusions about the effects of the nationality so conferred. See eg Slawzik Minority in Teschen (Nationality) Case (1940), AD, 11 (1919–41), No 9; German Nationality (Annexation of Czechoslovakia) Case, ILR, 19 (1952), No 66; Ch.-Hofmeister v SA Gebel et al (1959), ILR, 47, p 51; See also Land Registry of Waldsassen v The Towns of Egger (Cheb) and Waldsassen (1965), ILR, 44, pp 50, 57ff.

7 Southern Rhodesia was a self-governing colony under a constitution granted in 1961. It pur­ported unilaterally to declare itself an independent state with a new constitution; and adopted a further, republican, constitution in 1970. The UK, by the Southern Rhodesia Act 1965 and Orders in Council made thereunder, declared illegal the new constitution introduced by the rebel regime and took other steps to impose its legal authority over Southern Rhodesia. See also
day adopted a resolution calling on 'all States not to recognise this illegal racist minority regime', ten days later the Council recorded that it regarded the declaration of independence as having no legal validity, and repeated its call on all States not to recognise the illegal regime. In 1970 the Council decided that

Parliamentary Debates (Lords), vol 336, col 343 (8 November 1972). However, the rebel regime remained in administrative and executive control of the country; none of the British legislation was enforced within Rhodesia. Courts there held the rebel regime to be, at first, a de facto government of Rhodesia, and later the de jure government, with powers of legislation and administration accordingly: Madzamumbo v. Lardner-Barbe (1966–68), ILR, 59, p. 237; Ndebele (1968), ILR, 53, p. 50. So far as the British Government was concerned, the illegal regime was not regarded as the government of the territory in any capacity, de jure or de facto, and the government of the territory was the government provided for in the 1961 Constitution as modified from time to time, although it was accepted that in practice much of it was rendered inoperative: Parliamentary Debates (Commons), vol 953, col 510 (written answers, 11 July 1978). Courts in the UK have regarded the rebel authorities as an unlawful regime, and its legislative and administrative acts to be without legal effect: Madzamumbo v Lardner-Barbe [1969] AC 645; Adams v Adams [1970] WLR 914; Re James [1977] 1 All ER 364. However, the UK's continued constitutional responsibility for Southern Rhodesia was not such as to make the Crown in right of the UK liable in respect of a plaintiff's unlawful arrest and detention by the illegal regime in that country: Mutasa v Attorney-General [1979] 3 ALL ER 257. By the Southern Rhodesia (Marriages, Matrimonial Causes and Adoptions) Order 1972 certain acts performed in Rhodesia were declared not to be regarded as unlawfully performed solely because they were performed pursuant to, or by persons appointed under, the unlawful constitution: SI 1972 No. 1718. Cf the decision of a New Zealand Court in Bilang v Regg (1971), ILR, 48, p. 30. See also § 49, pp. 27–31. In Shingara v Espey (1969), AJ, 63, p. 82; the USA recognised the UK as the legitimate government for Southern Rhodesia; and see Ngai Chi Lam v Espey (1969), ILR, 53, p. 536. Even in the absence of general recognition by the international community, Rhodesia was held by a South African court nevertheless to be a state, although not the same ‘Rhodesia’ with which an earlier agreement had been concluded, which therefore was no longer in force: State v Onisation (1976), ILR, 68, p. 3.


SC Res 217. In the same resolution the Security Council called on all States not to entertain any diplomat or other relations with the illegal regime. In a further resolution in 1968 the Council emphasised the need for the withdrawal of all consular and trade representation in Southern Rhodesia (SC Res 253), and in 1970 it further decided that member States should immediately give all diplomatic, consular, trade, military and other relations that they may have with the illegal regime and terminate any representation that they may maintain in the territory (SC Res 277). A US Court of Appeals rejected an attempt to force the US Government to deny entry to the USA of persons travelling on Southern Rhodesian passports, as was requested in SC Res 253: Kangwa VANCE, AJ, 73 (1979), p. 297.

'Remember States shall refrain from recognising this illegal regime, and called on them 'to take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal regime in Southern Rhodesia shall not be accorded any recognition, officially or otherwise, including judicial notice, by the competent organs of their State'. States generally observed these obligations to withhold recognition. The situation was regularised at the Constitutional Conference held at Lancaster House, London, from 10 September to 15 December 1979, which led to the resumption of constitutional authority by the United Kingdom and then, after elections in Rhodesia, to independence for that country in 1980 under the name of Zimbabwe.

The proclamation of a Turkish Cypriot State in the northern part of the island followed the invasion of the island by Turkish forces in July 1974 in response to a Greek coup d'état which threatened to annex Cyprus. There developed in practice two autonomous administrations, one for the Greek Cypriot community and the other for the Turkish Cypriot community. In February 1975 the Turkish Cypriot administration proclaimed the formation of the 'Turkish Federated State of Cyprus' in that part of Cyprus under its control. Although the only effective administration in that part of Cyprus, that state and its
governing authorities have not been generally recognised. In March 1975 the Security Council regretted the proclamation of the Turkish Cypriot State but did not in terms call for its non-recognition, calling instead for the avoidance of action which might divide the island. In November 1983 the "Turkish Republic of Northern Cyprus" was proclaimed as an independent state, which has been recognised only by Turkey, the Security Council regarded the proclamation as "invalid" (while referring to the "Turkish Cypriot authorities", thus perhaps according some undefined degree of recognition).

In 1976 South Africa established the Transkei as an independent state. The General Assembly of the United Nations, which regarded that independence as a sham and South Africa's action as an aspect of, and thus tainted by what it considered to be the illegality of, that country's policy of apartheid, declared the Transkei to be 'invalid' and called on governments to deny any form of recognition to the so-called independent Transkei. South Africa has subsequently purported to establish further similar independent states - Bophuthatswana (1977), Venda (1979) and Ciskei (1981) and these have been treated by the international community in the same way as it responded to the establishment of Transkei. General Assembly resolutions condemning these acts and calling for non-recognition of them have been endorsed by the Security Council, although these various resolutions are not binding, states have in practice complied with them.  

17 The Republic of Cyprus was established in 1960 (see § 40, n 4). On 5 July 1978 the British Government stated that they 'recognised only one Government in Cyprus, that of the Republic of Cyprus under President Kyriazis'. Parliamentary Debates ( Lords), vol 394, col 984. See also Hepford Hotels Ltd v Aegean Turkish Holidays Ltd [1978] Q B 205, [1979] AC 508; White, ICLQ, 37 (1988), pp 983-4; and § 46, n 3. As to the consequences of the Government of Cyprus not designating or approving Ercan airport in northern Cyprus pursuant to relevant local legislation and the Chicago Convention of 1944, see UKMIL, BY, 51 (1980), p 367. As to telephone communications with northern Cyprus, see UKMIL, BY, 58 (1987), p 515.

18 SC Res 367.

19 See RG, 88 (1984), pp 429-32; Flory, AFDI, 30 (1984), pp 177-86.


23 See GA Res 32/105N (1977); RG, 82 (1978), pp 851-3; and § 40, n 3.

24 See GA Res 34/93G (1979), and the statement made by the President of the Security Council on behalf of the Council on 21 September 1979 (S/13549).

25 See GA Res 36/172A (1981), paras 9 and 10; and see also the statement made by the President of the Security Council, on behalf of the Council, on 15 December 1981 (S/IV 2315). See also GUR Corps v Trust Bank of Africa Ltd [1986] 3 All ER 449, in which, after the Foreign and Commonwealth Office had certified that the British Government did not recognise the Ciskei as a state de facto or de jure and had had dealings with its 'Government', the Court of Appeal held it to be a subordinate body set up to act on behalf of South Africa, and as such capable of being a party to proceedings before the English courts. See also comment by F A Mann, ICLQ, 36 (1987), pp 345-50; Breck, ibid, pp 350-62; and Crawford, BY, 57 (1986), pp 405-10.

26 See eg nn 22, 24 and 25.

27 Thus the 'United Kingdom does not recognise Transkei, Venda, Bophuthatswana or Ciskei as independent states: there are therefore no official contacts with them. The so-called homelands are an integral part of the Republic of South Africa and are treated as such: Parliamentary Debates (Commons), vol 102, col 977 (written answers, 23 October 1986). US policy is similar: see UNYB (1979), p 169. But since citizens of the homelands have lost South African nationality, while the homelands' independence is not recognised internationally, those citizens may be stateless: UN JN, 31 (1979), pp 180-1.

28 As to acquisition of territory generally, see § 241ff. The situation here being considered must be distinguished from that which occurs when the whole territory of a state is under belligerent occupation by an enemy state in time of war: see vol II of this work (7th ed), § 366 ff.

29 See § 52.

30 As to the Italian occupation of Albania in 1939 see Sereni, American Political Science Review, 35 (1941), pp 311-17; Marek, Identity and Continuity of States in Public International Law (1954), pp 331-7; Whitman, Digest, 2, pp 321-7; and § 72, n 2.

31 Albanian sovereignty was restored in 1945. However, owing partly to the non-recognition of its government by a number of states, Albania was not invited to the Conference at San Francisco in 1945 and did not become an original member of the UN.

32 As to the annexation by Germany of the Free City of Danzig in September 1939, see US ex rel Zeller v Watkins, I LR, 15 (1948), No 51; Re Krager, I LR, 18 (1951), No 60; British and Polish Trade Bank AG v Handelsmaatschappij Albert de Bary and Co. I LR, 21 (1954), p 485; Re Wetzel, I LR, 24 (1957), p 434; and see generally § 83, n 12.

33 Italy invaded Abyssinia on 5 October 1935, and proclaimed its annexation on 9 May 1936. See generally, Rousseau, Le Conflit Italo-Ethiopien devant le droit international (1918); Marek, Identity and Continuity of States in Public International Law (1954), pp 263-82; § 46, nn 13, 14; and § 265, n 2.

34 Thus, although in the course of the Italian-Abyssinian conflict in 1936, neither the Assembly nor the Council expressly reiterated the obligation of non-recognition deriving from Art 10 of the Covenant, it was generally assumed that the obligation formulated in the Resolution of 1932 (§ 34, n 11) held good. This apparently was the view of Great Britain in 1938 which took steps in order to obtain a declaration of the Council of the League that the question of the recognition of the position of Italy in Abyssinia was one for each member of the League 'to decide for itself in its own situation and its own obligations' (Off J (May-June 1938), p 335). See also the declaration of the British Prime Minister of 13 April 1936: Parliamentary Debates (Commons), vol 334, col 1099. And see Rousseau, Le Conflit Italo-Ethiopien devant le droit international (1936), pp 251 et seq.

35 See Parliamentary Debates (Commons), vol 337, col 1890 (29 June 1938) for a list of 29 members of the League of Nations which had in one form or another recognised the Italian conquest of Abyssinia, and in addition Austria, Germany and Japan also recognised the Italian conquest; but...
this recognition was, however, itself withdrawn when Italy joined in the Second
World War, and this was confirmed in the Peace Treaty with Italy.

As regards Austria, Germany's absorption of Austria was initially widely
recognised and Austria was regarded as having ceased to exist as a separate
state. But with the outbreak of the Second World War the attitude of states
the USA never did so. The UK granted de facto recognition in December 1936, and de jure
recognition in November 1938; see Halie Selassie v Cable and Wireless Ltd (No 2) [1939] 1 Ch
182. See also § 50, n 10, to credentials addressed to 'the King of Italy and Emperor of
Austria'.

See, as to the UK, Parliamentary Debates (Commons), vol 362, col 139 (3 July 1940); Azzà
Kebbeda Tezema v Italian Government; AD, 9 (1938–40), No 36. At the time of the withdrawal
of recognition it is difficult to say that Italy's effective control of the country was any less than
it was before, and this recognition was originally granted. In the Agreement concluded in January 1942
between Great Britain and the Emperor of Ethiopia the former recognised Ethiopia as being a
free and independent state and the Emperor its lawful ruler (Cmr 6334, Ethiopia No 1 (1942)).
That Agreement was replaced by one concluded in 1944 which did away with most of the
restrictions, necessitated by the war, upon Ethiopian sovereignty (Cmr 6584, Ethiopia No 1
(1945)). See also Bentwich, BY, 22 (1945), pp 275–78.

See Arts 33–38. The treaty also provided for Italy to pay reparations to Ethiopia of $25,000,000:
Art 74b.

See generally Marek, Identity and Continuity of States in Public International Law (1954), pp
338–68; Whitman, Digest, 2, pp 327–6; Toynbee, Survey (1938), i, pp 179–259; Klinghoffer,
Les Aspects juridiques de l'occupation de l'Autriche (1943); Herbert Wright, AJ, 38 (1943),
pp 621–33; René-Nicolius, Consulat International, 39 (1953), pp 119–33; Clive, The International
Legal Status of Austria, 1938–46 (1962); Seidl-Hohenfeldern, Die Übersiedlung von Herrschafts-
verhältnissen an Beispiel Österreichs (1982) and in Staatliche Kontinuität (eds Meissner and
Ziegler, 1983), pp 61–72. On the question of the continuity of Austria subsequent to her
annexation by Germany in 1938 see Verotta, Die internationale Stellung Österreichs (1947).
As to Austria's present position generally, see § 98.

Thus a few days after the laws were passed providing for Austria's incorporation into
Germany, the British Foreign Office was stated in Parliament that the British Governments were bound to
recognise that the Austrian State has now been abolished as an international entity and is in
process of being entirely absorbed into the German Reich: Parliamentary Debates (Lords), vol
108, col 180 (16 March 1938). See also TS No 71 (1938) for an agreement between the UK and
Germany regarding the application to Austria of certain UK-German treaties, and the lapsing of
the equivalent UK–Austria treaties. See also the terms of the Foreign Office certificate in Re
Mangold's Patent (1951) 68 RPC 1; ILR, 18 (1951), No 59 (and note in BY, 28 (1951), p 406).

The attitude of the USA was not clear prior to the Moscow Declaration of 1943. Thus although
at first the US Government stressed that its reaction to the situation was dictated by purely
practical and administrative considerations, the US Government later insisted to Germany that it
in accordance with international law Germany should succeed to the duties and obligations of
Austria, and considered the US–Austrian Extraterritorial Treaty to be extinct whilst the US–
German Extraterritorial Treaty was intended to apply to Austria. See also O'Connell, State
Succession in Municipal Law and International Law (vol 2, 1967), pp 38–9, 379. After the
cautious attitude displayed by an American court in Johnson v Briggs Inc, AD, 9 (1938–40), No 33,
the later decisions accepted Austria's incorporation into Germany: Land Oberösterreich v Gisler,
ibid, No 34; US ex rel Zdanov v Uhl, AD, 10 (1941–42), No 164; US ex rel D'Equesnoy v Uhl, AD,
12 (1943–45), No 85; US ex rel Schwarzkopf v Uhl, ibid, No 54. Later cases, doubtless influenced
by the clear attitude of the government consequent upon the Moscow Declaration, regarded the
annexation of Austria as not having been recognised by the USA: Eek v Nederlandse Algemene
Staatsrechtstoetsen, AD, 13 (1946), No 13; Serry v US, ILR, 22 (1955), p 398. See also a French
case, Nermec v Etablissements LAH, ibid, p 120, holding the annexation null and void; and Inferrengement of Copyright (Austria) Case, ILR, 18 (1951), No 19, holding Austria to have ceased to
exist as a state. However, Austria's annexation in the Netherlands: Re Ten Amsterdam Oil Companies,
AD, 13 (1946), No 20; and Veemendaal v Pommeranz, AD, 15 (1948), No 55.

changed, and in the Moscow Declaration of 1 November 1943 the United
Kingdom, United States of America and the Soviet Union stated that they
'regarded the annexation imposed upon Austria by Germany on March 15 1938
as null and void'. Thereafter states generally took that view, with its consequence
that Austria should be regarded as having ceased to exist as a state. In 1945 a
number of states, including the major powers, recognised the Austrian Govern-
ment; and in Article 1 of the Austrian State Treaty 1955 the Allied Powers
recognised that Austria is 're-established as a sovereign, independent and democ-
ratic State'.
The Baltic States of Estonia, Latvia and Lithuania were incorporated into the
Soviet Union in 1940 as a result of procedures which had the superficial appear-
ance of a voluntary union, but which in reality amounted to a forced absorption
by the Soviet Union, scarcely distinguishable from annexation. Some coun-
tries, including the United Kingdom, have recognised that those states as
constituted in 1940 ceased de facto to have any effective existence and that they
were de facto, but not de jure, part of the Soviet Union; others such as the
United States of America refused all recognition of their incorporation into

38 BPSP, 161 (1954), p 288.

An Austrian representative was admitted as observer to the last meeting of the Assembly of
the League of Nations in 1946. See also cases cited in n 37. Nevertheless, German nationality
acquired as a result of German annexation of Austria has been treated as effective: see eg
Austrian Nationality Case, ILR, 18 (1951), No 62; Re Mangold's Patent (1951) 68 RPC 1; ILR, 18 (1951),
No 99; Austrian-Extradition Treaty, ILR, 23 (1955), p 364. But cf Loss of Nationality
(Germany) Case (1956), ILR, 45, p 353.

39 TS No 58 (1957).

See generally, Marek, Identity and Continuity of States in Public International Law (1954), pp
369–416; Kavanagh and Spruyt (eds), Baltic States (1972) (Report of the US House of Repre-
sentatives, 1954); Timmermans, Neth ILR, 32 (1985), pp 289–94; Meissner, in Staatliche Kontinuität
(eds Meissner and Ziegler, 1983).

40 See eg Parliamentary Debates (Lords), vol 448, col 345 (15 February 1984). See also A/C Tallin
Lnavaahius v Tallinna Shipping Co (1946) 79 Lloyd's Rep 245; (1947) 80 Lloyd's Rep 99; Re
were diplomatic and consular representatives of the Baltic States in the UK in 1946 continued to
be accorded certain diplomatic courtesies on a personal basis, but no more appointments were
made: see eg Parliamentary Debates (Commons), vol 79, col 583 (written answers, 24 May 1985).
And see § 47, n 7, and § 50, n 14, as to the mutual waiver, in a bilateral agreement with the Soviet
Union, of British claims relating to the Baltic States, and Soviet claims to, inter alia, gold reserves
which belonged to the Baltic States. As to contacts between the British Embassy in Moscow and
officials in the Baltic States, not inconsistent with the UK's view of their status, see UKMIL, BY,

41 The incorporation of Latvia into the Soviet Union has been held by a Federal German Court in
1955 to have been accepted de jure by the Federal Republic of Germany (AJ, 50 (1956), p 441),
but for the contrary view see the Republic of Latvia Case, ILR, 20 (1953), pp 180, and 225 (1955), p 230,
Netherlands and Norway have recognised the incorporation: Poorten-Dertsinckg v Brussel,
Republiek van Letland (1942), AD, 11 (1919–42), No 75; Lessers v Rotterdamse Bank, ILR, 20 (1953),
p 57, and Kling v Lessers and Rotterdamse Bank, ILR, 22 (1955), p 101. For Canadian de facto but not de
jure recognition of the incorporation of the Baltic States into the Soviet Union, see The Elie,
Laetsch v USSR, 26 (1949), pp 427–30. See also the decision of a Belgian court in Pudencek v Augustowskis,
ILR, 18 (1951), No 20; and of an Irish court in The Ramara, AD, 10 (1941–42), No 20.

42 See the cases cited at n 5, n 27. See also Gerbaud v Meden, ILR, 18 (1951), No 82, for a similar
decision of the French Court de Cassation.
the Soviet Union. In 1990 the three states sought to reassert their independence, which became generally recognised, including by the Soviet Union, in 1991.

In August 1990 Iraq invaded and purported to annex Kuwait. This was declared by Security Council Resolution 662 (1990) to have ‘no legal validity’ and was ‘considered null and void’. After the imposition of economic sanctions by, principally, Security Council Resolutions 661 (1990) and 670 (1990), and the use of military force against Iraq by a coalition of forces acting under Security Council Resolution 678 (1990), Iraq withdrew from Kuwait in March 1991 and rescinded its annexation of Kuwait.69

(3) The seizure or occupation of foreign territory
Perhaps the most long-lasting and actively considered example of non-recognition in cases of this kind has been the occupation by Israel of certain neighbouring territories as a result of hostilities accompanying the declaration of the State of Israel in 1948 and leading to the armistice agreements signed in 1949,46 and further hostilities in 1967 and 1973. The territories in question have been the city of Jerusalem (where Israel occupied the New City (or West Jerusalem) in the 1948–49 hostilities, and the Old City (or East Jerusalem) in the 1967 hostilities), the Gaza Strip (occupied by Egypt in the 1948–49 hostilities, and then by Israel in 1967), the Sinai Peninsula (Egyptian territory, occupied by Israel in 1967), the Golan Heights (Syrian territory, occupied by Israel in 1967) and the area on the West Bank of the River Jordan which had not been part of the State of Israel as originally declared (occupied by Jordan after the 1948–49 hostilities, and then occupied by Israel in 1967). Under the Peace Treaty between Israel and Egypt 1979, 47 Sinai was restored to Egypt (Article I), and the Gaza Strip48 was left on the Israeli side of the permanent boundary between Egypt and Israel established by Article II, although that provision was stated to be ‘without prejudice to the issue of the status of the Gaza Strip’. Jerusalem, the West Bank and the Golan Heights are still occupied by Israel.49

As regards Jerusalem, while Israel has not formally and in terms annexed the city, the integration of the New City into Israel since 1948 (including the proclamation of Jerusalem as its capital in 1950 and the measures adopted since 1967 to unite the Old City with the New City (including the enactment of a law in 1980 declaring the united city of Jerusalem to be the capital of Israel and the seat of the major institutions of state) 50 have amounted to an assertion in practice of the integration of Jerusalem into the State of Israel. States have generally refrained from recognising that Israel has de jure any right to Jerusalem,51 although de facto recognition of Israel’s effective control over West Jerusalem has sometimes been accorded.52

[Note: This section discusses the recognition of states and governments and their relationships with Israel, including the status of Jerusalem and the occupation of the territories mentioned. It references various international resolutions and legal analyses to support its arguments.]


As regards the West Bank, it should be noted that this area of the former Palestine was occupied by Jordan after the 1948–49 hostilities. Jordanian sovereignty over the area was recognised by some states, including the UK: Parliamentary Debates (Commons), vol 474, cols 1137–8 (27 April 1950), and ibid, vol 19, col 345 (written answers, 5 March 1982). After the fighting in 1967 between Israel and Arab States, the West Bank was occupied by Israel – as a belligerent having claimed sovereign authority. At the 1974 Special Session of the General Assembly they affirmed ‘the right of the Palestinian people to establish an independent national authority, under the leadership of the PLO in its capacity as the sole legitimate representative of the Palestinian people, over all liberated territory’. Thereafter Jordan maintained its sovereignty over the West Bank, but regarded itself as doing so as a trustee for the Palestinians. In August 1988 King Hussein of Jordan announced that Jordan would dismantle legal and administrative links between Jordan and the West Bank: ILM, 27 (1988), p 1637; RG, 93 (1989), pp 141–2. It is not clear whether this amounted to a formal renunciation of Jordanian sovereignty. If it did, however, pave the way for the declaration of an independent State of Palestine in November 1988: see RG, 40, n 2.

See RG, 85 (1981), pp 182–3; Crane, Harv ILJ, 21 (1980), pp 784–93. See also SC Res 476 (1980) and 478 (1980) declaring the purported changes in the status of the City to be null and void, and calling upon states with diplomatic missions at Jerusalem to withdraw them from Jerusalem.

Thus the UK, USA and many other states have their embassies at Tel Aviv rather than Jerusalem. The UK and some other states maintain consular posts in Jerusalem. As regards Jerusalem, while Israel has not formally and in terms annexed the city, the integration of the New City into Israel since 1948 (including the proclamation of Jerusalem as its capital in 1950 and the measures adopted since 1967 to unite the Old City with the New City (including the enactment of a law in 1980 declaring the united city of Jerusalem to be the capital of Israel and the seat of the major institutions of state) have amounted to an assertion in practice of the integration of Jerusalem into the State of Israel. States have generally refrained from recognising that Israel has de jure any right to Jerusalem, although de facto recognition of Israel’s effective control over West Jerusalem has sometimes been accorded.
Israel's occupation of East Jerusalem since 1967, as well as its occupation since then of the West Bank and the Golan Heights, have generally been regarded as giving the Israeli authorities no more than the rights, powers and obligations of a military occupant. Their extent has been called in question in the context of Israel's policy of increasingly integrating those territories into the State of Israel, and in particular by the establishment of Israeli civilian settlements in the occupied territories. The situation generally has been the subject of many resolutions adopted by the Security Council and General Assembly. Thus, for example, measures taken by Israel in 1967 to change the status of Jerusalem were considered by the General Assembly to be 'invalid'; the Assembly and Security Council have on several occasions referred to the need for Jerusalem as well as to the other territories occupied by Israel, to the inadmissibility of the acquisition of territory by force; the Assembly has declared the changes by Israel in occupied Arab territories in contravention of the 1949 Geneva Conventions to be 'null and void', and has called upon states not to recognise any such changes and invited them to avoid action that could constitute recognition of Israel's occupation; the Security Council has similarly determined that all measures taken by Israel to change the physical character, demographic composition, and the institutional structure or status of the territories occupied since 1967 have no legal validity; and that Israel's decision in 1981 to impose its laws, jurisdiction and administration in the Golan Heights was 'null and void and without international legal effect'.

With regard to India's seizure of the former Portuguese territory of Goa in 1961, the United Nations failed to condemn an Indian act of force in seizing the territory, the incorporation of which into India has become accepted by most international law. With the continued presence of South African authorities in Namibia, and to refrain from any acts or dealings with the Government of South Africa implying recognition of the legality of its presence and administration in Namibia, the Security Council and General Assembly accepted the Court's advice. States generally refrained from recognising lawful South Africa's presence in Namibia, which attained independence in 1990.

§ 56 Consequences of non-recognition

The consequences of non-recognition depend to some extent on the reason for non-recognition. Certain consequences, however, apply generally. First, non-recognition alone does not

South Africa's presence in Namibia (formerly South West Africa) was originally lawful, by virtue of the Mandate for South West Africa, but became unlawful after the United Nations General Assembly decided in 1966 that the Mandate was terminated, that South Africa had no other right to administer the territory and that henceforth it came under the direct responsibility of the United Nations. This did not lead to South Africa vacating Namibia. The Security Council passed a number of resolutions in which it declared that the continued presence of South African authorities in Namibia was illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate were illegal and invalid. The Security Council also requested an Advisory Opinion from the International Court of Justice regarding the legal consequences for states of the continued presence of South Africa in Namibia. The Court advised that the decisions of the Security Council created for member states of the United Nations an obligation to recognise the illegality and invalidity of South Africa's continued presence in Namibia, and to refrain from any acts or dealings with the Government of South Africa implying recognition of the legality of its presence and administration in Namibia. The Security Council and General Assembly accepted the Court's advice. States generally refrained from recognising lawful South Africa's presence in Namibia, which attained independence in 1990.
make the state or government any the less a state or government in terms of its own national legal order, or its laws any the less laws in its territory, although it does affect its international position and the exercise of rights and duties on the international plane. Secondly, non-recognition of the government of a state does not affect the continued existence of the state itself, although it will affect its ability to perform those international acts which require action by governments. Thus the state's international rights and responsibilities will continue, although action to enforce them may have be delayed until the government is recognised. Treaties will continue in force, although if they require governmental action it may not be possible to give effect to them so long as one party's government remains unrecognised by the other. The non-recognised government will not be regarded by non-recognising states as competent to make its state a party to a multilateral treaty, or to act on behalf of the state in legal proceedings; and agents sent abroad by the non-recognised government will not have diplomatic, consular or other official status as regards a state withholding recognition. Thirdly, non-recognition of a new situation often involves continuing recognition of the previous state of affairs. Thus, non-recognition of the annexation of one state by another will usually mean that a state which withholds recognition will continue to regard the annexed state as continuing its former separate existence, treaties with it as still in force, and its diplomatic and consular officers as still entitled to act as such.

Generally, a situation which is denied recognition, and the consequences directly flowing from it, will be treated by non-recognising states as without international legal effect. Thus a non-recognised state will not be treated as a state, nor its government as a government of the state; and since the community or authority in question will thus not be treated as having the status or capacities of a state or government in international law, its capacity to conclude treaties, or to send agents of a diplomatic character, or to make official appointments of persons whose acts are to be regarded as acts of a state may all be called in question. Generally, in its relations with non-recognising states that community will not benefit from those consequences which normally flow from the grant of recognition.

Apart from such general consequences of non-recognition, particular consequences may flow from the circumstances of the individual case, and the scope of any obligation to withhold recognition. The question was considered by the International Court of Justice in its Advisory Opinion of 21 June 1971 on the Legal Consequences for States of the continued presence of South Africa in Namibia. The Court found that all member states of the United Nations were under an obligation to regard the continued presence of the South African authorities in Namibia as illegal and to treat all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the

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12 See International Registration of Trade Mark (Germany) Case [1959], ILR, 28, p 82; Blix, Treaty-Making Power (1966), pp 113–46; and above, n 6. But cf Billerbeck and Gee v Bergbau-Handel GmbH (1967), ILR, 72, p 59, in which the court may have been influenced by the fact that the treaty dealt with a private law matter. As to the reaction of the UK to a notification by the German Democratic Republic in 1955 to Switzerland, regarding the application of the Berne Copyright Convention, see Whitman, Digest, 2, p 55, and ICLQ, 7 (1958), p 93; see also ICLQ, 8 (1959), pp 159, 264; E Lauterpacht, Contemporary Practice of the UK (1963), p 5. As to the consequence that non-recognition involves refusal to accept passports issued by the unrecognised state, see Parliamentary Debates (Commons), vol 606, col 26 (written answers, 3 June 1959), and E Lauterpacht, Contemporary Practice of the UK (1964), pp 27–8. CI Kangan v Vance, AJ, 73 (1979), p 297 (and § 55, n 9). See also § 50, n 5 as to attendance at conferences by unrecognised states and conclusion of treaties with them.
13 Art 47. In the case concerning Certain German Interests in Polish Upper Silesia (1926) the PCJ held that as Germany had not recognised the Polish army as a belligerent force, the fact that it had been recognised as a co-belligerent army by the Principal Allied Powers could nevertheless not be relied on as against Germany. Series A, No 7, pp 27, 28. However, postage stamps issued by an unrecognised state (in case of Transkei) may be acceptable under the terms of the Universal Postal Convention: see UKMIL, BY, 49 (1978), p 339. But cf UKMIL, BY, 58 (1987), p 515, as to telecommunications. See also § 50, nn 10–13, as to contacts which may be possible even in the absence of recognition.
14 See § 47.
Mandate as illegal and invalid; and that all member states were obliged to refrain from any acts or dealings with the Government of South Africa implying recognition of the legality of its presence and administration in Namibia. Although the Court considered that the precise determination of the acts permitted or allowed was a matter within the competence of the appropriate political organs of the United Nations it nevertheless offered advice as to those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity because they may imply a recognition that South Africa’s presence in Namibia is legal. Thus member states were said to be generally obliged ‘to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia’, and they must abstain from invoking or applying bilateral treaties concluded by South Africa on behalf of or concerning Namibia which involve active inter-governmental cooperation. As regards ‘multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia’. The duty of non-recognition also imposes upon member states the ‘obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia’. Member states are also obliged not to enter into ‘economic or other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory’. However, the Court emphasised that the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation; in particular, the invalidity of official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate cannot be extended to those acts, such as, for example, the registration of births, deaths and marriages the effects of which can be ignored only to the detriment of the inhabitants of the Territory. The Court also found that the termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia were opposable to all states, including non-members of the United Nations in the sense of barring erga omnes the legality of the situation which is maintained, in the Court’s view, in violation of international law, with the result in particular that no state which enters into relations with South Africa concerning Namibia may expect the United Nations or its members to recognise the validity or effects of such a relationship or of the consequences thereof. After the Court’s opinion had been delivered, the General Assembly called upon all states to refrain from all direct or indirect relations, economic or otherwise, with South Africa when it purports to represent Namibia, and not to recognise as legally valid any rights or interests in Namibian property or resources purportedly acquired from the South African Government after 27 October 1966 (the date on which the Mandate was terminated). In a later resolution the General Assembly requested all states to refrain from action which may confer a semblance of legitimacy upon South Africa’s illegal occupation of Namibia.

However, there are at present practical limits to the extent to which states can persist in refusing to acknowledge an existing situation, even if it is unrecognised and its origins illegal. Furthermore, where the situation does not involve a violation of international law, non-recognition does not make it illegal and the principle ex injuria tuis non ortitur will not apply. Non-recognising states may therefore be able to take some account of the existence of an unrecognised community, and quite extensive dealings are in practice possible without recognition being necessarily implied. Non-recognition of a community as a state or its governing authority as a government does not exclude recognition of them in some other capacity, for example as a rebel regime entitled to recognition as insurgents, or as a subordinate agency of another state which is duly recognised. In these cases such relations may take place within the framework of international law as are appropriate to whatever standing the community is recognised as having.

Generally, national courts are more ready than governments to acknowledge the legal force of established facts, even despite a possible illegality in their origins, particularly where questions of private rights are involved. The attitude of the courts of a non-recognising state towards the acts of an unrecognised

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16 Similarly, in respect of Southern Rhodesia, members of the UN were under various specific obligations regarding their dealings with the regime in that country, from which they were obliged to withhold official recognition (see § 55, n 5). In comparison, the obligations of members of the League of Nations in relation to the purported establishment of Manchukuo were less extensive (see § 54): thus the replacement of consular officials was in that case regarded as not inconsistent with non-recognition, while in respect of Southern Rhodesia (and Namibia) consular relations had to be severed (but see § 55, n 5, as to the UK’s consular relations with Southern Rhodesia in the early stages of its rebellion).


19 GA Res 2871 (XXVI) (1971); see also SC Res 301 (1971), and generally § 88, n 33f.

20 GA Res 3031 (XXVIII) (1972). See also GA Res S-9/2 (1978), §§ 11 and 36. However, since South Africa in fact remained in control of Namibia there would still seem to be room for acknowledging certain legal consequences flowing from South Africa’s effective administration in Namibia. Thus despite the illegality and invalidity of South Africa’s presence in Namibia, the ICJ observed that South Africa could still be held responsible for its acts in Namibia ‘physical control of territory, and not sovereignty or legitimacy of title, is the basis of state liability for acts affecting other states’ (ICJ Rep (1971), p 54). In Nencm e Etablissements LAB A French court pointed out that even a situation which is to be regarded as null and void nevertheless gives rise to a state of fact which certain consequences may flow: ILR, 22 (1955), p 100.

21 See § 50. See also § 47, n 3, as to the continued applicability of treaties notwithstanding non-recognition of a government of a state.

22 See § 49, n 19.

23 See § 38, n 3.

community will, however, depend on its particular rules of national law, and especially the extent to which the courts may be bound by the attitude or statements of the executive branch of government. In some cases the courts may rigidly follow the apparent logic of non-recognition, and have declined to attribute any legal consequences or validity to acts of the unrecognised authority, in effect treating such authority as non-existent. In other cases, however, particularly where the issues before them concern ordinary matters of private law not affecting the public policy of the state, courts have given preponderant weight to the realities of the situation including the effective existence of the unrecognised community, and have been able to take due account of legal transactions taking place under the rules of law in fact applying in the territory subject to the authority of the non-recognised community. In particular, courts in applying their rules of private international law may be led to have regard to the legal system actually applying in a given locality, irrespective of the question of recognition. They may also take judicial notice of the fact that an unrecognised authority is in control of a particular territory. Furthermore, courts may sometimes be able to regard a state or government as in existence for the purposes of the proceedings before the court even where none is recognised by the executive, as where those terms are used in circumstances in which the court's view do not require them to be interpreted in their strict and formal sense.

26 See § 460.
27 See Jaffé v. Sapor (1921) 1 11 456. In consequence of the refusal of the USA to recognise the annexation of the Baltic Republics by Soviet Russia in 1920 the courts declined to give effect to the decrees of the authorities in the annexed territories or to issue letters rogatory to them. See Briggs, AJ, 37 (1943), pp 585–96; The Kosovo, AD, 10 (1941–42), No 15; The Sitk, ibid., Nos 16 and 19; The Mareut, 1944 I (2d) 431. See also Latvian State Cargo and Passenger Line v. Clark, AD, 15 (1948), No 16; Latvian State Cargo and Passenger Line v. McGrath, ILR, 18 (1951), No 27; Latvian State Cargo and Passenger Line v. US, ILR, 20 (1953), p 193; Re Kosov Estate (1958), ILR, 26, p 76; Re Mitzke's Estate (1962), ILR, 33, p 43; Re Luk's Estate (1965), ILR, 35, p 62. See also to the same effect the decision of the High Court of Justice in The Ramaza, AD, 10 (1941–42), No 20; of French courts in Heritiers Bonannian vs. Soc Optique, Clunet, 51 (1924), p 133, and Jellinek v. Levy (1940), RG, 51 (1947), p 250; and of a Moroccan court in Attorney-General v. Salomon Tolendano (1963), ILR, 40, p 40. See also Johnson v. Briggs Inc, AD, 9 (1938–40), No 13, as to decrees of the unrecognised regime in Austria after the Anschluss, and § 55, n 7, as to decisions by UK courts concerning acts of the illegal regime in Southern Rhodesia.

28 In Carl Zees Stifting vs. Rayner and Keeler (1967) AC 853 Lord Wilberforce regarded it as still open to English courts to follow the courts of other countries whereby, "where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned... the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give effect to the actual facts or realities found to exist in the territory in question" (at p 954).

29 In 1933, in Salmoil's Standard Oil Company, 262 NY 220; 186 NE 679; AJ, 7 (1933–34), No 8, the Court of Appeals of New York held that the nationalisation decrees of the unrecognised Soviet Government with regard to property situated in Russia were to be treated as valid: the Department of State had stated to the court that the Soviet Government exercised effective power in Russia, and that the refusal to recognize it was due to reasons other than the absence of effective- ness. In Sokoloff v. National City Bank, AD, 2, (1923–24), No 19, it was pointed out that courts might recognise acts and decrees of an unrecognised foreign government 'if violence to fundamental principles of justice or to our own public policy might otherwise be done'. In Latvian State Cargo and Passenger SS Line v. McGrath, ILR, 18 (1951), No 27, a US court indicated that ordre public considerations of private international law could be allowed to operate so as to permit effect to be given to decrees of an unrecognised government provided that the executive department had no positive and deliberate policy to the contrary (which in fact it had in respect of the matter before the court, concerning the Soviet Union's annexation of the Baltic States). In Upright v. Mercury Business Machines Co (1961) ILR, 32, p 65, a US court held that effect could be given to acts of the German Democratic Republic (although not recognised by the USA) concerning private rights and obligations arising in territory under its control, unless those acts were inimical to the aims and purposes of national policy. This limitation of the consequences of non-recognition to acts of a political nature was applied in Re Alexanderovitch Estate (1964), ILR, 35, p 51, so as to allow a power of attorney executed in Lithuania in accordance with the local law to be regarded as lawful and effective. For comment on Upright v. Mercury Business Machines Co (above), see Lubman, Col Law Rev, 62 (1962), pp 275–310. See also the Hauser case decided by the Swiss Federal Tribunal, AD, 4 (1927–28), at p 63: and § 49, nn 27–30 (as regards acts of insurgents), and p 200 (as regards certain acts performed by South Africa in Namibia). In Russian Volunteer Fleet v. United States (1931) 282 US 481; AD, 6 (1931–32), No 24, the Supreme Court of the US held that non-recognition does not deprive the nationals of a state with an unrecognised government of a right of action.

30 See several decisions of the US-Italian Claims Commission regarding the laws of the unrecognised 'Italian Social Republic' which for 19 months operated as a pro-German administration in part of Italy after the surrender of Italy in the Second World War: Levi Claim, ILR, 24 (1957), p 303; Falco Claim (1959), ILR, 29, p 21; Fubini Claim (1959), ibid., pp 34–37. See also Re an Inquiry by the Italian Ministry for Foreign Affairs (1958), ILR, 26, p 68; The Denny, AD, 10 (1941–42), No 18; Bilang v. Rigg (1971), ILR, 48, p 3; Oguchi v. Odawumuru (1979), ILR, 70, p 17. And see cases cited at § 49, n 28, and several decisions of Japanese courts cited by Tsutsui, ILCQ, 37 (1988), pp 325, 326–31, including the Kokuyose case (1982), on which see also Heuser, ZV, 49 (1989), pp 335–42. In R v Secretary of State for the Home Office, ex parte Z, The Times, 25 August 1989, the criminal law applying in an unrecognised state was accepted as the basis for assessing the likelihood of persecution which might be suffered by a British citizen by the executive, as where those terms are used in circumstances in which the court's view do not require them to be interpreted in their strict and formal sense.


The decision of the House of Lords in Atral Monetary Fund v. Hashim (No 3) [1991] 2 WLR 729 suggested that the legal personality of a company incorporated in a territory not recognised as a state would not be recognised in English law: the subsequently enacted Foreign Corporations Act 1991 provided for legal personality to be recognised in such circumstances.

32 So as, for example, to be able to conclude that the consuls of the established, and government cannot in fact transmit funds to the territory controlled by the unrecognised authority (Re Xeon Yoko Bank's Estate, ILR, 19 (1952), No 93); or to uphold an order for the deportation of a person to that territory (US ex rel. Leong Choy Moon v. Shangharness, ILR, 21 (1954), p 225; US ex rel. Tom Man v Shangharness, ILR, 23 (1956), p 397, affirmed (1959) ILR, 28, p 93).

33 See eg Re Al Fin Corporation's Patent (1970) Ch 160 (North Korea treated as a state despite a certificate from the Foreign Office denying any recognition by the UK to that effect); Luigi Monta of Genoa v. Cecobracht Co Ltd [1956] 2 All ER 169 (treating the authorities in Formosa as a government despite a certificate from the Foreign Office denying any recognition by the UK to
Changes in the condition of states

§ 57 Changes not affecting states as international persons

States are exposed to change. There is a constant and gradual change in their citizens through deaths and births, emigration and immigration. There is a frequent change in those individuals who are Heads of States, and there is at times a change in the form of their governments, or in their dynasties if they are monarchies. Governmental authority may be temporarily disrupted or territorially restricted, as during a civil war or belligerent occupation. Their territories may increase or decrease. Nevertheless, in spite of such changes a state remains the same international person.  

International law is not, however, indifferent to these changes. Although strictly no notification to or formal recognition by foreign states is necessary in cases of a change in the headship of a state or in its entire dynasty or if a monarchy becomes a republic or vice versa, no official intercourse based on the change of situation is possible between the states refusing recognition and the state concerned. Although, further, a state can assume any title it likes, it cannot claim the privileges of rank connected with a title if foreign states refuse recognition. The continuity of a state as an international person notwithstanding changes of the kind mentioned may be illustrated by the history of France, which has over the centuries retained its identity although it acquired, lost and regained parts of its territory, changed its dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now once more a republic. All its international rights and duties as an international person continued in spite of these important changes. Even such loss of territory as occasions the reduction of a major power to a lesser status does not alter the status as an international person. This continuity of states as international persons despite changes of the kind referred to is reflected in such rules of international law as those which hold a state bound by treaties concluded under a previous regime, which hold it responsible for acts by a former government or Head of State, or which require it to honour the public debt of a predecessor regime. Similarly, a new regime is entitled to represent the state in international organisations of which it is a member, litigation against the state begun under one government continues after a new government comes to power.  


For this reason a state is responsible for all acts committed by a former Head of State, although such Head of State may have attained his position through revolution. See §43 and The Republic of Peru v Dreyfus Brothers (1888) 38 J Ch D 348. It is believed that this responsibility exists, whether or not the former Head of State was recognised by the state dentanding redress. See also Henke Claim, ILR, 26 (1958–59), p 276; Ets Claim (1959), ILR, 30, p 116. Cf the Tucoco Arbitration (1923), RIAA, 1, p 369.  

5 See Riz Claim, ILR, 26 (1958–59), p 274; Russell Jackson v People's Republic of China, ILM, 22 (1983), p 75 (and see also p 1077); as regards succession to the financial obligations owed to the UN in the case of the change in the regime representing China, see ILM, 11 (1972), pp 653–4; Bissell, AJ, 69 (1975), pp 628–33; and RG, 88 (1984), p 215, as to succession to China's unpaid contribution to the ILO.  

The republic in February 1918 by the Russian Soviet Government of the public debts of Russia incurred by the previous duly recognised governments was a breach of international law as generally understood at that time; see Fauchille, §215 (4), and literature there cited. See also Chailley, La Nature juridique des traités internationaux (1932), pp 135–46. This attitude of the Soviet Government constituted one of the reasons why a number of states refused at that time to recognise that government. There appears to be room for a reconsideration of the existing rule on the subject in cases when the social and political upheaval accompanying a revolutionary change of government is such as to render equitable and reasonable a modification of the obligations contracted by the former regime. In 1986 the Soviet Union concluded with the UK an agreement (TS No 65 (1986)) under which the UK agreed not to pursue British claims in respect of inter alia bonds issued by and debts owed by the former Russian Imperial Government, and released to the Soviet Union certain money held in official bank accounts of persons representing the former government; for its part the Soviet Union agreed not to pursue certain claims against the UK, including claims to certain gold and other assets in the UK of the former Imperial Russian Government.  

A somewhat similar agreement was later concluded between the UK and China, whereby the UK undertook not to pursue British claims in respect of inter alia debts incurred by, and bonds issued by, former Chinese Governments (which debts and bonds the Government of the People's Republic of China had from the beginning disowned), in view of which undertaking China agreed to pay a stated sum to the UK (TS No 37 (1987)).  


7 See eg Lieghoe and Others (1984, 1986), ILR, 75, p 439, in which a new British Government compensated as defendant in proceedings instituted against the UK at a time when a government of a different political persuasion was in power and whose policies led to the situations giving rise to the litigation.
§ 58 Changes affecting states as international persons

Some changes do, however, affect states as international persons.

(1) Two states which hitherto were separate international persons are affected in that character by entering into a real union, since, while retaining their separate identities in many respects, through that change they appear thereafter together as one and the same international person.

(2) A partial loss of independence on the part of the state concerned may affect its character as an international person. Many restrictions may be imposed upon it without interfering with its independence properly, but certain restrictions may go so far as to have such an effect, with consequences for their character as international persons. Thus if a hitherto independent state comes under the protection of another state, its character as an international person is affected. Again, if several hitherto independent states enter into a federal state, they transfer a part of their sovereignty to the federal state and become thereby partially sovereign states, and may even cease to be international persons at all. Even entry into a customs union may in particular circumstances, and depending on the terms of the treaty engagements in question, be regarded as compromising a state's independence.

§ 59 Extinction of states

A state ceases to be an international person when it ceases to exist. In practice this may happen:

(a) when one state merges into another and becomes merely a part of it (as occurred when the Congo Free State merged in 1908 into Belgium, Korea in 1910 into Japan, and Montenegro into the South-Croat-Slovene State after the First World War), or when two or more states merge to form a single new state (as may happen upon the formation of a new federal state, if all the member states of the federation cease to retain any elements of international personality). The absorption of Estonia, Latvia and Lithuania by the Soviet Union in 1940 was claimed by the latter to be a voluntary merger, but some states, including the United Kingdom and the United States, declined fully to recognise that those states form part of the Soviet Union. Austria's absorption into Germany in 1938 was initially widely accepted as putting an end to Austria's existence as a separate state, but was, after the outbreak of the Second World War, regarded as null and void, with Austria being regarded as continuing as a state;

(b) when a state breaks up so that its whole territory henceforth comprises two or more new states. However, the question whether all the new territorial units are properly to be regarded as new states, or whether one of them constitutes a continuation, much diminished, of the original state is not always easy to answer, and raises complex issues as to the circumstances in which a state ceases to be the same state. Such problems have arisen, for example, over the dissolution of Austria–Hungary after the First World War, and after the defeat of Germany at the end of the Second World War.

1 See generally, § 75.
2 See § 55, nn 41–4.
3 See § 55, nn 36–40. Ethiopia's annexation by Italy in 1936 was the subject of a similar change of attitude on the part of the international community: see § 55, nn 31–5.
4 See eg as to the break-up of the United Arab Republic in 1961, § 63, n 6.
5 See, in favour of the view that the new Austrian Republic was a new state, Strapp, Elements, § 5, pp 110; contra, Tempester, iv, pp 417, 418, Souborotch, Effets de la dissolution de l'Autsch, Hongrie sur la nationalité de ses ressortissants (1926), pp 41–5, and Borchard, AJ, 19 (1925), pp 358, 359; the matter is also discussed by Anzlottl, p 86; I'Autriche et la protection de l'Autriche en Belgique (1925).
6 See, in favour of the view that the new Austrian Republic was a new state, Strapp, Elements, § 5, pp 110; contra, Tempester, iv, pp 417, 418, Soborotch, Effets de la dissolution de l'Autsch, Hongrie sur la nationalité de ses ressortissants (1926), pp 41–5, and Borchard, AJ, 19 (1925), pp 358, 359; the matter is also discussed by Anzlottl, p 86; I'Autriche et la protection de l'Autriche en Belgique (1925).
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SucCESSION OF STATES


§ 60 Succession of states A succession of international persons occurs when one or more international persons takes the place of another international person, in consequence of certain changes in the latter’s condition. Such a succession may involve any category of international persons, but it is convenient here to consider only successions involving states, whether fully or partially sovereign.

It is sometimes helpful to distinguish between universal and partial succession. The former takes place when one international person is completely absorbed by another, either through voluntary merger, or upon the dismemberment of a state which is broken up into parts which either have become separate international persons of their own or have been annexed by surrounding international persons, or (in former times) through subjugation.

Partial succession takes place when a part of the territory of an international person has separated from it in a revolt and by winning its independence has become itself an international person; when one international person has acquired a part of the territory of another through cession; when a hitherto fully sovereign state has lost part of its independence through entering into a federal state, or coming under suzerainty or under a protectorate; or when a hitherto partially sovereign state has become fully sovereign.

Although it is convenient to treat cases of succession as involving several distinct kinds of situation in which states emerge or break up, the various categories are not terms of art carrying with them clearly established legal consequences, nor are they sharply differentiated. Thus while the emergence of India to full independence in 1947 can be regarded as the emergence of a newly independent state from a previously dependent territory, it was even before 1947 already a country with a considerable degree of separate international status; its full independence in 1947 was accompanied by the partition of the former British India to form, in addition to the newly independent State of India, the new State of Pakistan, which was thus a newly independent state emerging from a previously dependent state and at the same time a new state emerging by a process akin to dismemberment or secession; and at the same time the incorporation into the newly independent State of India of the Indian States formerly subject to their sovereign rulers was a form of merger.

§ 61 How far succession takes place When a succession of states has occurred, the extent to which the rights and duties of the predecessor devolve on the successor is uncertain and controversial. Some writers, indeed, maintained that a succession of international persons never takes place. Their argument was that
the rights and duties of an international person disappeared with the extinguished person, or became modified, according to the modifications an international person underwent through losing part of its sovereignty.

The practice of states suggests that no general succession takes place according to international law. With the extinction of an international person its rights and duties as a person disappear. But certain rights and duties do devolve upon an international person from its predecessor. Since this devolution takes place through the very fact of one international person following another in the possession of state territory, a succession of one international person to those devolved rights and duties clearly takes place. But no general rule can be laid down concerning all the cases in which a succession occurs, and each needs to be examined separately. That examination naturally reflects the historical circumstances of the time, and the major preoccupations of the leading members of the international community in the situations which at the time most frequently give rise to cases of succession. Furthermore, state practice in much of this area has been variable, often dependent on the very special circumstances of particular cases, and based on ad hoc agreements which may not necessarily reflect a view as to the position in customary international law. It must also be noted that many of the decisions of national courts involving questions of succession turn on provisions of the relevant municipal law rather than on international law.

In earlier editions of this volume, the law was expounded by treating separately the various situations involving a succession, and considering in relation to each the different categories of rights and duties whose devolution was in question. Although this methodology was not adopted in the two Vienna Conventions of 1978 and 1983 (discussed at §§ 69, 70), it is convenient for present purposes to follow the approach taken in previous editions, as the basis for an exposition of the law as it exists apart from those Conventions.

§ 62 Absorption or merger When a state is absorbed into another state as, for instance, with Korea's voluntary merger in 1910 into Japan, or with the admission of Texas into the United States of America in 1845, or with the accession of the German Democratic Republic to the Federal Republic of Germany in 19901 or when a state has been subjugated by another state,2 the latter remains the same international person and the former becomes totally extinct as an international person. Somewhat similar are cases of unification, when two or more international persons combine to form a single state3 – as Egypt and Syria did in 1958 to form the United Arab Republic, and Tanganyika and Zanzibar did in 1964 to form Tanzania – in which case both former international persons are replaced by a single new international person. A particular form of unification is that which occurs where a number of hitherto sovereign states combine to become a new federal state4 (although in this case there may be a relevant distinction to be drawn between those federal states which, like the United States of America, totally absorbed all the international relations of the member states, and those, like Switzerland, which did not). These situations, involving the extinction of one state by merger into another, are perhaps the most straightforward ones; and so to those situations involving a succession of states.

(a) Treaties5 A state's consent to be bound by a treaty establishes not only a legal relationship between that state and the other party (or parties) but also a legal nexus between the treaty and that state's territory in relation to which its consent to be bound was given.6 It does not follow, however, that, where there is a change in the responsibility for the international relations of the state's territory, that nexus is necessarily sufficient to require the state which has assumed those responsibilities for the territory to succeed to all treaties previously applying to it. For example, no succession takes place with regard to rights and duties of the extinct state arising from its purely political treaties. Thus treaties of alliance or of arbitration or of neutrality7 or of any other political nature fall to the ground upon the extinction of the state which concluded them. They presuppose the continuing existence of the contracting state and may be regarded as in a sense devolved. But no general rule can be laid down for the consequences of other situations involving a succession of states.

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1 Development regarding Germany from 1945 to 1990 were somewhat special: see § 40, n 19ff. For consideration of some implications of German unification in 1990 as regards participation in the European Communities see Tomuschat, CML Rev. 27 (1990), pp 415–36, and Timmermans, ibid, pp 432–49.

2 As to the position of Austria following the Anschluss with Germany in 1938, see §§ 35, nn 36–40.

3 As to various matters in respect of which questions of succession arose upon the union on 1 July 1960 between Somaliland (which had only become independent five days earlier, having formerly been a British protectorate) and Somalia (formerly a trust territory under Italian administration) to form the Somali Republic, see Cotran, ICLQ, 12 (1963), pp 1010–26.

4 See generally Huber, Der Staatsnuktionssprcss (1898), pp 163–70; Keith, The Theory of State Succession (1907), pp 92–94; and Schoenborn, Staatsnuktionssprcssen (1913), §§ 8 and 9.


6 As to treaties concluded by Prussia and questions of succession arising in relation thereto as a result of that state's participation in the North German Federation, and the subsequent evolution of the German state after 1945, see E Lauterpacht, ICLQ, 9 (1956), pp 414–20; and also Bertschinger v Bertschinger, II, 22 (1955), p 141.

7 YBILC (1964), ii, p 1, p 67, para (49).

8 On the effect of changes of sovereignty upon neutrality, see Jellinek, Der autonome Erwerb und Verlust der Staatsangehörigkeit durch völkerrechtliche Vorgänge (1951) and Graupner, Gottor Bulletin, 32 (1946), pp 135–53.
As regards treaties of commerce, extradition and the like made by the extinct state, it is controversial whether they remain valid so that a succession takes place. The prevailing view, at least in cases of absorption, has been to answer the question in the negative, because such treaties, although they are non-political in nature, possess some prominent political features.

However, in cases of unification there is support in state practice for the view that in principle the pre-unification non-political treaties of the constituent states continue to bind the successor state, at least as regards that part of its territory in respect of which the treaty was in force at the time of unification took place. Even as regards those multilateral treaties considered to reflect generally accepted rules of international law, especially of a humanitarian character, the better view is probably that the successor state, if not already a party to them, does not become such by virtue of any succession to the extinct state, although it will be subject to any obligations under customary international law arising from, or reflected in, the treaty's provisions.

It is in any event well established that succession takes place with regard to such international rights and duties of the predecessor state as are locally connected with its land, rivers, main roads, railways and the like. According to the principle res transit cum suo onere, all rights and duties arising from treaties of the predecessor state concerning boundary lines, repairing of main roads, navigation on rivers, and the like, devolve on the successor state.

There is, however, uncertainty as to whether the succession is as to the treaty itself, or as to the situation resulting from the implementation of the treaty; there is similarly uncertainty as to the precise categories of territorial dispositions to which there is a succession, and in particular whether (as is probably the case) those dispositions, while not being limited to treaties providing for objective regimes or arising from a treaty representing a territorial settlement made in the general (or at least a regional) interest, must constitute something in the nature of a territorial regime.

As to membership of international organisations, which is a somewhat special kind of treaty right, the absorbed state, having become extinct, will cease to be a member of those international organisations of which it was formerly a member, and the absorbing state will continue its previous membership in its own name. In the case of a union state, the new "union state" will be subject to any special rules and procedures of the organisation in question, in its own name.

This practice was followed when the United Arab Republic in 1958 assumed membership rights in the United Nations in place of the previous separate membership of Egypt and Syria, and when Tanzania did the same in 1964 in place of Tanganyika and Zanzibar.

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8 On the judicial tendency to secure a degree of continuity in this respect, see Green, Current Legal Problems (1953), pp 291–96. See also the UN Secretariat's study of 'Succession of states in respect of bilateral treaties', in relation to extradition treaties (YBILC (1970), p. 102; UN Doc A/CN 4/229); and Shearer, Extradition in International Law (1971), pp 45–51.

9 See also, to the same effect, the decision of the German Supreme Court of 13 August 1936, with reference to the extradition treaties concluded by the German states prior to the German law of 1934 which transformed Germany into a unitary state (at least in the field of foreign affairs; AJ, 31 (1937), p 239, and comment thereon by Rienfeld, ibid, p 720. In cases of absorption a third state which has had a treaty on this subject (or some other subject dependent upon assumptions about the character of the other contracting party) with the state which has been absorbed may reasonably take the view that it cannot be assumed that it had the intention of entering into treaty relations on that subject with the absorbing state. In other situations, however, the position may be different, thus making it easier to see why it has been succession to an extradition treaty.

Thus where a territory to which a treaty has been applied in consequence of the absorption of a state by another, see Moore, v, (1947), p 188. at p 188. See also comment by Rousseau, RG, 90 (second para), and § 86, n 17 (second para). See also comment by Rousseau, RG, 90 (1986), pp 1030–31, concerning the case of Garcia-Moragues (at p 1028).

10 Thus the willingness of many states to conclude a commercial or extradition treaty depends on its assessment of the nature, in relevant respects, of the other potential party to the treaty. The absorption of one by another is likely to involve the replacement of the former's governmental structure and policies by the latter's. On the whole question concerning the extinction of treaties in consequence of the absorption of a state by another, see Moore, v, § 773; McNair, Laws of Treaties (1961), ch 37A; Hyde, AJ, 26 (1932), pp 133–36; Chailley, La Nature juridique des traités internationaux (1932), pp 146–59; and below, § 548. See also Mervyn Jones, By, 24 (1947), pp 360–75. After the admission of Texas into the USA, the latter held to the view that the pre-federation treaties of Texas lapsed and were not succeeded to by the USA. See also Tringali v Malese, AJ, 62 (1968), p 202, as regards the effect of Eritrea's federation with Ethiopia on Eritrea's pre-federation treaties. As to an investment protection treaty see Tran Qui Than v Indonesia, 1968). See also comment by Rousseau, RG, 90 (second para), and § 86, n 17 (second para). See also comment by Rousseau, RG, 90 (1986), pp 1030–31, concerning the case of Garcia-Moragues (at p 1028).

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12 See Jenkins, BY, 24 (1952), pp 105–44.

13 See Starke, BY, 41 (1965–66), pp 111–16, and Aust YBIL (1966), pp 9–16; and see generally as to boundaries, § 2261.


15 See § 583, nn 11, 12.

16 The ILC identified succession in respect of membership of international organisations as one aspect of the topic of "true succession", but decided in 1967 to leave it aside for the time being: YBILC (1967), ii, p 368, para 41. The UN Secretariat had previously prepared for the ILC a memorandum on "The succession of states in relation to membership in the United Nations" (YBILC (1962), ii, p 101; UN Doc A/CN 4/149, and Add 1). See generally, Aufrecht, ICLQ, 11 (1962), pp 154–70 (as to succession to membership in the practice of the IMF); O'Connell, State Succession in Municipal Law and International Law (vol 2, 1967), pp 181–211.

17 The absorbing state may not, of course, previously have been a member; in that case it would probably be better to regard it as not succeeding to the absorbed state's membership but as having to apply for membership if so wishes.

18 See UNYB (1958), p 106; Cotran, ICLQ, 8 (1959), pp 346, 357–65; Aufrecht, ICLQ, 11 (1962), pp 154, 158–60. See also § 63, n 6, as to the break-up of the United Arab Republic.
(b) Other international rights and obligations

There is an ill-defined area in which rights and obligations under customary international law vested in a predecessor state are succeeded to by the state in which it merges. That this happens to an extent is undeniable, although the limits are unclear. But, for example, where states enter into a federation, the federal state will be entitled in international law to the international rights of maritime jurisdiction previously vested in its member states. 19 Although it is a separate question whether, under the internal constitutional arrangements governing the federation, rights in relation to maritime jurisdiction are, on the internal plane, exercised by the member states or by the federal state. 20 Similarly, acts of the predecessor state in relation to title to territory may accrue to the benefit of the successor state, or in other cases may be to its disadvantage (as where the predecessor state has previously acknowledged the rights of a third state). 21

(c) Physical property of the state 22

Such property belonging to the extinct state, both movable and immovable, becomes the property of the successor state. But it will be for the successor state's laws, or in the case of a voluntary union for the terms of any agreement governing the union, to determine whether the property becomes vested in the state itself or in some component part of the state, such as a territorial subdivision.

(d) Fiscal property and debts 23

There is also a genuine succession with regard to the fiscal property and the fiscal funds of the extinct state. 24 They both, like physical property of the extinct state, accrue to the absorbing state ipso facto by the absorption of the extinct state. The

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19 It is possible to regard this as no so much a question of succession but rather an attribution de novo to the new federal state of maritime rights, eg to a territorial sea, to which every coastal state is entitled.


22 Property will normally be regarded as the property of the state if it is such in accordance with its internal laws, although special circumstances may lead to that law being disregarded: YBILC (1981), ii, pt 5, p 175.


24 As to the effects of changes of sovereignty on currency questions, see Nolde, Hag R, 27 (1929), ii, pp 285-313; the comprehensive works of Feichlenk and Sach, cited above; YBILC (1981), ii, pt 2, pp 35-6, paras (22)-(29) and p 41, paras (17)-(23).

25 See Haile Selassie v Cable and Wireless Ltd (No 2) (1939) Ch 182. That case is also an authority for the rule that only the successor who is recognised as such is entitled to the assets of the former sovereign. See also The United States v Proleusan (1865) 35 LJ Ch 7. Even though incorporation of international public debts of the extinct state are also taken over by the absorbing state, 25 although, particularly where the debts do not relate directly to the governance of the former state, the private creditor of an extinct state may in practice be unable to secure payment of the debts in the courts of the successor state unless that state has expressly or implicitly recognised them; 26 and in any case the private creditor acquires no right directly available to him under international law against the absorbing state. But if he is a foreigner, the right of protection possessed by his home state enables the latter to exercise pressure upon the absorbing state for the purpose of making it respect the proprietary rights of aliens (which include debts owed to them by the extinct state). Some jurists 27 go so far as to maintain that the succeeding state must take over the debts of the extinct state, even when they are higher than the value of the accrued fiscal property and fiscal funds. But it is doubtful whether in such cases the practice of the states would follow that opinion.

(e) Local law and private rights 28

The applicable system of local law after a merger of states is determined by the law of the successor state – the absorbing state or the new unified state as the case may be. It will in principle have sovereign power to make laws for the whole of the Baltic States into the USSR was recognised by the UK only de facto and not de jure. The UK concluded an agreement in 1968 with the Soviet Union regarding British claims which had arisen in respect of the Baltic States, using, in settlement of those claims, gold in the UK which belonged to the former central banks of the Baltic States, and accepted from the Soviet Union a renunciation of claims to that gold: see § 50, n 14.

29 This is also generally recognised by writers on international law and the practice of the states. See YBILC (1981), ii, pt 2, pp 91-2 paras (3)-(4), and 105-7 para (3)-(10). See also State of Rajasthan v Shamlal (1960), ILR, 49, p 422.

An exception is often suggested as regards those debts (or contracts) which are so contrary to the basic interests of the new state that it cannot equitably be called upon to take them over. On these so-called 'odious' debts and contracts, see YBILC (1981), ii, pt 2, pp 78-9, paras (4)-(43); Zemanek, Hag R, 116 (1965), iii, at pp 282-9; I.L.A, Report of the 54th Conference (1970), pp 150-150. In the third edition of this vol it was stated that a 'state which has subjugated another would be compelled to take over even such obligations as have been incurred by the annexed state for the immediate purpose of the war which led to its subjugation'. This opinion seems to be open to very grave doubt: see the Report of the Transvaal Concessions Commission, at p 9 (see n 34), and Westlake, i, p 81, and Sach, op cit in n 23 above, pp 165-82, who regards such a war debt as amongst dettes odieuses not passing to the successor state. See to the same effect Cahn, AJ, 44 (1950), pp 477-87. But see n 32, as to the Settlers of German Origin in Territory ceded by Germany to Poland Case (1923), PClj, Series B, No 6.

A successor state (Yugoslavia) has been held not liable for debts incurred by the authorities of an unrecognised 'puppet' regime (Croatia) set up on Yugoslav territory by a belligerent occupant: Re Does for Reply Coupons Issued in Croatia, ILR, 23 (1956), p 591.

See also Shinsbon Pakistan Estate Portland Cement Factory Ltd v Attorney-General, ILR, 17 (1950), p 72; Vinayak Shripatrao Patwardhan v State of Bombay (1960), ILR, 49, p 468.

This is the real point of the judgment in the case of Cook v Spring (1899) AC 327, and in the case of The West Rand Central Gold Mining Co v The King (1905) 2 KB 391. Insofar as the latter judgment denied the existence of a rule of international law that compels a subjugator to pay the debts of the subjugated state, its arguments are in no way decisive, and it should be noted that the plaintiff being a British corporation the adverse judgment could not give rise to an international question.

See Martens, i, p 67; Heftter, § 25; Huber, Die Staatsausubung (1898), p 158.

its territory, subject only to such international obligations (eg in the field of human rights, or as regards treatment of aliens, or flowing from particular treaties) as may be binding on it. If the formerly applicable laws are to continue to apply, either in whole or in part, they – together with rights and duties arising under those laws – will do so as a result of the consent, expressed or implied, of the successor state, in whose courts those laws, rights and duties will primarily have to be enforced. In general, it would seem that a change of sovereignty does not of itself terminate private rights dependent on the previous sovereign's laws, and that in the absence of action to the contrary by the successor state there may be a presumption that the former local laws continue to apply and that a change of sovereignty affects acquired private rights as little as possible.

and 10, and Hag R, 130 (1970), ii, pp 134–46. See also at (f) and (g) in text, as to contracts and claims for damages; and n 32, as to acquired rights generally.

On the effect of state succession on corporations, see Mann, Studies in International Law (1973), pp 524–52; and the case concerning the continuity of the corporate entity constituting the City of Eger (Cheb), Land Registry of Waldsassen v The Towns of Eger (Cheb) and Waldsassen (1965), ILR, 44, p 50; Caisse Centrale de Réassurances des Mutuelles agricoles v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France (1967), ILR, 41, p 369; Sonaren v Genebro (1968), ibid, p 384.


It will be noted that in Cook v Sprigg (see n 27) and in the decisions which followed it English courts have not questioned the rule of international law according to which a change of sovereignty as the result of cession does not affect private property. The ratio decidendi in these cases has been the doctrine that acquisition of territory by cession or annexation being an 'act of state' (see § 112, n 15), municipal tribunals have no authority to give a remedy in respect of any actions arising therefrom. See Forests of Central Rhodesia Case (1933), RIAA, 3, p 1407; Secretary of State for India v Sardar Rustam Khan, AD, 10, (1941–42), No 21; Hooge Ti Heneu Tinko v Atoa District Moari Land Board (1941), AC 308; Raj Rajender Chand v Mit Sahki, ILR, 24 (1957), p 74; Dalma Dadi Cement Co Ltd v Commissioner of Income Tax, ILR, 26 (1958–59), p 79; Thalendrakishore v State of Madhya Pradesh (1958), ILR, 27, p 30; Indulchar v State of Bombay (1958), ibid, p 32; State of Saurashtra v Memon Haji Ismail Haji Vallabhbhai (1959), ILR, 31, p 13. The recent practice of states, particularly in view of the peace treaties concluded after the First World War, tends to establish as a rule of international law the duty of a successor state, whether the succession arises upon cession or annexation or dismemberment, to respect the acquired rights of private persons, whether proprietary, contractual, or concessionary. (See the Advisory Opinion of the PCIJ on the Settlers of German Origin in Territory ceded by Germany to Poland (1923), Series B, No 6, particularly pp 35, 36; the Court held that the political origin attaching to the rights, and rendering them obnoxious to the successor state, does not relieve it of the duty to respect acquired rights of this character.) The successor state cannot avoid its liabilities by enacting legislation either of a discriminatory character or nominally affecting all the residents of the territory.


Particular rights and obligations arising under the local law, including those that involve the former state (such as debts owed by it, property rights conferred by it, and contracts concluded with it), are in general dealt with in the light of the foregoing principles, and certain of these matters which arise frequently are treated more fully in sub-paragraphs (d), (f) and (g).

(f) Contracts (apart from those resulting in financial indebtedness)

There is a considerable body of authority in favour of the view that the absorption state is bound by the contracts of the extinct state – for instance, a contract for the building of warships, or for coaling a fleet. Where the contract can be said to have a local character, such as a scheme for irrigation or for the building of locks on a river, the case for continued survival is stronger than in the case of other contracts. On the other hand, contracts of employment in the public service of the extinct state or directly affecting public rights of the state would not seem, in the absence of some undertaking to the contrary, to bind the successor state. Concessionary contracts – for instance, a state concession for the building and running of a railway or for the working of mines – usually have a local character, and there is much to be said in favour of the view that, if before the extinction of the state which granted the concessions every act necessary for vesting them in the holder had been performed, they survive the extinction and bind the absorbing state. However, in all such cases, whether involving concessions or other forms of contract, the original state party to the contract has disappeared, and, since contractual rights are essentially a matter for local law, their survival will be largely dependent on the provisions of the law of that absorption or the unification which has taken place. Even where a contract binds the successor state, it does so within the framework of the law applicable to the contract and subject to the successor state’s right to terminate or vary the contract in accordance with that law (and, if it chooses, to change the law), within such limits prescribed by international law as may be relevant (eg as regards the property rights of aliens).

Rapporteur on Succession of States (Bedjouai), dealing with economic and financial acquired rights (YBILC (1969), ii, p 69): the ILC considered the topic of acquired rights was extremely controversial, and preferred to make progress on certain specific elements, namely public property and public debts (ibid, pp 228–9). See also n 29.

See generally, in addition to works cited in the bibliography preceding § 60, O'Connell, BY, 27 (1950), pp 93–124; ILA, Report of the 53rd Conference (1972), pp 654–60; and n 34 below.

The Report of the Transvaal Concessions Commission (see Parliamentary Papers, South Africa (1901), Cmd 623), although it declares (p 7) that 'it is clear that a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist', nevertheless agrees that 'the modern usage of nations has tended in the direction of the acknowledgment of such contracts'. It is probable, however, that not a usage, but a real rule of international law, based on custom, is in existence with regard to this point. See Hall, § 29; Westlake, 127, 1901; pp 35–36, 38–39, and Westlake, A, pp 74–83; Castren, Hag, R, 78 (1951), i, pp 458–484; and O'Connell, BY, 28 (1951), pp 204–19.


See Maharashtra Shree Umadat Mills Ltd v Union of India (1962), ILR, 49, p 349 (agreement granting exemption from income tax).

(g) Damages
There is good authority for saying that a state does not become liable for unliquidated damages for the torts or delicts of the extinct state which it has absorbed.\(^6\) Where, however, the latter had acknowledged its liability and compensation had been agreed, a debt has arisen which, it is suggested, ought to survive the extinction of personality and be discharged by the absorbing state.\(^7\)

It seems that the analogy of the absence of liability for unliquidated damages for a delict is applicable to the case of unliquidated damages for breach of a contract, so as to make them irrecoverable against a successor, for breach of contract is also a wrongful act;\(^8\) but that, if compensation for breach had been agreed with the extinct state, the absorbing state ought to discharge that liability.

(b) Nationality\(^9\)
The previously existing state having ceased to exist, its nationality must be regarded, for purposes of international law, as also having ceased to exist. Former nationals of the extinct state do not therefore retain their former nationality for purposes of international law. The acquisition of nationality being essentially a matter of national law, it will be for the law of the successor state to determine whether and on what conditions they acquire its nationality, and whether, for purposes of its law, some meaning may still be given to the former nationality of the extinct state. International law does not itself confer the successor state's nationality on former nationals of the extinct state. It does, however, probably oblige the successor state to provide for the possibility of those nationals acquiring its nationality at least in the case of those of them who are resident in or have a substantial connection with the territory which the successor state has absorbed.

\(^{6}\) Brown's Claim (1923), RIAA, 6, p 120; see also Hurst, BY (1924), pp 103–78. The award in Brown's Claim was followed by the same tribunal in No 84 of the Hanusian Claims (1925), RIAA, vi, p 157. See also Farad v Government of the Union of India, ILR, 26, (1958–II), p 192; Khushangar Electric Supply Co Ltd v United State of Rajasthan (1959), ILR, 49, p 355; State of Saurashtra v Jamdar Mohamed Abdulla (1961), ILR, 49, p 379 (both this and the previous case regarded compensation as 'act of state' grounds); Jagannath Agrawala v State of Orissa (1964), ILR, 45, p 19. But cf Gagan Singh v Union of India, ILR, 23 (1956), p 101, and Collector of Saharanpur v Shankarlal Kalidas Patel (1959), ILR, 31, 10, upholding the liability of the successor state. See generally on succession in matters of state responsibility, Monnier, AFII, 8 (1962), pp 39–90. See also Re Application No 243/57 (The W Association, By X, Y and Z v German Federal Republic and the Territory of the Saar), ILR, 24 (1957), p 408, raising the questions whether the Saar succeeded to obligations of Germany (as constituted before 1939) to pay compensation in relation to certain occurrences in that territory, and whether the Federal Republic of Germany in turn succeeded to the obligations of the Saar; Re Application 216/57 (Mrs X v German Federal Republic), ibid, p 413, dismissing a claim against the Federal Republic of Germany arising out of acts of Saar officials before that territory's integration into the Federal Republic, on the ground that the acts occurred before the relevant treaty entered into force for the Federal Republic. Note also that British claims against the Balkan States were settled by an agreement concluded between the UK and the USSR, which had incorporated those states into the Soviet Union: see § 50, n 14.

\(^{7}\) For the general test of the obligation to take over liquidated damages in respect of railway accidents see the decision of the Polish Supreme Court in Dziorszewska v Directed of Electrical Association of Czeszowoda, AD, 7 (1933–34), No 38; see also Indulkar v State of Bombay (1958), ILR, 37, p 32. See Mosler, Wirtschaftskonzessionen bei Aenderung der Staats hoheit (1948); O'Connell, BY, 27 (1950), pp 93–124. See also the decision of the Austrian Supreme Court in Klein v Republic of Austria, AD, 15 (1948), No 18. As to the predecessor state's outstanding claims against third parties, see Land Oberosterreich v Gude, AD, 9 (1936–40), No 34, where an American court laid down the rule that 'a right of action belonging to one sovereign will pass to its successor, if the successor has come to powers in a manner acceptable to what our own government considers the principles of international law'.

\(^{8}\) See Collector of Saharanpur v Shankarlal Kalidas Patel (1959), ILR, 31, p 10. However, in the Lighthouses Arbitration (1956) Greece acknowledged and adopted breaches of concessions by Crete occurring before Greek sovereignty was extended to the previously autonomous State of Crete. The Tribunal regarded Greece as 'bound, as successor State,' to assume the financial consequences for the breach of the concession contract: (1956) RIAA, xii, pp 155, 198; ILR, 23 (1956), pp 79, 92.

\(^{9}\) See generally § 266, as to the consequences of subjugation as regards the nationality of inhabitants of the subjugated state; and also §§ 249, 390, as to the acquisition and loss of nationality in certain cases involving the change of sovereignty over territory.

\(^1\) In some respects the creation of the Federal Republic of Germany and the German Democratic Republic on the territory previously constituting the German Reich is a case of dismemberment, but there are certain special considerations which require such a view to be applied with caution: see § 40, n 19ff, and § 59, n 8.

\(^2\) As to the dissolution of the Federation of Mali upon the secession of Senegal, and its replacement by the two separate States of Senegal and Mali, see Cohen, BY, 36 (1960), pp 375–84, especially pp 382–5 as regards treaties; YBILC (1974), ii, pt 1, pp 262–3, para 11.

\(^3\) See above, § 59, n 7, for a case of incomplete absorption of territory, eg Austria after 1918. The history of Austria has at different times involved questions of state succession in cases of dismemberment (upon the dissolution of the Austro-Hungarian Empire in 1918), of merger (as a result of the Anschluss with Germany in 1938), and of dismemberment again (with Austria's subsequent separation from Germany and re-emergence as an independent state after the Second World War). See Sedl-Hohnfelder, Die ibertragung von Herrschaftsverhaltnissen am Beispiel österreich (1982); and § 55, n 36.


\(^5\) At least some former treaties with Germany have been held to continue to be binding in respect of the Federal Republic of Germany or the German Democratic Republic, as the case may be: see Clark v Allen (1947) 331 US 503; AJ, 42 (1948), p 201; Zischueg v Miller (1968) 389 US 429; AJ, 62 (1968), p 971; Re Estate of Kraemer, AJ, 64 (1970), p 701, all three cases concerning the 1923 Treaty of Friendship, Commerce and Consular Rights; Trade Mark Registration Case (1967), ILR, 59, p 490 (concerning the Adirond Agreements for the Registration of Trade Marks 1981); Billerbeck and Cie v Bergbaus-Handel GmbH (1967), ILR, 72, p 59 (concerning the Geneva Convention on the Enforcement of Foreign Arbitral Awards; Re Application of Treaty Case (1973), ILR, 77, p 440 (concerning the Hague Convention on Civil Procedure 1955). An earlier decision in a contrary sense turned on non-recognition of the GDR at the time: International Registration of Trade Mark (Germany) Case (1959), ILR, 28, p 82.

\(^6\) South African courts have held South Africa's extradition treaty with the Federation of Rhodesia and Nyasaland to be still binding in respect of former component parts of the Federation which became separate states after its dissolution: State v Bull (1966), ILR, 52, p 84; State v Devoy (1971), ILR, 55, p 89.
over by the different successors! As regards the property abroad of the former
debts of the extinct state must be taken

the historical record of the predecessor as well as of the successor state, and the
particular territory and its administration, while at the same time
absorbing states finds on the part of the territory it absorbs.' Special considera-
tions, however, apply to state archives, because of their frequent relevance to

cases may dictate otherwise).

previously members of an international organisation, practice in the case of the
'union state' as remaining bound by its treaties after its dissolution if those
relatively limited practice as there is relates to the dissolution of unions of states

themselves states and international persons, while others were annexed by surrounding stat

held, in an arbitration under the UPU Convention, entitled to
dele to pay debts incurred by

Dues

the communication by Syria to the President of the General Assembly (UN Doc
retaining the name United Arab Republic) acted on the basis that Syria had seceded from the
union for one member only

Thus when - as in the case of
Sweden-Norway in 1905 - a real union (see § 73) is dissolved and the members become separate
international persons, all treaties concluded by the union devolve upon the former members,
except those which were concluded by the union for one member only - eg by Sweden-Norway
for Norway - and which, therefore, devolve upon that former member only, and, further, except
those which concerned the union itself and lose all meaning by its dissolution.

See the communication by Syria to the President of the General Assembly (UN Doc A/4914),
and the statement by the President on 13 October 1961 (UN Doc A/IV 305 and 1036); UNYB
(1961), p 168; YBILC (1974), ip 1, p 262, para (9). It would seem that both Syria and Egypt
(still retaining the name United Arab Republic) acted on the basis that Syria had seceded from the
union. See generally Young, Aj, 56 (1962), pp 482-8; Green, Saskatchewan Law Review, 31
(1967), pp 93-112, and in Law, Justice and Equity (eds Holland and Schwarzenberger, 1967),
p 152-67.

There may, however, be some need for qualification of the general rule in respect of movable
property of the former state if it was only accidentally on the territory of a successor state
without having any other connection with that territory.

See examples of state practice given in YBILC (1981), ii, ip 2, pp 68-71, paras (2)-(14).
See examples of state practice in ibid, pp 108-12, paras (3)-(21). But a successor state which never
recognised the former state (regarding it as the 'puppet' creation of an occupying state) has been
held, in an arbitration under the UPU Convention, entitled to declare(binding incurred by it:
Re Dues for Reply Coupons Issued in Croatia ILR, 23 (1966), p 59.

See, however, the award in the Ottoman Debt Arbitration (1925), RIAA, 1, p 529.

In the complicated case of the dismemberment of Austria-Hungary in 1918, when the real
union - see § 73 - was dissolved, and the old state broke up into fragments, some of which became
themselves states and international persons, while others were annexed by surrounding states,
the Treaties of Peace made express provision for the apportionment between the states concerned

of the pre-war debts of Austria-Hungary, and defined the extent of the liability of Austria for the
debt incurred by the dismembered dual monarchy in prosecuting the war. Thus the Treaty of
Peace with Austria provided (Art 203) that each of the states to which territory of the former
Austro-Hungarian monarchy was transferred, and each of the states arising from the dis-
memberment of that monarchy, including Austria, should assume responsibility for a portion of
the secured and unsecured bonded debt of the former Austro-Hungarian Government, as it
stood before the outbreak of war. Machinery was provided for ascertaining that portion which
each state was to assume. None of these states, other than Austria, was to bear any responsibility
for the bonded war debt of the former Austro-Hungarian Government; but, on the other hand,
they were to have no recourse against Austria in respect of war debt bonds which they or
their nationals held (Art 205): see Administrative Decision No 1 of the Tripartite Claims Commission
(1927), RIAA, 6, p 203. For a scholarly and exhaustive treatment of the relevant provisions of the
various peace treaties, see Penkowchin, Public Debts and State Succession (1931), pp 431-755.

See also, as to the Italian Peace Treaty of 1947, Piramonti, H. 73 (1948), ip 286-304.
After the Second World War, on 13 October 1945, the new states arising from the dismemberment
of the pre-war State of Germany were settled in the Agreement on German External Debts 1953
(UNTS, 333, p 4; TS No 7 (1959), under which, broadly, the FRG accepted liability for Germany's
outstanding pre-war debt. See Simpson, ICLQ, 6 (1957), pp 472-86. See also, arising out of this Agreement,
Belgium et al v Federal Republic of Germany (the Young Loan Arbitration) (1980), ILR, 59,
p 495.

For a detailed discussion of the principle of state succession as to the public debt on dis-
memberment and in other cases, see Sack, Succession aux dettes publiques d'état (1929), particu-

Thus upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963 Southern
Rhodesia was given the former Federation's office building (Rhodesia House) while Zambia
was given the former High Commissioner's residence: see O'Connell, State Succession in
Municipal Law and International Law (vol 1, 1967), p 231. See also YBILC (1981), ii, pt 2, pp 46-7; paras
(14)-(15). Simpson v Taylor (1974), ILR, 56, p 40; Kunstsammlungen Zu Weimar v Eichfon, ILM,
21 (1982), p 773 (reversing an earlier decision in 1975), ILR, 61, p 143, given at a time when the
successor state in question - the GDR - was not recognised.

R v Ambya (1964), ILR, 53, p 102; Luizjama v Republic (1967), ibid, p 178.

See Soprom-Köszeg Railway Case (1929), RIAA, 2, pp 961, 962, affirming, inter alia, that change of
sovereignty does not of itself terminate the contracts of the predecessor state.

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states will be in any better position than the other to succeed to them. The situation regarding succession to claims to damages is probably governed in accordance with broadly the same principles as those indicated for cases of absorption. 14

§ 64 Separation: secession It may happen that a part of a state secedes and becomes a separate state. In such cases the practice before 1945 tended to support the conclusion that the new state did not succeed to the treaties of the state of which it was formerly a part but rather began its international existence free from any such treaty inheritance (except for those treaty rights and obligations locally connected with its territory), and this is probably still the correct position today. Practice since 1945 has been equivocal, and also limited (apart from the situation of dependent territories emerging to independence), to which special considerations apply and which calls for separate treatment in § 66.

However, while with regard to treaties generally the position is essentially similar to that obtaining in the case of absorption (§ 62) there is more room for the view that in case of separation resulting in the emergence of a new state the latter is bound by - or at least entitled to accede to - general treaties of a 'law-making' nature, especially those of a humanitarian character, previously binding on it as part of the state from which it has separated. Thus Pakistan and Burma, when accepting in 1949 the obligations of the Constitution of the International Labour Organisation, considered as binding upon them the various international labour conventions which applied to their territories when forming part of India. Similarly Pakistan considered itself a party to the Convention for the Suppression of Traffic in Women and Children 1921 in virtue of the fact that India became a party to that Convention before the establishment of Pakistan as an independent state. 3

The state from which the secession has taken place continues in principle, and despite its territorial diminution, to be bound by its treaties, although in particular cases its loss of the territory in question may have consequences for the continued operation of the treaty.

As regards succession in respect of membership of international organisations, the question arose in the matter of the admission to the United Nations of some states previously forming part of India, which was one of the original signatories of the Charter. The General Assembly did not adopt the view of Pakistan that it was a 'co-successor' to India and as such entitled to automatic membership, but required Pakistan to apply for membership as a new member state. 4 The issues raised were referred to the General Assembly's Sixth Committee, for guidance as to future cases, and that Committee adopted the view that 'when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter'. 5

As regards the physical property of the state, and its international debts, succession takes place to a similar extent to that occurring in cases of dismemberment of a state. 6

14 See § 62, nn 38-40. See also Schloesser v Directorate of Finance for Vienna, Lower Austria and Burgenland, I.L.R. 26 (1958-61), p 299, concerning non-liability for refunding wrongful taxes. But see Untersuchungsanstalt der Franzosenwirtschaft zum Wolverton des Heilbronner Landesverwaltung, I.L.R. 26 (1958-61), p 89, accepting liability in respect of compensation of property. See also Austrian Citizen's Entitlement to Compensation (Governorship Case) (1960), I.L.R. 32, p 153, upholding the successor state's enjoyment of the benefit of a third state's waiver of claims against the predecessor state.


4 Ibid, pp 264, 266, paras (17)-(18), (27), regarding the creation of Pakistan on the partition of India and its succession to independence in 1947, the separation of Singapore from Malaysia in 1965 (to which see also Green, Can YBIL, 4 (1966), pp 2-42; Jayakumar, I.L.Q., 19 (1970), pp 299-423), and the separation of Bangladesh from Pakistan in 1971. The answer to questions of succession may lie, to some extent at least, in the terms used in a treaty and the interpretation to be given them in relation to the new situation: see O'Connell, A.J., 58 (1964), pp 41-61. See also regarding succession by Pakistan to treaties, the decision of the Supreme Court of Pakistan in M/S Yangtse (London) Ltd v M/S Barslas Brothers (Karachi) & Co (1961), I.L.R. 34, p 27, and comment by Fitzgerald, I.L.Q., 11 (1962), pp 843-7; and see Hossain, B.T., 36 (1962), pp 570-5, regarding succession by India and Pakistan to certain treaties formerly applicable to British India.

5 Pakistan and Burma were admitted in 1947 and 1948, respectively. Ceylon was not admitted owing to the opposition of the Soviet Union. See Liang, A.J., 43 (1949), pp 144-54, and Schachter, B.Y., 25 (1948), pp 101-9.

6 See § 63, nn 7 & 8. But there seems no compelling reason in principle why in the case of a seceding state it should succeed to any of the property abroad of the parent state, unless particular circumstances make this appropriate. In substance, recognition of the new state is sometimes made to depend upon its undertaking a proper share of the obligations of the former state of which it formed part. See also Paquet, Les Consequences financieres de la succession des etats (1954).
As regards nationality, since the parent state continues to exist and its nationality remains in being, the rights and obligations of the ceding state, other than those which run with the territory itself, will take place in accordance with an agreement between the states concerned, in which they will regulate at least the more important consequences of the transfer so far as concerns questions of succession. In the absence of a relevant agreement, a succession will occur in the following circumstances.

As regards treaties, the transfer of sovereignty over territory from one state to another has consequences reflected in the so-called 'moving treaty frontiers' rule, whereby the territory passes automatically out of the treaty regime of the former sovereign and into the treaty regime of the successor sovereign. There is thus no succession by the successor state to the treaty rights and obligations formerly applying to the territory, but rather a substitution of treaty regimes. An exception is, of course, made for those international rights and obligations of the predecessor which are locally connected with the territory in question, and which will thus devolve upon the successor state; and, in the opposite sense, the successor state's treaty regime may be inapplicable to the transferred territory to the extent that its application would be incompatible with the object and purpose of a particular treaty. The transferee state, although territorially diminished, remains in principle bound by its treaties, although in respect of particular treaties its loss of the territory in question may have consequences for the continued operation of the treaty; and in particular it will retain its membership of international organisations, while the ceded territory will henceforth be covered by the transferee state's membership of international organisations.

A succession also takes place with regard to the ceding state's physical
property" situated in the ceded territory, although as already noted in relation to the dismemberment of a state, state archives are subject to certain special considerations to which effect can only be given by an agreement between the states concerned. The successor is probably bound to take over a corresponding part of the debt of its predecessor, at least as regards those state debts directly connected with the transferred territory. Succession in matters of nationality,10

7 See The United States v Percheman (1833) 7 Peters 51. See also YBILC (1981), ii, pt 2, pp 33–4, paras (12)–(20), (25)–(29).
8 See § 63, n 8; see also the discussion of state practice in the context of transfers of territory in YBILC (1960), paras (1)–(20).
9 Thus, for instance, Arts 9, 33, and 42 of the Treaty of Berlin 1878 (see Martens, NRG, 2nd series, 3, p 449) stipulated that Bulgaria, Montenegro, and Serbia should take over part of the Turkish debt. Again, the Peace Treaty of Lausanne 1912, by which Italy acquired Tripolitania, stipulated that Italy should take over part of the Turkish debt (Martens, NRG, 3rd series, 7, p 7). Likewise the Treaty of Peace with Germany of 1919 provided that the powers to which German territory had been ceded should assume responsibility for a portion of the pre-war debt of the German Empire, and also of the pre-war debt of the German state to which the ceded territory belonged. The Treaty of Peace with Italy of 1946 lays down that the successor state shall be exempt from payment of the Italian public debt but that it should assume the obligations of the Italian State towards holders who continued to reside in the ceded territory insofar as these obligations concerned that part of the debt which was issued prior to the entry of Italy into the war and was not attributable directly or indirectly to military purposes (Annex XIV (6)). For the Ottoman Debt Arbitration (1925) see AD, 3 (1925–26), and note by Brown in AJ, 20 (1926), pp 135–39. See also Alphand, Le Partage de la dette Ottomane (1928). As, however, Germany in 1871 had refused to undertake any part of the French debt, France in the Treaty of Versailles 1919 was exempted from assuming any part of the German debt on account of the cession of Alsat-Lorrain (Art 250); and in the case of Poland, that part of the German debt which was attributable to measures for the German colonisation of Polish provinces was to be excluded from the apportionment (Art 255).

On the other hand, the USA refused, after the cession to Cuba in 1898, to take over from Spain the so-called Cuban debt – that is, the debt which was settled by Spain on Cuba before the war (see Moore, i, § 97, pp 351–85). Spain argued that it was not intended to transfer to the USA a proportional part of the debt of Spain, but only such debt as attached individually to the island of Cuba. USA, however, met this argument by the assertion that the debt concerned was not incurred by Cuba, but by Spain, and settled by her on Cuba. See also Alphand, The Doctrine of State Succession (1934). Similarly, by Arts 46–57 of the Treaty of Lausanne 1923 between Turkey and the Allied and Associated Powers, provision was made for the distribution of the Turkish Public Debt among various states which succeeded to portions of the Ottoman Empire or were created in territories formerly forming part of it. The courts of law in most of the succession states arising after the First World War denied succession as to fiscal obligations except where it was stipulated for by treaty; to Poland, see Ehrlich, Pravo narodowe (2nd ed, 1932), § 213. As to the practice of courts in Czechoslovakia, Austria and Romania see AD, 1925–26, 1927–28, and 1929–30. On the refusal of Germany to take over the Austrian public debt after the annexation of Austria in 1938, see Garner, AJ, 32 (1938), pp 766–75; Brandt, ZÖV, 9 (1939), pp 127–47.

Many writers have maintained that there is a rule of international law requiring succession to public debts. See Huber, Die Staatsnachsuezung (1898), §§ 125–35 and 205, where older treaties are enumerated. See also Schmidt, Der Uebergang der Staatschulden bei Gebietsabtretungen (1913); Sibylé, JCL, 3rd series, 7 (1925), pp 22–39; and Sack, Succession aux dettes publiques d’Etat (1929), particularly pp 52–90. The practice of states, as shown above and as summarised in YBILC (1981), ii, pt 2, pp 86–90, paras (11)–(21), (25)–(36), is, however, too equivocal to establish such a general rule to be propounded with any confidence, except probably with regard to localised debts (as to which see eg Polish Mining Corporation v District of Ratibor, AD, 7 (1933–34), No 37).

10 See further §§ 249, 390, as to the consequences of cession upon the nationality of inhabitants of the ceded territory.

local law and private rights,11 contract12 and damages13 is, in respect of matters pertaining to the territory ceded or transferred, probably to be regulated in accordance with broadly the same principles as those indicated for cases of succession;14 the ceding state may be expected to amend its own laws in these matters to take account of the partial loss of territory as a result of the cession.

§ 66 Former dependent territories Colonies used to be regarded as in the fullest sense territories under the sovereignty of the colonial state, so that there was little reason, for purposes of succession, to distinguish between the accession to independent statehood of a former colony and the breaking away of part of a state so as to establish a new state.15 In more recent times,16 however, under the influence of the principle of self-determination and the movement in favour of decolonisation associated with the United Nations Charter,17 perceptions have changed in some respects. First, colonies and other dependent territories have come to be widely accepted as having a degree of territorial identity and separate international status while still dependent. Secondly, that identity and status have
been seen as differentiating them from the colonial power's metropolitan territory. Thirdly, many dependent territories have had, even before attaining independence, their own separate and locally autonomous governments, and sometimes even a degree of international status. As regards treaties' a widespread view, reflecting considerable state practice, has been that a former dependent territory, on becoming an independent state, does so without being bound by any of the treaties of its former parent state which extended to the territory of the new state: it starts, according to this view, with a 'clean slate'. This conclusion, however, is only acceptable subject to some qualifications.

First, as in other cases, international rights and obligations arising under treaties and locally connected with the new state's territory, are excepted from the 'clean slate' rule; this is a matter particularly relevant to the territorial extent of the sovereignty of the new state. Secondly, the International Court of Justice has held that a state emerging from dependent status remains bound by treaties specifically made for it by the former parent state, and it is possible to apply this conclusion to cover not only those treaties entered into especially for the territory but also those general treaties specifically extended to it under a territorial application clause. Thirdly, account must be taken of the practice whereby many newly independent former dependent territories continue in force many of the treaties which had previously been extended to them, although - at least as regards bilateral treaties—this practice may not so much establish that continuity is required as a matter of law but rather reflect the consent of the parties, given either expressly or by conduct, in the interests of stability and continuity of legal relations.

As regards multilateral treaties previously applying to the former dependent territory (or previously applicable to it as a consequence of the parent state's ratification, even if the treaty has not entered into force by the date of its independence), the 'clean slate' rule is modified to the extent of not requiring the newly independent state to go through the formal process of accession as if it were a non-party state already in existence; the territorial nexus previously existing between it and the treaty has usually been regarded as sufficient to allow it (so far as is consistent with the aims and treaty obligations of the Crown with respect to Indians in Canada, insofar as they still subsist, because of an agreement with the Government of Canada with the attainment of independence by Canada, at the latest in 1931) UKMIL, BY, 51 (1938), p 398. Judicial review of this decision, in addition to works cited in the bibliography preceding § 60 and n 2 of this §, O'Connell, BY, 38 (1962), pp 84–180; ICLA, The Effect of Independence on Treaties, and Report of the 32nd Conference (1966), pp 574–95, Report of the 33rd Conference (1968), pp 596–632, and Report of the 34th Conference (1970), pp 103–5; Keith, AJ, 61 (1967), pp 521–46; O'Conry, La Succession d'Etats aux Traités (1968); Pereira, Da Successao de Estados Aqueles aos Tratados (1968); Marcondes, Acessao i l'Independencia e Successao d'Etats aux traites retenus internationaux (1969); Goerdeler, Die Staatsenkenungsfolge in multilateralen Verträgen, with special reference to former French states; Nguyen-Huu-Tru, Quelques prolonctions de succession d'Etats concernant le Viet-Nam (1970); Boker-Szegi, New States and International Law (1970); Ockey, International Law and the African New States (1972); Lodossin, Succession of New States to International Treaties (1972); Lane-Fong, State Succession Relating to Unequal Treaties (1974); ICLA, 1974, ii, p 1, pp 211–14, paras (3)–(17), pp 215–17, paras (3)–(12), and pp 236–40, para (1)–(16).


See eg. Lora and Tonya v Societa Industria Armatissima (1971), ICLA, 71, p 48; Lening v HZA Berlin-Parchov (1973), ICLA, 53, p 153; State v Oosthoven (1976), ICLA, 68, p 3; Re Bottrell (1980), ICLA, 78, p 105. In Re Director of Public Prosecutions, ex parte Schwartz (1976), ICLA, 73, p 44, it was doubted whether the 'clean slate' rule was part of customary international law. Even if it were part of customary international law it could not be imposed by a party to a multilateral treaty with which the state to which the statute applies was party in forceful and judicially valid of an agreement originally concluded between a state and its then dependent territory.

See § 62, n 13, and n 21. In 1980 the Foreign and Commonwealth Office stated that all relevant...
structure of the treaty)\textsuperscript{14} to be treated as a party\textsuperscript{15} on the strength of a less formal indication that it so wishes. Practice has varied on whether the effective date for the newly independent state becoming a party is the date of its independence or the date of its notification.\textsuperscript{16} Finally, as regards membership of international organisations, the newly independent state does not succeed to the membership vested in its former parent state, but must apply for membership in the usual way.

Because of the many uncertainties as to the extent to which a succession to treaty rights and obligations takes place, and in the interests of certainty and continuity, it has been common, although by no means universal, practice for the parent state and the newly independent state to conclude a devolution agreement making provision for the continued applicability to the latter of those of the parent state's treaties which extended to the territory of the newly independent state.\textsuperscript{17} This practice has been followed in particular by the United Kingdom,\textsuperscript{18} on the attainment of independence by its dependent territories. The legal effect of such an agreement is not altogether clear, but it would seem that at least it clarifies and regulates the position as between the former parent state and the newly independent state, that it does not operate as an assignment of treaty rights and obligations effective in relation to other parties to the treaties covered by it,\textsuperscript{19} but that it indicates 'the intentions of the newly independent State in regard to the predecessor's treaties and [is] a formal and public declaration of the transfer of responsibility for the treaty relations of the territory.'\textsuperscript{20} As an alternative to a devolution agreement some former dependent territories have preferred, on attaining independence, to make a unilateral declaration regarding their attitude towards treaties formerly applying to their territories, usually to the broad effect that formerly applicable treaties will be treated as continuing to apply for an interim period, during which final decisions will be made about their future operation.\textsuperscript{21} These declarations, while not by themselves definitively regulating treaty relations with other states, and allowing the new state to select which

\textsuperscript{14} Thus the intentionally limited number of parties to a treaty, or its limited geographical scope or some other condition of participation, might make it inappropriate for a newly independent state to become a party in this way. See eg as to the relationship between Malta and Malawi and the European Convention for the Protection of Human Rights and Fundamental Freedoms after their attainment of independence, Eisken, BY, 41 (1965-66), pp 401-10, and 43 (1966-69), pp 190-92.

\textsuperscript{15} As to the question whether the new state becomes a party subject to the reservations previously attached to the parent state's participation in the treaty, see YBILC (1974), ii, pt 1, pp 222-6, paras (1)-(14).

\textsuperscript{16} See ibid, pp 233-5, paras (2)-(6).

\textsuperscript{17} See generally E. Lauterpacht, ICLQ, 7 (1958), pp 524-30; Francis, ICLQ, 14 (1965), pp 612-27 (with particular reference to the position of Jamaica); O'Connell, State Succession in Municipal Law and International Law (vol 2, 1967), pp 352-73; YBILC (1974), ii, pt 1, pp 182-7, paras (1)-(22); Schaffer, ICLQ, 30 (1981), pp 593, 597-602; Kawailey, ICLQ, 35 (1986), pp 717-23 (with particular reference to the position of the Seychelles, which three years after independence repudiated the devolution agreement concluded on independence). Several of the works cited at n 5, especially those dealing with practice within the Commonwealth, refer to the conclusion of devolution agreements.

Largely because of the existence of devolution agreements, bilateral extradition treaties were held to continue in force after independence in Laos and Eleven Others v R (1971), ILR, 70, p 2, and R v Commissioner of Correctional Services, ex parte Fitz Henry (1976), ILR, 72, p 64. Similarly, the existence of such an arrangement between the Netherlands and Indonesia on the latter's independence would appear to have underlain the statement to the court on behalf of the British Government that Indonesia had succeeded to the rights and obligations under the Netherlands-UK extradition treaty in Re Westerling, ILR, 17 (1950), No. 21. In R v Director of Public Prosecutions, ex parte Schwartz (1976), ILR, 73, p 44, the devolution agreement was not relied on (as of itself it could not create treaty relations with the other state), although the extradition treaty was held to continue to apply by virtue of the conduct of the parties. See also United States Government v Rouen (1989) 3 All ER 315, 327-8. Extradition treaties were, in the absence of any devolution agreement, held still to apply to states which had attained independence since the treaties were concluded, in Sabatier v Dubrowski, AJ, 73 (1979), p 510; and M v Federal Department of Justice and Police (1979), ILR, 75, p 107.

\textsuperscript{18} Eg the agreements with Iraq in 1931 (TS No 15 (1931)); with Malaya in 1957 (Cmd 346); UNTS, 279, p 287; with Sierra Leone in 1961 (Cmd 1464); UNTS, 420, p 12; and with Seychelles in 1976 (TS No 109 (1976)). In the case of India and Pakistan the agreed devolution arrangements were set out in the Indian Independence (International Arrangements) Order 1947.

Examples of devolution agreements involving other territories include the agreements concluded in 1949 between the Netherlands and Indonesia (UNTS, 69, p 266); in 1954 between France and Vietnam (BFS, 161 (1954), p 649 (Art 2)); and in 1962 between New Zealand and Western Samoa (UNTS, 476, pp 4, 6).

\textsuperscript{19} See § 626, as to the operation of treaties on third states. But a third state may expressly consent to a devolution of a treaty in such an agreement (see eg the UK-Venezuela Agreement 1966, Art 8 (TS No 13 (1966))), and see BPHL (1966), pp 72-3.

\textsuperscript{20} YBILC (1974), ii, pt 1, p 184, para (10). The ILC concluded its review of state practice in the following terms:

'(18) The practice of States does not admit, for instance, that a devolution agreement should be terminated by itself creating a legal nexus between the successor State and third States parties, in relation to treaties applicable to the successor State's territory prior to its independence. Some successor States and some third States parties to one of those treaties have undoubtedly tended to regard a devolution agreement as creating a certain presumption of the cohesion of the state in force for certain types of treaties. But neither successor States nor depositaries have as a general rule attributed automatic effects to devolution agreements. Accordingly, State practice as well as the relevant principles of the law of treaties would seem to indicate that devolution agreements, however important as general manifestations of the attitude of the succession State towards the treaties of its predecessor, should be considered as res inter alias acta for the purposes of their relations with third states.'

The ILC added the further consideration that it was sometimes difficult to identify the treaties covered by a devolution agreement: ibid, p 186, para (18). See also R v Director of Public Prosecutions, ex parte Schwartz (1979), ILR, 73, pp 44, 48.

\textsuperscript{21} See generally, YBILC (1974), ii, pt 1, pp 187-93, paras (2)-(9), where much practice is reviewed; Mallamud, AJ, 63 (1969), pp 782-91; and Schaffer, ICLQ, 30 (1981), pp 593, 602-6. Many of the works cited at 56, n 5, especially those dealing with practice within the Commonwealth, refer also to unilateral declarations of this kind. See also Molony v Senior Legal Adviser (1971) AC 182, where the Privy Council treated a unilateral declaration by Lesotho as resulting in the multiarty treaty question in the proceedings continuing to bind Lesotho after independence. See similarly Re R (1976), ILR, 75, p 115.

The precedent for making unilateral declarations of this kind was probably set by Tanganyika in 1961, see Materials on State Succession (UN Secretariat), pp 177-8; ICLQ, 11 (1962), pp 1210-14. Where former British dependent territories have, on independence, preferred to make a unilateral declaration rather than conclude a devolution agreement, the UK practice has been to circulate to members of the UN a disclaimer of its continued responsibility as regards its treaty rights and obligations formerly applied by it to the territory in question: see eg Materials on State Succession (UN Secretariat), p 178.

Under the Vienna Convention on Succession of States in respect of Treaties 1978 (see § 69) there is no succession to treaty rights and obligations solely by virtue of a unilateral declaration by the successor state (Art 9); see also Arts 27 and 28 as to the possibility of the successor state making a unilateral declaration of provisional application in respect of multilateral treaties.
treaties it wishes to continue in force (sometimes referred to as amounting to 'opportuna succession'), 
nevertheless at least facilitate the provisional continuation of treaty relations pending the orderly establishment of more permanent arrangements, arrived at expressly or by implication, with the other states parties to the treaties in question.22

As regards state property, practice suggests that the newly independent state will succeed to immovable property situated in its territory, and probably also to movable state property which is located in its territory because of some direct and necessary connection with it and not just fortuitously,23 state archives relating to the new state and located in its territory will pass to it with other movable property, but practice relating to archives held abroad has been varied.24 As regards the public debt of the parent state, practice, while not uniform,25 suggests that the new state will succeed at least to responsibilities under debts contracted for and on behalf of the formerly dependent territory, particularly if contracted by one of its organs,26 and that the new state is unlikely to succeed to a proportionate share of the general public debt of the parent state. These various aspects of succession are often dealt with in articles as concluded between the new state and the parent state in the context of the former's emergence to independence. This would seem to be the most satisfactory27 way of resolving many of the uncertainties which would otherwise arise, particularly as regards those matters which concern only the parties to the agreement.

Succession in matters of nationality,28 local law,29 contracts30 and claims for

22 For an example of a bilateral agreement between a newly independent state and a third state specifying formerly applicable treaties which should continue to apply, see the USA-Ghana Exchange of Notes 1957-58, UNTS, 442, p 175, on which see Bevans, AJ 59 (1965), pp 93-7.
23 See practice cited in YBILC (1981), ii, p 2, pp 38-40, paras (9)-(11), and, with particular reference to currency and state funds, p 41, paras (17)-(23). As to succession to public property in the case of former French states in Africa, see Fouilloux, AfFD, 11 (1965), pp 889-915. See also concerns expressed in the UN Tribunal on Libya, giving effect to G.A. Res 1803 (VIII) (1963) providing for succession to Italian state property in Libya: Italy v United Kingdom of Great Britain and Northern Ireland and the United Kingdom of Libya (1953), ILR, 25 (1958%), p 2; Italy v Libya (General List No 2) (1954), ibid, p 13; Italy v Libya, ILR, 22 (1955), p 103. Tax payable to the state in respect of matters arising before independence have been held, after independence, to be payable to the new state: See Rajendra Mills Ltd v Income Tax Officer, ILR, 26 (1958-11), p 100.
24 See generally the considerations referred to at §§ 63, n 8, and the practice cited in YBILC (1981), ii, p 2, pp 62-3, paras (7)-(12), p 64, para (19), and various resolutions of the UN General Assembly and other bodies cited at pp 65-6, paras (28)-(35). As to archives relating to Algeria in the period before its independence see also AFDI, 28 (1982), pp 1020-1, RG, 86 (1982), pp 325-7, and 89 (1985), pp 742-3.
25 The ILC summarised practice in these circumstances since 1945 as providing 'precedents in favour of the passing of State debts and pre-existing treaties, as well as cases of repudiation of such debts after they had been accepted'; YBILC (1981), ii, p 2, p 94, para (13). See also Zemanek, Hug R, 116 (1965), iii, pp 255-70; Re Marcho (1965), ILR, 47, p 83; Poldermansen v State of the Netherlands (1956), ILR, 24, (1957), p 69. But see, at least when supported by the metropolitan government's representatives in the colonial territory, and to have allowed time for repayment, responsibility for payment after independence has been held not to pass to the new state but to remain with the metropolitan government: Ruet (1984), RG, 90 (1986), p 249.
26 It should be noted that it might be possible to regard such a debt as being that to the former dependent territory rather than to the parent state. See De Keer Maurice v Etat Belge (1963) and Demol v Etat Belge, Ministre des Finances (1964), ILR, 47, p 75. As regards the UK practice on granting independence to former dependent territories, it 'would appear that borrowings of British colonies were made by the colonial authorities and were charged on colonial revenues alone. The general practice appears to have been that, upon attaining independence, former British colonies succeeded to four categories of loans: loans under the Colonial Stock Acts; loans from IBRD; colonial welfare and development loans; and other borrowings in the London and local stock market.' YBILC (1981), ii, p 2, p 98, para (38).

An important issue arises where a debt is contracted by the dependent territory but guaranteed by the parent state. In such cases involving the IBRD, the:
damages or redress\footnote{2} is, in respect of matters pertaining to the territory attaining independence, probably to be regulated in accordance with broadly the same principles as those indicated in connection with cases of secession;\footnote{3} but these matters are pre-eminently suitable for being dealt with by agreement\footnote{5} in the context of the attainment of independence.

§ 67 Succession of governments, and on the suppression of a revolt Although not strictly a matter of state succession, it is convenient to consider here succession of governments,\footnote{5} and, so far as questions of succession are concerned, the situation which arises on suppression of a revolt. No question of state succession arises because in both cases the state, as an international person, is unchangeable: all that is involved is a change, or an unsuccessful attempt to change, the government through which the state acts.

In the case of a change of government, whether in a normal constitutional manner or as the result of a successful coup d'état or revolution, it is well established that the new regime takes the place of the former regime in all matters

\begin{itemize}
  \item the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule\footnote{7}.
  \item For the liability of a successor government, as the result of voluntary subscriptions, lawful seizures of prizes, or confiscation by it, see eg, the Franco-Algerian agreements concluded at Evian in 1962, AJ, 57 (1963), p 716. Questions of nationality and the continuation of laws, in particular, will often be covered in the constitution of the newly independent state which, in British practice, will usually have resulted from agreement reached at the Constitutional Conference preceding independence. As regards nationality, matching provisions for the consequences for citizenship of the UK of the creation of the new state's nationality are contained in the UK legislation providing for the state's succession; see eg, as regards Belize, the Belize Act 1981, ss 4 and 5.
  \item The ILC decided not to deal with succession of governments or the consequences of any form of social revolution: YBILC (1974), ii, pp 170–71, paras 65–6. For the liability of a successor government for contracts concluded by the predecessor government see Western Electric Co Inc Claim (1959), ILR, 30, p 166. See also § 57, nn 4–11.
  \item As regards the position which arises when a revolt which got so far as the establishment of a rival government is suppressed, the question arises of entitlement to the property of the suppressed government. Insofar as it is in situ or in situ in the territory of the parent state against which the revolt took place, no question of international law arises. Insofar as the property is in situ in the territory of foreign states, a distinction must be made between, on the one hand, property which formerly belonged to the parent state and was seized by the rebel government, and, on the other hand, property which had been acquired by the rebel government, as the result of voluntary subscriptions, lawful seizures of prizes, and so forth. The former property can be recovered by the parent government in a foreign court by title paramount; the latter is recoverable by virtue of its right as the successor of the rebel government. These principles are illustrated by a group of decisions given by English courts after the end of the American Civil War.\footnote{4} The case of liability for the debts and wrongful acts of the rebel government is not so simple, but the Mixed Commission appointed by the Treaty of Washington 1871, held that the United States of America were 'not internationally liable for the debts of the Confederacy, or for the acts of the Confederate forces'.\footnote{3} But affecting the international rights and obligations of the state. In such situations the new government may, of course, wish to depart from the path set for the state by its predecessor, but if so it can only do so in accordance with the applicable rules for, eg denouncing treaties or withdrawing from organisations. One qualification to the new government's replacement of the old government which must be noted is that which follows where a new government is only recognised de facto.\footnote{3}
\end{itemize}
in other situations a government which has successfully overcome a rebellion against it has been held to be bound by and responsible for the acts of the rebel authorities where they have attained the status of de facto government, and particularly if it has authority over the generality of the state's territory and the acts were of governmental character: in such circumstances the rebels may reasonably be regarded as having acted for the state, so that their acts commit a successor government.6

§ 68 State succession: recent developments State practice has been, however, insufficiently uniform to provide evidence of clear rules of international law. In many cases, particularly in the period following the Second World War during which many former colonial territories attained independence, bilateral arrangements were made governing some or all aspects of the succession which was taking place; but even if they could be regarded as reflecting rules of customary international law applying to the kind of succession with which they were dealing, they were not directly relevant for other circumstances in which state succession might occur. In addition, many states felt that the earlier practice gave undue prominence to the interests of the major imperial powers and not enough to those of the newer members of the international community, many of whom had of course become international persons in circumstances involving state succession. It was against this background that the law of state succession was placed on the agenda of the International Law Commission. The Commission decided to deal with the subject in two stages, first covering the law of state succession in relation to treaties, and then moving on to state succession in relation to other matters (this was later made more specific by dealing with succession in relation to property, archives and debts).1 Successive reports by the special rapporteurs appointed by the International Law Commission led to draft articles on the two aspects being presented by the Commission in 19742 and 19813 respectively. These draft articles formed the basis for consideration at conferences held in Vienna in 1977–78 and 1983, which led to the Vienna

6 The distinction between de facto general and local governments is particularly relevant in this connection; the Confederate Government was only local. Where, however, the suppressed de facto government was general, the better opinion is that the state which suppresses it and succeeds to its property is responsible for its contracts and loans; see Tieso Arbitration (1923), RIAA, 1, p 369; Award of the Permanent Court of Arbitration in the French Claims against Peru in AJ, 16 (1922), p 482; Borchard, p 206; Spiropoulos, Die de facto-Regierung im Völkerrecht (1926), pp 92-8; and Kunz, Strupp, Wört, ii, p 612. But a distinction has been drawn between contracts of the suppressed de facto government which are impersonal transactions of governmental routine and therefore bind the state, and contracts of a nature personal to the suppressed government which therefore do not survive; instances of the former type are the purchase of postal money orders (Hopkins' claim before the American-Mexican Claims Commission, above), or of motor ambulances (Peerless Motor Car Co's claim before the same Commission in AJ, 22 (1928), pp 180-82; RIAA, 4, p 203; AD, 4 (1927-28), No 163).

1 The ILC initially divided the topic of state succession so as to deal also with succession in respect of membership of international organisations, but decided in 1967 to leave that aspect of its work aside for the time being: YBILC (1967), ii, p 368, para (41).


Conventions on, respectively, the Succession of States in respect of Treaties,4 and on Succession of States in respect of State Property, Archives and Debts.5 Both Conventions require 15 ratifications or accessions before they enter into force. By 1 January 1991 neither Convention had acquired enough ratifications or accessions to do so.

§ 69 Vienna Convention on Succession of States in respect of Treaties 1978 The Vienna Convention on Succession of States in respect of Treaties 19781 applies to treaties between states (Article 1), and only if the succession itself occurred in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations (Article 6). In its application to a succession of states in respect of any treaty which is the constituent instrument of an international organisation, the Convention applies without prejudice to either the rules concerning acquisition of membership or any other relevant rules of the organisation; similarly, the Convention applies to the effects of a succession in respect of any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation (Article 4). Although the Convention does not apply to the effects of a succession of states in respect of international agreements concluded between states and other subjects of international law or in respect of international agreements which are not in written form, applicable rules set out in the Convention which apply under international law independently of the Convention are not affected, and the Convention will also apply as between states even in respect of international agreements to which other subjects of international law are also parties (Article 3). Similarly even though a treaty is by virtue of the Convention not considered to be in force in respect of a state, that does not impair the duty of that state to fulfil any obligation embodied in the treaty to which it is subject under international law independently of the treaty (Article 5). In principle, the Convention applies only in respect of a succession of states which has occurred after the entry into force of the Convention, although the states concerned may otherwise agree, and there are provisions for states to make declarations which in certain circumstances would have the effect of applying the provisions of the Convention to an earlier succession of states (Article 7).

Even where a predecessor state and a successor state have concluded an agreement providing that the former's obligations and rights devolve upon the latter, those obligations or rights under treaties in force in respect of a territory at the date of a succession of states do not become the obligations or rights of the successor state towards other state parties to those treaties by reason only of the

4 See § 69.

5 See § 70.

1 For the text of the Convention, see ILM, 17 (1978), p 1488; Cmd 7760. The Convention was based on final draft articles adopted by the ILC in 1974: see YBILC (1974), ii, pt 1, pp 174-269.

See also papers prepared by the UN Secretariat and cited in the bibliography preceding § 60.

fact of such an agreement: the effects of a succession of states on treaties which at the date of the succession were in force in respect of the territory in question are governed by the Convention, notwithstanding the conclusion of any such agreement (Article 8). A similar rule applies where a successor state makes a unilateral declaration providing for the continuance in force of treaties in respect of its territory (Article 9). Special provision is made for those treaties which themselves make provision for what should happen in the event of a succession of states (Article 10). It is also provided that a succession of states does not as such affect a boundary established by a treaty; obligations and rights established by a treaty and relating to the regime of a boundary; or rights and obligations under certain other territorial regimes (Articles 11 and 12). These provisions, save insofar as they apply to boundaries or boundary regimes, do not apply to treaty obligations of the predecessor state providing for the establishment of foreign military bases on the territory to which the succession relates (Article 12.3).

There is furthermore a general saving for the principles of international law affirming the permanent sovereignty of every people and every state over its natural wealth and resources, which are not affected by anything in the Convention (Article 13).

Where there is succession in respect of part only of a state's territory, as when part of a state's territory becomes part of another state, or when a territory for the international relations of which a state is responsible, and not being part of its territory, becomes part of another state, Article 15 of the Convention provides that from the date of the succession treaties of the predecessor state cease to be in force in respect of the territory in question, and treaties of the successor state are in force in respect of that territory unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

So far as concerns newly independent states; the Convention's rules (Articles 239) are complex and detailed. The general rule is that a newly independent state is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the treaty was in force in respect of the territory to which the succession relates. Subsequent articles deal with the special position in regard to multilateral treaties, the position regarding bilateral treaties, the position in respect of provisional application of treaties, and provisions which apply when newly independent states are formed from two or more territories.

As regards multilateral treaties, a newly independent state may by notification establish its status as a party to any multilateral treaty which at the date of the succession was in force in respect of the territory in question, unless it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation; furthermore, if under the terms of the treaty or by reason of the limited number of the negotiating states and the object and purpose of the treaty, the participation of any other state in the treaty must be considered as requiring the consent of all the parties, the newly independent state may establish its status as a party only with such consent. Special provision is made for the participation of a newly independent state in a multilateral treaty which is not in force at the date of the succession, and also for its participation in treaties signed by the predecessor state subject to ratification, acceptance or approval before the date of the succession. Reservations made by the predecessor state in respect of the territory to which the succession relates are maintained for the benefit of the newly independent state if it becomes a party or a contracting state to the multilateral treaty, unless it expresses a contrary intention or formulates a reservation relating to the same subject matter as the earlier reservation; when making a notification establishing its status as a party or as a contracting state, a newly independent state may also formulate a reservation unless the reservation is one of the formulae of which would be excluded by the relevant provisions of the Vienna Convention on the Law of Treaties. Special provision is also made regarding the possibility of the newly independent state expressing its consent to be bound by part only of a treaty, and exercising a choice between differing provisions of the treaty where such a choice is permitted.

As regards bilateral treaties, such a treaty which at the date of the succession was in force in respect of the territory in question is considered as being in force between a newly independent state and the other party to the treaty when they expressly so agree or by reason of their conduct are to be considered as having agreed. In such cases the treaty applies in the relations between those states from the date of the succession, unless a different intention appears from their agreement or is otherwise established. Generally, the fact that after the succession the treaty may have been terminated as between the predecessor state and the other party, or suspended in operation as between them, or amended as between them, does not make it cease to be in force between the newly independent state and the other party, or suspended in operation as between them, or amended as between them. It may happen that two or more states unite and so form a new successor state. In such a case any treaty in force at the date of the succession in respect of any of them continues in force in respect of the successor state unless the successor state and the other state or states party to the treaty otherwise agree, or it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. Normally, any treaty continuing in force on the above basis only applies in respect of the part of the territory of the successor state in respect of which the treaty was in force at the date of the succession. However, in the case of a bilateral treaty the successor state and the other state party may otherwise agree, and in the case of a multilateral treaty of a kind such that the participation of any other state must be considered as requiring the consent of all the parties, the successor state and the other state parties or may otherwise agree; in the case of other kinds of multilateral treaty the successor state may make a notification that the treaty shall apply in respect of its entire territory, unless it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. Special provi-
sions are made for the effects of a uniting of states in respect of treaties not in force at the date of the succession, and the effects in respect of treaties signed by a predecessor state subject to ratification, acceptance or approval.

When one or more parts of a state separate to form one or more states, and whether or not the predecessor state continues to exist, the general rule provided in Article 34 of the Convention is that any treaty in force at the date of the succession in respect of the entire territory of the predecessor state continues in force in respect of each successor state formed in that way, and any treaty in force at that date in respect only of part of the territory of the predecessor state which has become a successor state continues in force in respect of that successor state alone. It is, however, provided that these provisions do not apply if the states concerned otherwise agree, or if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. In those cases where a separation nevertheless leaves the predecessor state continuing in existence, any treaty which was in force in respect of the predecessor state continues in force in respect of its remaining territory unless the states concerned otherwise agree, or it is established that the treaty related only to the territory which has separated from the predecessor state, or it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor state would be incompatible with its object and purpose or would radically change the conditions for its operation. There are, as in other cases, special provisions governing the participation of the successor states in treaties not in force at the date of the succession, and also their participation in treaties signed by the predecessor state subject to ratification, acceptance or approval.

§ 70 Vienna Convention on Succession of States in respect of State Property, Archives and Debts 1983 The Vienna Convention on Succession of States in respect of State Property, Archives and Debts 1983 applies only to the effects of a succession of states occurring in conformity with international law, and in particular with the principles of international law embodied in the United Nations Charter (Article 3). It also only applies in respect of a succession of states which has occurred after the entry into force of the Convention except as may be otherwise agreed, although there is provision for states to make a declaration that they will apply the provisions of the Convention in respect of earlier successions; but this is without prejudice to the application of rules set out in the Convention if they would apply under international law independently of the Convention (Article 4). The provisions of the Convention are also not to be considered as prejudging any question relating to the rights and obligations of natural or juridical persons (Article 6).

(a) State property (Articles 7–18)
State property means property, rights and interests which, at the date of the succession of states in question, were, according to the internal law of the predecessor state, owned by that state. In general, the passing of state property of the predecessor state to the successor state entails the extinction of the rights of the former and the arising of the rights of the latter to that property. State property passes on the date of the succession in question and, generally, takes place without compensation. The property of a third state which is situated in the territory of the predecessor state is not affected by the succession of states between the predecessor state and successor state as such. The predecessor state must take all measures to prevent damage or destruction to state property which passes to the successor state in accordance with the Convention.

Where part only of the territory of a state is transferred to another state, the passing of state property to the successor state is to be settled by agreement between it and the predecessor state. In the absence of such agreement immovable state property situated in the territory to which the succession relates passes to the successor state as does movable state property connected with the activity of the predecessor state in respect of that territory.

In the case of a newly independent state,3 the successor state acquires immovable state property of the predecessor state situated in the territory to which the succession relates, and immovable property which belonged to that territory but is situated outside it and had become state property of the predecessor state during the period of dependence, and other immovable state property of the predecessor state situated outside the territory in question if the dependent territory had contributed to its creation, although in this case the property only passes to the successor state in proportion to the dependent territory's contribution. Movable property of the predecessor state passes to the successor state if it was connected with the activity of the predecessor state in respect of the territory to which the succession relates, and if it belonged to that territory and had become state property of the predecessor state during the period of dependence, as does other movable property to the creation of which the dependent territory has contributed (but only in proportion to its contribution). These provisions relating to movable and immovable property also apply when a newly independent state is formed from two or more dependent territories, and when a dependent territory becomes part of the territory of another, pre-existing, state. Although the predecessor state and the newly independent state may reach agreement to determine matters of succession to the state property of the predecessor state in a manner otherwise than is prescribed in the Convention, such agreements must not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

Where two or more states unite so as to form one successor state, the state property of the predecessor state passes to the successor state.

1 For the text of the Convention see ILM, 22 (1983), p 298. The Convention was based on final draft articles adopted by the ILC in 1981: see YBILC (1981), ii, pt 2, pp 20–113. See also papers prepared by the UN Secretariat and cited in the bibliography preceding § 60.
2 For comments see Monnier, AFDI, 30 (1984), pp 221–9.
3 The definition of this term is, in Art 2.1(e) of the Convention, the same as that in Art 2.1(f) of the Convention on Succession of States in respect of Treaties: see § 69, n 2.
Where part of the territory of a state separates so as to form a successor state, and unless the predecessor and successor states otherwise agree, immovable property situated in the territory in question passes to the successor state; so does movable property connected with the activity of the predecessor state in respect of that territory, and other movable property of the predecessor state, but in an equitable proportion. The same rules apply when part of the territory of a state separates from that state and unites with another state. These provisions are without prejudice to any question of equitable compensation as between the two states that may arise as a result of a succession of states.

Lastly, where a state dissolves and ceases to exist and the parts of its territory form two or more successor states, and unless those successor states otherwise agree, immovable state property passes to the successor state in the territory of which it is situated while immovable state property situated outside the territory of the predecessor state passes to the successor states in equitable proportions; movable property passes to the successor state in respect of the territories in question passes to the successor state concerned, while other movable property passes to the successor states in equitable proportions. These provisions are without prejudice to any question of equitable compensation that may arise.

(b) State archives (Articles 19–31)
State archives are all documents of whatever date and kind, produced or received by the predecessor state in the exercise of its functions which, at the date of the succession of states, belonged to the predecessor state according to its internal law and were preserved by it directly or under its control as archives for whatever purpose. With the passing of state archives of the predecessor state to the successor state the former's rights are extinguished and the rights of the latter to those state archives which pass to it arise. State archives normally pass to the successor state on the date of the succession of states in question, and generally without compensation. Archives which at the date of the succession of states are situated in the territory of the predecessor state and are owned according to that state's internal law by a third state are not affected by the succession of states as such. A special saving is included as regards the preservation of the integral character of groups of state archives of the predecessor state.

The predecessor state must take all measures to prevent damage or destruction to state archives which pass to the successor state in accordance with the provisions of the Convention.

When part of the territory of a state is transferred by it to another state, the passing of state archives to the successor state is to be settled by agreement between them. If there is no such agreement, the part of state archives which for normal administration of the territory in question should be in the disposal of the state to which the territory is transferred passes to the successor state, and other state archives which relate exclusively or principally to the territory also pass to the successor state. The predecessor state must provide the successor state with the best available evidence from its state archives which bears upon title to the transferred territory or its boundaries, or which is necessary to clarify the meaning of documents of state archives of the predecessor state which pass to the successor state pursuant to other provisions. The predecessor state must also make available to the successor state, at its request and expense, appropriate reproductions of its state archives connected with the interests of the transferred territory; for its part the successor state must make available to the predecessor state, at its request and expense, appropriate reproductions of state archives which have passed to the successor state.

A newly independent state is to acquire archives which belonged to the territory in question and became state archives of the predecessor state during the period of dependence, that part of the state archives of the predecessor state which for normal administration of the territory in question should be in that territory, and other parts of the state archives of the predecessor state relating exclusively or principally to the territory. Provision is also made for passing to the newly independent state appropriate reproductions of parts of the state archives of the predecessor state which are of interest to the territory and which the predecessor state must provide the newly independent state with the best available evidence from its state archives which bears upon title to the territory of the newly independent state or its boundaries, or which is necessary to clarify the meaning of documents of state archives of the predecessor state which passed to the newly independent state pursuant to the provisions of the Convention. The predecessor state is also to cooperate with the successor state in efforts to recover any archives which, having belonged to the territory in question, were dispersed during the period of dependence. All these provisions also apply when a newly independent state is formed from two or more dependent territories or when a dependent territory becomes part of the territory of a state other than that which was formerly responsible for its international relations. Agreements concluded between the predecessor state and the newly independent state in regard to state archives must not infringe the right of the peoples of those states to development, to information about their history, and to their cultural heritage.

When two or more states unite so as to form one successor state, the state archives of the predecessor states pass to the successor state.

When part of the territory of a state separates and forms a new state, and unless the predecessor state and the successor state otherwise agree, the successor state acquires the part of the predecessor state's archives which for normal administration of the territory to which the succession of states relates should be in that territory, and other state archives that relate directly to the territory in question. As in other cases, the predecessor state must provide the successor state with the best available evidence relating to title to territory or to boundaries, or which is necessary to clarify the meaning of documents. Agreements between the two states in regard to state archives of the predecessor state must not infringe the right of the peoples of those states to development, to information about their history and to their cultural heritage. The two states shall, at the request and expense of one of them or on an exchange basis, make available appropriate reproductions of their state archives connected with the interests of their respective territories. These provisions also apply when part of the territory of a state separates and unites with another state.

When a state dissolves and ceases to exist and the parts of the territory of the predecessor state form two or more successor states, and unless the successor

* See, as to the right to development, § 106, n 15.
states concerned otherwise agree, the successor state acquires the part of the state archives of the predecessor state which should be in the territory of a successor state for normal administration of its territory, and also such other state archives as relate directly to the territory of the successor state; other state archives of the predecessor state pass to the successor states in an equitably manner, taking into account all relevant circumstances. The usual provision is made for making available evidence bearing upon title to the territory or boundaries of the successor states, or which is needed to clarify the meaning of documents of state archives. There is similarly the usual provision for appropriate reproductions of state archives of the predecessor state to be made available as between the successor states at their request and expense or on an exchange basis. Agreements between the successor states concerning state archives of the predecessor state must not infringe the right of the peoples of those states to development, to information about their history, and to their cultural heritage.

(c) State debts (Articles 32-41).
A state debt is any financial obligation of a predecessor state arising in conformity with international law towards another state, an international organisation or any other subject of international law. On the passing of state debts the obligations of the predecessor state are extinguished and the obligations of the successor state in respect of the state debts which pass to it arise. The normal rule is that state debts of the predecessor state pass on the date of the succession. A succession of states does not as such affect the rights and obligations of creditors. Where part of the territory of a state is transferred by that state to another state, the passing of the state debt of the predecessor state to the successor is settled by agreement between them, but in the absence of such agreement the state debt of the predecessor state passes to the successor state in an equitable proportion, taking into account in particular the property, rights and interests which pass to the successor state in relation to that state debt.

Where the successor state is a newly independent state, that state does not acquire the state debt of the predecessor state unless an agreement between them provides otherwise in view of the link between the state debt of the predecessor state connected with its activity in the territory in question and property, rights and interests which pass to the newly independent state. Any such agreement must not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibrium of the newly independent state.

When two or more states unite and so form one successor state, the state debt of the successor states passes to the successor state.

When part of the territory of a state separates from it and forms another state, and unless the two states agree otherwise, the state debt of the predecessor state passes to the successor state in an equitable proportion, taking into account in particular the property, rights and interests which pass to the successor state in relation to that debt. The same rule applies when part of the territory of a state separates from that state and unites with another state.

When a state dissolves and ceases to exist and the parts of its territory form two or more successor states, and unless those states otherwise agree, the state debt passes to the successor states in equitable proportions, taking into account in particular the property, rights and interests which pass to the successor states in relation to that state debt.

§ 71 Composite international persons in general
International persons are as a rule single sovereign states. In such a state there is one central political authority as government, which acts for the state in its international intercourse with other international persons. Such a state may grant considerable internal independence to outlying parts of its territories (such as colonies) but still remain a single state, since it alone is sovereign and exclusively entitled to act internationally.

There may, however, also be composite international persons. These exist when two or more sovereign states are linked together in such a way that their position within the international community is either exclusively or at least to a great extent that of one single international person. Although states may be linked together in various ways, there have so far been two broad categories of composite international persons, namely, real unions and federal states. From these must be distinguished personal unions and unions of confederated states, which are not international persons.

§ 72 States in personal union
A personal union exists when two sovereign states and separate international persons are linked together through having the same individual as monarch. Such a personal union existed from 1714 to 1837 between Great Britain and Hanover, from 1815 to 1890 between the Netherlands and Luxembourg, and from 1885 to 1908 between Belgium and the former

1 See § 84.

A fact which according to English law results in the subjects of the two countries owing a common allegiance and having a common nationality: Calvin’s Case (1608) 7 Co Rep 1, and Issacson v Durant (1886) 71 QBD 94. The links which join members of the British Commonwealth together find expression in the notion of a common 'Commonwealth citizenship': see § 385.
Congo Free State. A personal union may be said to exist today as between the United Kingdom and those other independent members of the Commonwealth, such as Canada and Australia, of which Queen Elizabeth II is also Head of State. A personal union is not, and is in no point treated as though it were, an international person, and its two sovereign member states remain separate international persons. Theoretically it is even possible for them to make war against each other. In, as sometimes happens, they are represented by one and the same individual as diplomatic envoy, such individual is the envoy of both states at the same time, but not the envoy of the personal union.

§ 73 States in real union A real union occurs when two sovereign states are, by an international treaty, linked together under the same Head of State, so that they make one and the same international person. A real union is not itself a state, but a union of two fully sovereign states which together make one single but composite international person. Their relationship depends on the treaty of union, which will usually prevent them from making war against each other, or from making war separately against a foreign state, nor can war be made against one of them separately. They can enter into separate treaties of commerce, extradition, and the like, but it is the union which concludes such treaties for the separate states, as separately they are not international persons. At present there is no real union in existence, that of Sweden—Norway having been dissolved in 1905, that of Austria—Hungary having come to an end by the collapse of the Austro-Hungarian Empire in 1918, just before the close of the First World War, and that of Egypt and Syria in the United Arab Republic having been dissolved in 1961.

§ 74 Confederated states (Staatenbund) Confederated states (Staatenbund) are several fully sovereign states linked together for the maintenance of their external and internal independence by a treaty into a union with organs of its own, which are vested with a certain power over the member states, but not over the citizens of these states. Such a union of confederated states is no more itself a state than a real union is; it is merely an international confederation of states, a society of an international character, since the member states remain fully sovereign states and separate international persons. But a union of confederated states may for some purposes be treated as an international person since it represents the compound power of the fully sovereign member states. The chief and sometimes the only organ of the union is one where the member states are represented by diplomatic envoys; its power is an international power which does not affect the full sovereignty of the member states, and is essentially nothing else than the right of the body of the members to use various forms of coercion against such a member as will not comply with the requirements of the Treaty of Confederation.

At present there are few, if any, unions of confederated states although the Confederation of Senegambia, established by a treaty concluded in 1981 and which entered into force on 1 February 1982, is probably one contemporary example. The Union of 1949 between Holland and Indonesia approached in some respects, especially with regard to the somewhat rudimentary common organs, a loose confederation. Of a similarly indeterminate character was the French Union which was established by the French Constitution of 1946 and which was composed, on the one side, of France and, on the other side, of associated states and territories. Some members of the French Union, such as Vietnam, Cambodia and Laos, possessed some independent international status, including the power to make treaties even before their acquisition of full independent statehood. Under the French Constitution of 1958 the French Union

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1 The last previous example may have been the major Republic of Central America, which comprised the three fully sovereign States of Honduras, Nicaragua, and San Salvador. It was established in 1823 and came to an end in 1829. See Martens, NRG, 2nd series, 31, pp 276–92.

2 Notable historic confederations are those of the Netherlands from 1580 to 1795, the USA from 1776 to 1787, Germany from 1815 to 1866, Switzerland from 1291 to 1798 and from 1815 to 1848, and the Confederation of the Rhine (Rheinbund) from 1806 to 1815.

3 As to the 'Charter of Integration' signed on 12 October 1982 between Egypt and Sudan, see RG, 87 (1983), pp 389–90. In September 1980 Libya and Syria announced a union of the two states into one state, having full sovereignty over the Syrian and Libyan Arab countries, and enjoying the status of one international entity: this appears to have been more a declaration of political intention than an accomplished fact, and Syria and Libya have effectively remained separate states. See also, as to the Union of States between Morocco and Libya, signed on 13 August 1984 (but not yet in force), see ILM, 23 (1984), p 2022 and Scheuner, AFDI, 30 (1984), pp 111–27. Some 'unions' are agreed upon primarily as a symbol of political solidarity, but go on to contain little in the way of substantive legal content, other than (in some cases) that more often associated with treaties of alliance or cooperation.

4 See UNTS, 69, p 208; Scheuner, Archiv des Volkerrechts, 3 (1951), pp 44–67; and Von Asbeck, YB of World Affairs (1953), pp 204–27. The union was dissolved in 1954. BFSP, 162 (1955–56), pp 981–5. The nature of the union was considered in Re Westerling, ILR, 17 (1950), No 21. See also § 84, n 22, as to the establishment in 1954 of the Netherlands East.


6 Cambodia, Laos and Vietnam (that is, the State of Vietnam with its seat of government in Saigon: see generally as to the complex situation in Vietnam, § 40, n 48) were established as associate
was remodelled to form the French Community. At first only dependent French Overseas Territories could become members of the Community: after 1962 a state could be a member of the Community even after becoming independent, its position within the Community being determined by agreements concluded to that end (so that the particular incidents of membership were not necessarily uniform). The Community never functioned as intended, and is now effectively defunct. The basic provisions of the Constitution regarding the Community provide for the members to be autonomous; for a single citizenship in the Community; for the Community to have jurisdiction over, inter alia, foreign policy, defence, currency and common economic and financial policy; for the President of the French Republic to be President of the Community, and for the establishment as organs of the Community of an Executive Council, a Senate and a Court of Arbitration. The Commonwealth, although sui generis, shows some of the characteristics of a loose confederation, having a common Head of State, a Secretariat and regular meetings of ministers to discuss matters of common interest.

§75 Federal States (Bundesstaten) A federal state is a union of several sovereign states which has organs of its own and is invested with power, not only over the member states, but also over their citizens. The union is based, first, on an international treaty of the member states, and, secondly, on a subsequently

members of the French Union by arrangements made in 1948 and 1949: BFSP, 152 (1948), iii, p 414; 155 (1949), iii, pp 158, 405, 427–87. France, in recognising their independence in 1950, declared that it had no other limits than that implied in their associate membership of the French Union: see Documents (1947–49), p 736, and the Law of 2 February 1950. The three states were also recognised by other states, including the UK and USA, both of whom took due account of the fact that the three states were still members of the French Union and thus subject to certain overriding French rights (see § 40, n 52). Notwithstanding the limitations on their status, Vietnam, Laos and Cambodia in 1952 ratified the Peace Treaty with Japan (UNTS, 136, p 46); Vietnam accepted the jurisdiction of the ICJ in connection with that Treaty (UNTS, 150, pp 147–9), and in 1953 acceded to certain ILO Conventions (see BFSP, 161 (1954), pp 281, 286. In 1953 France declared its readiness to ‘perfect’ the independence and sovereignty of Cambod-, Laos and Vietnam by transferring to them those powers which France had till then reserved to herself (BFSP, 160 (1953), p 657). Agreements with Cambodia and Laos to this effect were subsequently concluded (ibid, pp 658–66 and 618–25); an Agreement with Vietnam was initialled but was apparently never signed (ibid, 161 (1954), pp 648–50). In 1955 Cambodia and Laos became members of the United Nations; as did Vietnam in 1977. As to the neutrality of Laos, see § 96, n 9.


5 Article 86, as amended in 1960. The following independent states were at one time members of the Community: Central African Republic, Chad, the Congo Republic, Gabon, Malagasy Republic and Senegal.

6 See §§ 78–80. But where a dependent territory is granted independence on the basis of a federal constitution it is doubtful whether the member states can be regarded as ever having been sovereign, or the arrangement between them constituting a treaty. The Commonwealth of Australia affords an example of such a situation: the federal structure of government was established by the Commonwealth of Australia Constitution Act 1900 (passed by the Parliament of the UK), but the Commonwealth did not become independent until much later: see § 78.

2 Elements of federalism can be discerned in the powers of certain organs of the European Communities to adopt regulations applying directly as law in the member states: see § 19, n 81ff. But the European Communities do not constitute a state.

3 See especially Nos 15 and 16 of The Federalist (by Hamilton, Jay, and Madison), which establish the difference between confederated states and a federal state in the way mentioned in the text above.

4 On matters where the constitution is silent or unclear, the competences of the federal state and the member states may in part depend upon the extent of the rights which the latter enjoyed before they joined the union and may be regarded as having carried with them into the union: certain aspects of the litigation over offshore rights discussed at nn 16–21, turned on the pre-federation rights of the member states concerned.

5 For affirmation of a member state still maintaining a government separate from that of the federal state, see Ranger v Greenfield and Wood (1963), ILR, 44, p 8.

6 See Stokes, The Foreign Relations of the Federal State (1931); Halajukc, ÖZÖR, 13 (1963), pp 307–8; Freeman, Extradition in International Law (1942), § 187, which refers to the fact that the member states may in part depend upon the extent of the rights which the latter enjoyed before they joined the union and may be regarded as having carried with them into the union: certain aspects of the litigation over offshore rights discussed at nn 16–21, turned on the pre-federation rights of the member states concerned.

7 Article 80 of the Constitution of the USSR, adopted on 7 October 1977, provides that ‘a Union Republic shall have the right to enter into relations with foreign States, conclude treaties with them and send and receive diplomatic envoys, the federal state is itself an international person, with all the rights and duties of a sovereign state in international law. On the other hand, the international position of the member states is not so clear. There is no justification for the view that they are necessarily deprived of any status whatsoever within the international community: while they are not full subjects of international law, they may be international persons for some purposes. Everything depends on the particular characteristics of the federation in question. Thus two member states of the Soviet Union – a federal state since 1918 – are separate members of the United Nations,7 and are parties to many treaties.
The constitution may allow member states to conclude treaties. Thus Article 32 of the Constitution of the Federal Republic of Germany provides that insofar as the member states are competent to legislate they may, with the approval of the Federal Government, conclude treaties with foreign states. Similarly, the

droit international (1954); Dolan, ICLI, 4 (1955), pp 629–36; Markus, L'Ukraine Soviétique dans les relations internationales 1918–23 (1959); Aspatian, The Union Republics in Soviet Diplomacy (1960); Lukashuk, Hag R, 135 (1972), pp 257–66; Uibopuu, Die Volkerrechtssubjektivität der Unionrepubliken der UdSSR (1975), and ICLI, 24 (1975), pp 811–45; see also § 50, n 16. The British Government have made clear that their acceptance in the negotiations leading up to the establishment of the Union of the Ukraine and Byelorussia as full members of the

See generally G. Ghosh, Treaties and Federal Constitutions (1961); Lissitzyn, Hag R, 125 (1966), n 6, pp 262–76. See also A. Torrelli, AFDI, 4 (1968), pp 337–410; Di Marco, Can YBIL, 16 (1978), pp 197–229. In its draft articles on the Law of Treason the ILC proposed an article to the effect that states members of a federal union may possess a constitutional right to declare the acts of a fugitive, the limits there laid down (Art 6). In its comments on draft Art 5 the ILC pointed out that while agreements between two members of a federal state have some similarities with international treaties and have had, in some instances, certain principles of treaties applied to them by analogy, those agreements between members of federal states have not been capable of constituting a federal state and could not be brought within the scope of the law of treaties without overstepping the line between international and domestic law: YBILC (1966), ii, p 192. See also § 395, n 4.


As to the position regarding the constituent republics of Yugoslavia, see Lapena, ICLI, 21 (1972), pp 226–7. According to Art 1, § 10, of the Constitution of the USA, the member states are not competent to conclude treaties either among themselves or with foreign states. On the application by a state member of extradition treaties concluded by federal states see Hudson, AJ, 19 (1966), pp 53–74; Porter of Kehl Case, ILR, 20 (1953), p 407. The member states of the Federal State of Germany, under the German Constitution as it existed before the First World War, retained their competence to send and receive diplomatic envoys, not only in intercourse with one another, but also with foreign states. The reigning monarchs of these member states were still treated by the practice of states as states heads of state, and without legal basis if these states had been no longer international persons. As to the position of the member states of the Federation of Germany under the Weimar Constitution of 1919, see ed of this vol, p 176, n 1.

member states of Switzerland retain the right to conclude treaties with foreign states as regards matters of minor interest. In the judicial settlement of disputes which have arisen between member states of a federal union, the municipal courts in question have often had recourse to rules of international law. Furthermore, member states have in a number of cases been granted immunity from jurisdiction by the courts of other countries, at least so far as concerns matters in which the member states retain their sovereign powers. Member states lacking inter-

See also Hls, RI, 3rd series, 10 (1929), pp 454–79. According to Arts 7 and 9 of the Constitution of Switzerland the Swiss member states are competent to conclude non-political treaties among themselves, and, further, such treaties with foreign states as concern matters of police, of local traffic, and of state economics.

See also New South Wales v. Queensland, 1891, 1 LTR, 601, and see supra on that effect, Bremen v. Prussia, decided by the German Staatsgerichtshof in 1925: AD, 3 (1925–26), No 266; and ibid, 1927–28, No 289; Canton of Thurgau v. Canton of St Gallen, decided in 1928 by the Swiss Federal Court; No 86, Württemberg v. Baden, decided in 1927 by the German Staatsgerichtshof; and Canton of Valsas v. Canton of Tessin (1980), ILR, 75, pp 114, 117, decided by the Swiss Federal Tribunal. The application of rules of international law to disputes between states members of the American Union has also been a constant feature of the work of the US Supreme Court. See J B Scott (ed), Judicial Settlement of Controversies between States of the American Union (2 vols, 1918), and Analysis thereof, by the same author (1929), and see also V Lauterer, The Function of Law, pp 439–42, Harrison Moore, JCL, 3rd series, 17 (1935), pp 163–209, and Cowles, Hag R, 74 (1949), pp 659; Vinuesa, AFDI, 34 (1948), pp 283–330.

See also on 16–21, for the litigation in the USA and some other states over offshore maritime rights.

national status may also sometimes have their own representatives abroad, although they will not be diplomatic agents in the usual sense of that term.12

Where, as happens frequently, a federal state assumes in every way the external representation of its member states, so far as international relations are concerned, the member states make no appearance at all. This is true of the United States of America and all those other American federal states whose constitution is modelled on that of the United States. Here the member states are sovereign too, but only with regard to international affairs. All their external sovereignty being absorbed by the federal state, they are not international persons at all.

A question which has in recent years assumed particular importance is whether it is the federal state or the member state which has rights to the seabed and subsoil below waters adjacent to their coasts. The answer depends on the particular circumstances of each federation.13 In the United States the Supreme Court held that rights over the subsoil of territorial waters belonged to the Union, on account of the international responsibilities involved, but the Submerged Lands Act 1953 in effect reversed this decision as regards the subsoil of territorial waters, although by the Outer Continental Shelf Lands Act 1953 the Union retained jurisdiction over submerged lands of the continental shelf outside state areas.14 The Canadian Supreme Court has similarly held that Canada, rather than the provinces, has power to legislate as regards the subsoil of the waters and the continental shelf.15 In Australia such major litigation has largely been avoided by an agreement reached in 1967 between the Commonwealth and the constituent states, leading to uniform legislation by both states and Commonwealth applying a common mining code to all offshore areas.

§ 76 Federal states and the implementation of international obligations

The division of powers between the federal state and its member states affects the capacity of federal states to contract and give effect to international obligations. The constitutions of most, if not all, federal states reserve the legislative power over many matters of importance to the member states of the federation either expressly or by implication, the result of the principle that powers not specifically entrusted to the federation remain with the member states. Federal states may accordingly often find themselves either unable to conclude treaties relating to matters falling within the legislative competence of the member states, or, having validly concluded such treaties, unable to give effect to them. In some federal states, such as Australia or India, the constitution seems to give some powers to the federation to legislate in matters covered by treaties concluded by the federation.

In the United States, in Missouri v Holland, the Supreme Court decided to the same effect by reference to the article of the constitution which provides that treaties concluded by the United States shall be the supreme law of the land.

12 But see Bonser v La Macchia (1969), ILR, 51, p 39 (holding the Commonwealth to have jurisdiction over fisheries beyond the three-mile limit); New South Wales v Commonwealth of Australia (1975), ibid. p 89 (holding the boundaries of the states to end at the low-water mark); and the Seas and Submerged Lands Act 1973, which declared and enacted that sovereignty over the territorial sea and its seabed and subsoil, and sovereign rights over the continental shelf, vested in the Commonwealth. See also R v Bull (1974), ILR, 51, p 217; Pearce v Fowle (1976), ILR, 69, p 109; Rapis and Son v State of South Australia (1977), ILR, 69, p 53; Robinson v Western Australia Museum (1977), ILR, 70, p 51. On problems of Australian coastal jurisdiction generally, see o'Connell, BY, 34 (1958), pp 199-259.


1 For a comparative study of various federal systems of government, see Article 19, States Rights under Federal Constitutions (1984).


4 Article 253 of the Constitution of India. And see Alexandrowicz, ILR, 4 (1952), p 295. This is also the position in the Federal Republic of Germany (see Arts 73 and 32) and Austria (see Arts 10(1) and 50); but, as to the former, see Concordat (Germany) Case ILR, 24 (1957), p 592.
alongside the constitution. Moreover, that Court has given a number of decisions affirming in some other spheres, because of exigencies of international intercourse, the competence and rights of the federal state and restricting to that extent the powers and the operation of the laws of the member states of the Union. Nevertheless, in principle a state which has incurred international obligations cannot rely on its internal constitutional arrangements as a justification for any failure to comply with those obligations. In respect of treaties this can lead to federal states being unable to become parties, particularly in view of Article 29 of the Vienna Convention on the Law of Treaties, providing that a treaty is binding upon each party in respect of its entire territory (unless a different intention appears from the treaty or is otherwise established).

To meet the difficulties caused, both in the United States and in some other countries by constitutions which do not allow for effective federal legislation in matters covered by treaties, there has been a tendency to include in treaties a so-called 'federal clause' the result of which is, in effect, to relieve the federal state of the obligations of the treaty in matters which fall within the competence of the members of the federation and which in many cases are coextensive with the scope of the treaty. The Constitution of the International Labour Organisation has accepted, in a different way, the same principle. Such practice may be considered contrary both to the requirement of reciprocity in treaties and to the effectiveness of a substantial part of international law in matters of general interest. It is, however, a technique to which resort has continued to be made, as eg in Article 41 of the Convention on the Status of Refugees 1951.

§ 77 Customs unions Two or more states sometimes by treaty agree to enter into a customs union, whereby their territories are together treated as a single area for customs purposes. Customs duties on the transfer of goods between their territories are abolished, and the states concerned apply a common customs tariff to goods coming into their territories from third states. Such unification of their tariffs for customs purposes usually involves close cooperation, which may involve a degree of integration, in associated economic matters and perhaps even in political and other matters. Such customs unions are the result of treaties concluded between the states concerned. Their effects upon the independence of the states which are parties to the customs union depend on the terms of the treaty establishing the union and the other particular circumstances affecting it. Thus, in the Advisory Opinion concerning the Customs Regime between Germany and Austria, the Permanent Court of International Justice held in 1931 that, in the circumstances of the case, Austria's entry into a customs union with Germany would not be compatible with Austria's obligations to maintain its independence. Other customs unions, however, have not been regarded as affecting the independence of the states concerned. Thus the states participating in the customs unions between Switzerland and Liechtenstein, and between Belgium, Luxembourg and the Netherlands has led to the inclusion of Liechtenstein in the Swiss monetary area: RG, 85 (1980) pp 278-306.

6 (1920) 252 US 416; AD, 1 (1919–22), No 1. And see § 19, n 95, on some aspects of the treaty-making power of the USA. See in particular Preuss, Mich Law Rev, 51 (1953), pp 1117–42, in connection with an amendment to the constitution, proposed in 1953 but not adopted, seemingly intended to make impossible decisions, such as that in Missouri v Holland, holding that a statute which would otherwise be unconstitutional as impairing the competence of the member states was constitutional if enacted in pursuance of a treaty. See also Wright, AS Proceedings (1952), pp 48–57; Perlman, Col Law Rev, 52 (1952), p 825; Chafee, Louisiana Law Rev, 12 (1947), p 335; Sutherland, HLR, 65 (1952), p 1305; Rodgers, Aj, 61 (1967), pp 1021–8. See also, bearing on the problem of the conduct of foreign relations in federal states, Fisher, AS Proceedings (1951), pp 2–10; Marin, ibid, pp 10–20; Bishop in Minn Law Rev, 36 (1952), p 299.

7 United States v Curtis-Wright Export Corp (1936) 299 US 304 (on the comprehensive scope of the right of the legislature to delegate powers to the Executive in matters relating to foreign relations); Hines v Davidowitz (1941) 312 US 52 (declaring the power to register aliens to vest exclusively with the Union); United States v Pink (1942) 315 US 203 (affirming the overriding effect of agreements purporting of the nature of a treaty – though not constituting treaties – to override the law and notions of public policy of the states); Scandinavian Airlines System Inc v County of Los Angeles (1961), ILR, 32, p 90 (state taxation statute must not infringe federal government's treaties with foreign states); South African Airways v New Jersey State Division of Human Rights (1970), ILR, 56, p 25 (state action trespassing on executive field of foreign affairs – visa policy of foreign state – not permissible).


9 In ratifying the UN Covenant on Civil and Political Rights 1966 Australia made a 'federal reservation' purporting to secure in practice a result similar to that which would have been secured had the Covenant contained a 'federal clause': see Triggs, ICLQ, 31 (1982), pp 278–306. Where a state's constitution gives the federal government the power to legislate to give effect to treaties, the treaty need not deal with a subject matter which is inherently international, and accordingly for purposes of a 'federal state clause' in a treaty the relevant powers to implement the treaty could still vest in the federal state and not in the constituent states: see Commonwealth v Tasmania (1981), ILR, 68, p 266. For an instance of a treaty concluded by a federal state but requiring the consent of the member state directed to the federal state but requiring the consent of the member state directly affected see Jenni v Conseil d'Etat of the Canton of Geneve (1978), ICLR, 75, p 99.

10 UNTS, 189, p 137. See also Art XXIV 12 of the GATT, under which contracting parties must take 'such reasonable measures as are available to [them]' to ensure compliance with the relevant requirements by their regional and local governments. In 1987 the GATT disputes panel considered the extent of the Canadian Government's responsibility in the GATT under this provision for the acions of provinces of Canada: GATT Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, ILM, 27 (1988), p 1599.

11 For the purposes of the GATT a customs union is defined (Art XXIV 8(a)) as meaning: 'the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union'.

12 FCII, Series A/B, No 41. See § 118, n 2.

13 On the Customs Union Treaty of 29 March 1923, see Pilotti, HAG, 24 (1928), pp 463–6. As a result of the Customs Union Treaty, some of the economic measures applied by Switzerland against Italy in 1935 were equally and without further formality operative in the territory of the Principality: OH J, Special Suppl No 147, p 43. Liechtenstein and Switzerland signed a treaty in 1980 for the inclusion of Liechtenstein in the Swiss monetary area: RG, 85 (1981), p 187.
lands (later developing into the Benelux Economic Union) have not ceased to be regarded as retaining their independence; nor have the member states of the European Economic Community, which is based upon a customs union.

THE COMMONWEALTH


Dominton regarded as retaining their independence; nor have the member states of the European Economic Community, which is based upon a customs


The British Commonwealth Affairs, 1931-52, (2


The New Commonwealth and its Status (1964) Roberts-Wray, Commonwealth


§ 78 Progress of self-governing dominions towards independence Prior to the First World War the self-governing dominions, Canada, Australia, New Zealand, and South Africa, had no international position, and were, from the point of view of international law, colonial portions of the mother country, even though some of them, as, for example, Canada and Australia, flew as their own flag the modified flag of the mother country, or that they had their own coinage, their own postage stamps, and the like. Nor did they become subjects of international law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to administrative unions, such as the Universal Postal Union. Even when they were empowered by the mother country to enter into certain treaty arrangements of minor importance with foreign states, they still did not thereby become subjects of international law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them.

Between the First and Second World Wars there took place a gradual but pronounced change in the status of the self-governing dominions, in the

1 It will be noted that the term 'dominion' did not appear in the official title of Australia, which is a 'commonwealth', or of South Africa, which, when a member of the Commonwealth, was a 'union'. However, until after the Second World War it was usual to refer to Canada, Australia, New Zealand and South Africa as dominions. India and Pakistan were initially set up on independence as two dominions: Indian Independence Act 1947. The Ceylon Independence Act 1947 did not refer to Ceylon as a dominion; nor has the term been used when other British territories have become independent.

Newfoundland was for a time a dominion, but although a separate member of the League of Nations its international status was not as advanced as that of other dominions. See on this aspect, Gilmore, Can YBIL, 18 (1980), pp 201–17. In 1933 the British Parliament passed the Newfoundland Act suspending the Constitution of Newfoundland and providing for the administration of the dominion by a governor acting on the advice of a Commission of Government. In 1948, as the result of a referendum to that effect in Newfoundland, an agreement was concluded between the two countries according to which Newfoundland united with Canada and became a province in the Canadian Federation. The terms of the Agreement are annexed to the British North America Act 1949 which confirmed and gave effect to the terms of union.

2 See § 595, n 1.
direction of full statehood in international law. The decisive constitutional development was the enactment of the Statute of Westminster 1931. This gave expression to the principle of equality of status and the fully autonomous statehood of the dominions by removing any lingering remnants of their formal dependence upon the Imperial Parliament. The Statute of Westminster provided, in particular, that in the future no law or provision made by a Dominion Parliament shall be void or inoperative on the ground of inconsistency with the law of England or an Act of the Imperial Parliament, that a Dominion Parliament shall have power to repeal Imperial legislation insofar as it is in force in the dominion concerned, and that in the future no Act of Parliament of the United Kingdom shall extend to a dominion or a part thereof unless the dominion has requested for the more expeditious exercise of their undoubted power of settling their relations by concluding treaties. Canada and South Africa acquired a Great Seal in 1932: Australia did the same, though for more limited purposes, in 1939.


It was stated in the British Parliament on 7 May 1986 that South Africa was 'in practice' independent and sovereign by 1920, and was recognised formally as such in 1926: Parliamentary Debates (Lords), vol 474, col 805.

The position of India as a subject of international law was for a time anomalous. India became a member of the League of Nations; was invited to the San Francisco Conference of the UN in April 1945; exercised the treaty-making power in its own right. However, so long as the control of India's internal and external relations rested ultimately with the British Government and Parliament, it could not be regarded as a sovereign state and as a normal subject of international law. By the Indian Independence Act 1947, which provided for the establishment of independent Dominions... to be known respectively as India and Pakistan, India became a fully self-governing dominion and an independent state. See also TP Sankara Rao v Municipal Council of Mysorepetam, ILR, 26 (1958–59), 71. As to India's position prior to that date, see Sen, The Indian States, their Status, Rights, and Obligations (1940); Bhattacharyya and Sen, Sovereignty and Paramountcy in India (1930); Holdsworth, The Indian States and India (1930); Jennings, RL, 3rd series, 10 (1929), pp 480–91; Sundaram, International Affairs, 9 (1930), pp 452–66, and Grotius Society, 17 (1931), pp 35–31; Sethi, Can Bar Rev, 14 (1936), pp 36–49; The British Empire (Report by Study Group of Royal Institute of International Affairs (1937)), pp 108–12; Whitman, Digest, 1, pp 499–509; Poulose, BY, 44 (1970), pp 201–12.

As to the states which arose on what was formerly Indian territory see O'Connell, BY, 22 (1949), pp 454–5; and see § 62, nn 2–4. As to the Indian vassal states see § 81, n 3.

In the case in the Legislative Assembly of the British West Indies, as to the position of the British West Indies did not do away altogether with the Statehood of and necessity for Imperial legislation. Thus legislation by Parliament at Westminster was until recently necessary for any act of the Constitution of the Commonwealth, and probably some aspects of New Zealand's constitution, and the Australian states were still subject to legislative and executive powers vested in the UK (but see Bartlett v Roberts (1976), ILR, 69, n 11). The various residual rights and powers were brought to an end by, respectively, the Canada Act 1982 (enacted at Westminster), the Constitution Act 1987 (enacted in New Zealand), and the Australia Act 1986 (identically named Acts being enacted at Westminster and in Australia: see § 34, n 9.

3 For a summary of the salient historical facts see 8th ed of this vol, pp 199–203. See also Gilmore, Vir JL, 22 (1982), pp 481–517.

4 That Statute was enacted in pursuance of the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation of 1929 (Cmd 3479) which, in turn, was summoned in accordance with a resolution of the Conference of 1926. See also the British Commonwealth Merchant Shipping Agreement of 10 December 1931 (1932), Cmd 3994, removing the restrictions on the dominions with regard to merchant shipping and recognising their full legislative authority over all ships within their territorial waters or engaged in their coasts trade. The Agreement was subsequently registered by the Union of South Africa under Art 18 of the Covenant on 10 May 1932, No 2960.

5 In Moore and Others v Attorney-General for the Irish Free State and Others [1935] AC 484, the Judicial Committee of the Privy Council held that, in view of the Statute of Westminster, the legislature of the Irish Free State was competent to enact legislation abrogating the Anglo-Irish Treaty of 1921 (which had been incorporated in an imperial Act of Parliament). No opinion was expressed on the conformity of such action with the 'contractual' obligations of the Irish Free State. See also British Coast Corporation v R [1935] AC 500, affirming the rights of Canada, under the provisions of the Statute of Westminster, to abolish appeals to the Judicial Committee of the Privy Council in criminal matters: see Jennings, LQR, 52 (1936), pp 173–88. See similarly Ireland v R [1964] AC 902, 852–5, as regards Ceylon's legislative powers under independence. See no 5 as to appeals to the Judicial Committee.


According to s 10 of the Statute of Westminster, its principal provisions were not applicable to Australia and New Zealand until adopted by the Parliaments of those dominions. Australia adopted the Statute of Westminster only in 1942 and New Zealand in 1947. See also the New Zealand cases, Woolworths (New Zealand) Ltd v Wyne, ILR, 19 (1952), No 16, and R v Freeberg (1967), ILR, 45, p 4.

7 Thus in 1934 South Africa re-enacted the Statute of Westminster so as to make it also a South African statute and to make South Africa, according to its law, fully independent of the Imperial Parliament (Status of the Union Act 1934). The same Act proclaimed the status of South Africa as a sovereign independent state.

8 The Irish Free State went much further. The Constitution Act 1936 removed the Crown from all the internal activities of the Free State. The Executive Authority (External Relations) Act 1936, in empowering the Executive Council to appoint diplomatic and consular representatives and to conclude international agreements, 'authorised' the King to act on behalf of Ireland in these matters and when advised by the Executive Council to do so. The Constitution of 1937 described Ireland as a sovereign and independent state.
With the passing of the doctrines of the indivisibility of the Crown\(^1\) and of common allegiance,\(^2\) there is no longer\(^3\) room for the view that a declaration of war by any member of the Commonwealth would involve in war all other members of the Commonwealth, including the United Kingdom. At the commencement and in the course of the Second World War the various dominions exercised, in principle, their right to declare war separately from the action taken by Great Britain.\(^4\) The fact that some of the dominions (and some other states which have become members of the Commonwealth) retained links with the Judicial Committee of the Privy Council as the final court of appeal from their courts in no way affects their independent status,\(^5\) the Judicial Committee does not function solely as a court of the United Kingdom, but as an integral part of the constitutional structure of each Commonwealth state which retains the right of appeal to it.


\(^{12}\) Since the British Nationality Act 1948 allegiance has not been a source of British nationality but rather a consequence thereof. Although according to that Act, and its successor the British Nationality Act 1981, citizenship in any other part of the Commonwealth results in the possession of a special status of ‘Commonwealth citizenship’, the incidence and even existence of such a special status throughout the Commonwealth are not uniform: see § 79, nn 12 and 13. The emergence of the Crown as no longer a single Crown for all Commonwealth countries but rather as a plurality of Crowns with a separate existence in right of each Commonwealth Realm precludes the existence of a common (in the sense of a single) allegiance; and in any event there can be no question of allegiance to the Crown on the part of persons who are only citizens of those members of the Commonwealth which are republics.

\(^{13}\) In 1939 Australia and New Zealand did not declare war separately on Germany. But in 1941 and 1942 Australia declared war separately on Finland, Romania, Hungary and Japan. Thus the state of war against Japan was declared on 9 December 1941, by the Governor-General of Australia to whom the King, acting on the direct advice of the Australian Government, assigned the power to declare war. In establishing this precedent importance was attached to acting on the practice that in all matters affecting Australia the King and his representatives act exclusively on the advice of the Government of Australia. It appears that Canada and South Africa declared war separately in all cases. The Irish Free State was the only Dominion which in 1939 declared its neutrality. The United States of America Neutrality Act of 5 September 1939 was not made applicable to South Africa and Canada till 8 and 10 September respectively, after they had declared war on Germany. For a detailed account see Mansergh, Survey of Commonwealth Affairs. Problems of External Policy 1931–39 (1952), pp 365–414.

\(^{15}\) Appeals to the Judicial Committee of the Privy Council were barred by Canada in 1933 in criminal cases; see Nadon v The King [1926] 4 AC 482; British Coal Corp v R [1935] AC 300. In 1949 Canada abolished altogether appeals to the Judicial Committee. Previously, in Attorney-General of Ontario v Attorney-General of Canada (1947) AC 127 it was held that, having regard to the Statute of Westminster, Canada was entitled to do so. India passed in 1949 the Abolition of Privy Council Jurisdiction Act and conferred the corresponding jurisdiction upon the Federal Court of India. The relevant Acts and some official comments thereon, are reproduced in Mansergh, op cit in bibliography preceding § 78, vol i, pp 36–68. In Irakelebe v R [1964] AC 900 it was held that the attainment of independence by Ceylon did not automatically terminate the right of appeal to the Judicial Committee. Australia partly abolished appeals to the Judicial Committee in 1968, and effectively completely abolished them in 1975, although final abolition was not formally completed until the Australia Act 1986, s 11 (see Watts, ICLQ, 36 (1987), p at 137, n 25). Many members of the Commonwealth no longer allow appeals to the Privy Council. See generally Wherear, Constitutional Structure of the Commonwealth (1962), pp 150–69; Roberts-Wray, Commonwealth and Colonial Law (1966), pp 433–63; Jackson, CLJ, 28 (1970), p 271f; Swinfen, Imperial Appeal: The Debate on the Appeal to the Privy Council 1833–1986 (1987). For a survey of the activities of the Judicial Committee of the Privy Council in the field of international law, see Fawcett, BY, 42 (1967), pp 229–63.

\(^{14}\) As to Cyprus, see § 46, n 4. The admission of Ceylon (now Sri Lanka) to the UN raised the question of the extent to which the UK–Ceylon defence agreement of 1947 constituted a limitation upon Ceylon’s sovereignty and independence: see Fawcett, The British Commonwealth in International Law (1963), pp 102–3. The Ceylon Independence Act 1947 had provided that as from the appointed day – subsequently fixed by Order in Council at 4 February 1948 – ‘His Majesty’s Government in the United Kingdom shall have no responsibility for the Government of Ceylon’. On 22 October 1948 representatives of all other Commonwealth Governments represented at the meeting of the Commonwealth Prime Ministers placed on record ‘their recognition of Ceylon’s independence’ and affirmed that ‘Ceylon enjoys the same sovereign independent status as the other self-governing countries of the Commonwealth which are members of the United Nations’ (see Mansergh, op cit in bibliography preceding § 78, vol ii, p 759). As to state succession within the Commonwealth after the Second World War, see § 66, n 5.

\(^{16}\) Including dependent territories of other Commonwealth states: thus Western Samoa, a trust territory administered by New Zealand, joined the Commonwealth in 1970 (having become independent in 1962); as did the former mandated territory of Namibia in 1989 (see generally § 88).

\(^{17}\) In the Treaty of 7 October 1947, between the Government of the UK and the Provisional Government of Burma the former agreed to recognise the Republic of the Union of Burma as a fully independent state (Ced 7360). The Burma Independence Act 1947 was passed in December of that year, It provided that on the appointed day, Burma shall become an independent country, neither forming part of His Majesty’s dominions nor entitled to His Majesty’s protection.

\(^{18}\) See also the previous note as to Western Samoa’s delay in becoming a member of the Commonwealth; similarly Cyprus became independent in 1960, but did not become a member of the Commonwealth until 1961.
and the Southern Arabian Federation in 1967. Similarly, a state which has joined the Commonwealth may cease to be a member, as did the Republic of Ireland, South Africa in 1961,4 Pakistan in 1972,5 and Fiji in 1987.6 Although at one time there was some uncertainty, it is now established that, although Queen Elizabeth

4 In 1948 Eire, in proclaiming the Republic of Ireland Act, became a republic, it considered itself and was considered as having seceded from the Commonwealth. Nevertheless, the UK took the position that, in view of the actual ties between the two countries, it would not regard the new Irish legislation as placing Eire in the category of foreign countries or Eire citizens in the category of foreigners. These two principles were embodied in the Ireland Act 1949, which recognised and declared that Eire had ceased to be part of His Majesty's Dominions. The British Nationality Act 1948 gave effect to the latter principle. Thus as the result of s 3(2) of that Act an Eire citizen in the UK would receive the same treatment under existing law as if he were a British subject. If resident in the UK he could vote. He would also be liable to military service, but only if he resided in Great Britain for at least two years; if unwilling to perform military service, he would be given the opportunity to return to Eire. In Murray v Parkes it was held that a citizen of the Irish Free State who was ordinarily resident in Great Britain when the National Service (Armed Forces) Act 1939 was passed was liable to be called up under that Act: (1942) 2 KB 123. The Court held that Irish citizenship was supplementary to, and not inconsistent with, the wider British nationality. Similarly it was held in Banker v Brownstone [1953] 3 All ER 1126 that under the National Service Act 1948, Irish citizens are to be treated, with regard to military service, exactly in the same way as British subjects. However, this applies only to Irish citizens 'ordinarily resident' (ie for a period longer than two years) in the UK. See also Humpe Pipe & Concrete Construction Co Ltd v Moreasley Ltd [1942] 1 KB 189.

5 More recently, s 2(1) of the British Nationality Act enabled an Eire citizen to receive, on application, the status of a British subject (as distinguished from treatment as such) and s 6 enabled him to become registered, on application, as a 'citizen of the United Kingdom and Colonies'. Section 31 of the British Nationality Act 1981 provides for the continuance as British subjects of certain citizens of Eire; in that Act, unless the context otherwise requires, 'alien' does not include citizens of the Republic of Ireland, and 'foreign country' does not include the Republic of Ireland (s 50(1)). By virtue of s 3(1) a citizen of Eire who under the Act is a British subject (ie pursuant to s 31) has the status of a Commonwealth citizen: see also s 51. Some other members of the Commonwealth have adopted a similar attitude. Thus, for instance, the New Zealand Republic of Ireland Act 1950 declared: (1) that notwithstanding that the Republic of Ireland is not part of His Majesty's Dominions, that republic is not a foreign country for the purpose of any New Zealand law; (2) that New Zealand law, including the British Nationality and New Zealand Citizenship Act 1948, shall not be affected by the circumstance that the Republic of Ireland had ceased to be part of His Majesty's dominions. That Act was repealed by the Commonwealth Countries Act 1977, s 4 of which provides for New Zealand law to 'operate with respect to the Republic of Ireland as if it were a Commonwealth country and not a foreign country'. As to the status of Ireland prior to these developments, see Faunon, Le Statut de l'Etat libéral d'Irlande (1929); Kynne, Die völkerrechtliche Stellung Irlands (1930); Kohn, The Constitution of the Irish Free State (1932); Planchon, The British Empire and the World Community (1932); Williams, 'Great Britain and the Irish Free State', Foreign Policy Reports (8 (1932)); Justiz im Krieg (1930), 6 (1930), pp 204–24; Jennings, RI, 3rd series, 13 (1932), pp 473–523; Round Table, 25 (1934–35), pp 21–43.

6 After a coup d'état in Fiji, and a change in 1987 from being one of the Queen's Realms to being a republic, Fiji's membership of the Commonwealth lapsed: see the Commonwealth Statement on Fiji adopted at the Commonwealth Heads of Government Meeting in October 1987, Commonwealth...
stances by members of the Commonwealth of the obligations of the ‘optional clause’ of the Statute of the International Court of Justice used to reserve from its operation disputes which might arise among them, this is not now the invariable practice.12 Similarly, the concept of a common national status as ‘British subject’ or ‘Commonwealth citizen’ does not carry with it the full implications of equality of status in all the territories of the Commonwealth,13 although it is

her as Queen of the United Kingdom); Wilson, The International Law Standard and Commonwealth Developments (1966), pp 40–65.

In the UK matters arising between the UK and Commonwealth countries used to be dealt with through a separate Ministry, finally called the Commonwealth Relations Office. In 1968 that Ministry was merged with the Foreign Office to constitute the Foreign and Commonwealth Office, through which relations with both foreign and Commonwealth countries are now conducted.

11 See vol II of this work (7th ed), p 60. See also Jennings, BY, 30 (1953), pp 326–30; Fawcett, The British Commonwealth in International Law (1963), pp 133–4, 202–8; Wilson, AJ, 51 (1957), at pp 612–14. The UK dropped this particular reservation when depositing a new acceptance of the ‘optional clause’ in 1969, although preserving much of its effect in the past by continuing to maintain a reservation for disputes with members of the Commonwealth with regard to situations of facts existing before 1 January 1969. Other Commonwealth states whose acceptances of the ‘optional clause’ were, on 31 July 1989, accompanied by a reservation as to inter-Commonwealth disputes were Barbados, Canada, The Gambia, India, Kenya, Malta and Mauritius. Commonwealth states whose acceptances of the ‘optional clause’ were at that time not accompanied by any reservation as to inter-Commonwealth disputes were Australia, Botswana, Cyprus, Malawi, Nauru, New Zealand, Nigeria, Pakistan, Swaziland and Uganda. Pakistan’s acceptance of 1960 did not contain such a reservation, although Pakistan only ceased to be a member of the Commonwealth in 1972. Ireland’s acceptance has never contained such a reservation. Apart from jurisdictional acceptances of the ‘optional clause’, various treaties in force between member states of the Commonwealth provide for disputes between parties to be submitted to the ICJ.

12 The British Nationality Acts, beginning with the Act of 1914, and the corresponding Acts passed in other Commonwealth countries have generally recognised a common status throughout the Commonwealth. However, the Citizenship Act of Ceylon 1948 did not adopt the concept of common nationality status for Commonwealth citizens. See generally Parry, Nationality and Citizenship (1957), especially pp 92–113 as regards Commonwealth citizenship, and ibid (vol 2, 1962).

The Irish Nationality and Citizenship Act of 1935 abolished for its citizens the status of British subject (ss 33(3)) – a provision contrary to the British Nationality and Status of Aliens Act then in force. While it is now clearly established that since the Statute of Westminster an independent sovereign subject does not, as such, have the right to enter or stay in any part of the Commonwealth, see De Merigy v Langlais, decided by the Supreme Court of Canada: AD, 14 (1947), No 63. See also Mason and Mason v Rodrigues (1952), ILR, 22 (1955), pp 61; Mohd Abdul Ghani v The State, ILR, 24 (1957), p 56; Nazamnath v The State, ILR, 24 (1957), p 429.

still not without significance or direct practical application; nor does that concept now generally prevail in the application of those rules of international law which determine a state’s rights and duties for an individual’s nationality.14 In connection with treaties too, earlier views that inter se agreements were a domestic matter and were not strictly treaties in international law have given way to a general acknowledgement that such agreements can be treaties.15 Although the special legal characteristics of inter se relations are in general diminishing16 and those relations are now more widely accepted as truly international in character, Commonwealth relationships are still characterised by a special and close degree of cooperation.17

§ 80 The legal nature of the Commonwealth

On 1 January 1990, 50 states were members of the Commonwealth.1 While it is clear that they are all fully sovereign states in international law, the question as to the particular category of international persons in which the Commonwealth regarded as a unit should be placed is more difficult to answer; it has in any case varied during the course of its development over the last half century. It is apparently sui generis and defies classification. It is not a federal state because there is no organ which has power

14 For the position regarding the appointment of national judges to the PCIJ, see Fawcett, The British Commonwealth in International Law (1963), pp 151–3; the ICJ has often included judges from more than one Commonwealth state. As regards diplomatic protection by one Commonwealth country of a citizen of another, see ibid, pp 185–6, and Parry, Nationality and Citizenship (1957), pp 114–23. In the Pugl Case the UK presented a claim against Pakistan of the loss of nationality of the Irish subject Raja: AD, 7 (1933–34), No 97. See also § 411, n 1. For a detailed study of the application of the general rules of international law regarding international claims to disputes involving nationals of Commonwealth countries, see Joseph, Nationality and Diplomatic Protection (1969).

15 See § 598, n 1.

16 Thus, in addition to matters mentioned in the text, a member of the Commonwealth may enjoy sovereign immunity from the jurisdiction of the courts of another (Kahan v Pakistan Federation (1951) 2 KB 1003), and the rule preventing enforcement in one state of a foreign state’s revenue laws has been held to apply equally to such laws of a Commonwealth country (Gosw v India, Ministry of Finance (Revenue Division) v Taylor, ILR, 22 (1955), p 286.

17 See § 669, n 39, as to Commonwealth preference; § 417, no 9, 10, as to the return of fugitive offenders.

1 In 17 of these Queen Elizabeth II is Head of State: they are Antigua and Barbuda, Australia, Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, Mauritius, New Zealand, Papua New Guinea, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines, St John’s, St Lucia, Trinidad and Tobago, Tuvalu and the UK. Six other member states are monarchies with their own sovereigns: Brunei, Lesotho, Malaysia, Swaziland, Tonga and Western Samoa. The remaining 27 are republics: Bangladesh, Botswana, Cyprus, Dominican, the Gambia, Ghana, Guyana, India, Kenya, Kiribati, Malawi, Maldives, Malta, Namibia, Nauru, Nigeria, Pakistan, Seychelles, Sierra Leone, Singapore, Sri Lanka, Tanzania, Trinidad and Tobago, Uganda, Vanuatu, Zambia and Zimbabwe. All

recognise the Queen as Head of the Commonwealth. Nauru’s and Tuvalu’s membership of the Commonwealth is in some respects limited, and they do not for example attend meetings of Commonwealth Heads of Government.

both over the member states and their citizens. It is not a confederation because there is no treaty which unites the member states and no organ which in fact and, for all material purposes, in law has power over them. The Commonwealth Secretariat, established in 1965, is primarily a coordinating body, without legal powers over the member states; the regular meetings of Heads of Governments of member states (and of other ministers) are essentially informal and consultative in character. It is unrewarding to enquire whether the Commonwealth resembles a real or personal union since although the Crown is accepted by all members of the Commonwealth (even by those which are republics, or separate monarchies) as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth, the latter is not, as such, based on the concept of a common allegiance to the Crown. On the other hand, there must be taken into consideration the legally relevant fact of Commonwealth citizenship and the circumstance that the countries of the Commonwealth do not all consider each other in all respects as foreign countries. Moreover, account must be taken of the flexible but regular and effective machinery of consultation and exchange of information. The Commonwealth is a community of states in which the absence of a rigid legal basis of association is compensated by the bonds of common origin, history and legal tradition.

STATES UNDER PROTECTION


§ 81 States under protection

An arrangement may be entered into whereby one state, while retaining to some extent its separate identity as a state, is subject to a kind of guardianship by another state. The circumstances in which this occurs and the consequences which result vary from case to case, and depend upon the particular provisions of the arrangement between the two states concerned.

Formerly one category of such states were the so-called 'vassal states', being states under the suzerainty of another state. These terms are now seldom used, although they are not wholly defunct. Thus Tibet is still sometimes said to be under the suzerainty of China. Vassal states, although retaining internal independence, normally had no separate international position.

1 See generally on so-called vassal states, 8th ed of this vol, §§ 90, 91; particularly p 189, n 11; and see p 190, n 3, as to Turkish suzerainty over Egypt up to 1914, and p 190, n 1 as to British suzerainty over certain Indian vassal states before it lapsed by virtue of s 7(1)(b) of the Indian Independence Act 1947. On the position of the Indian vassal states see cases cited at n 3 below, and on the latter see also Chacko, Hag R, 93 (1958), p 181-203.

2 See Parliamentary Debates (Commons), vol 602, col 126 (written answers, 25 March 1959), and Parliamentary Debates (Lords), vol 236, col 239 (6 November 1973) for the British Government's view to this effect, although qualified by the condition that Tibet retained its autonomy.

This autonomy is accompanied by recognition of the special position of the Chinese authorities there: Parliamentary Debates (Lords), vol 520, col 201 (3 July 1990).

In Art 2 of the Treaty of 3 July 1914, between Great Britain, China and Tibet, it was recognised that Tibet was under the suzerainty of China.

For a treaty of 1904 between Great Britain and Tibet, under which British consent was required for many actions by Tibet relating to foreign relations, see BFSP, 98 (1904-5), p 148. See also McCabe, AJ, 62 (1966), p 69-71, and Rubin, ibid, p 812-14.

In 1951 China and Tibet concluded an agreement which provided for China to be responsible for the foreign relations of Tibet: BFSP, 158 (1951), p 731. Thereafter Chinese actions tended increasingly towards the absorption of Tibet into China. In 1954 India and China concluded an agreement on trade and intercourse between India and Tibet, Tibet being referred to as the 'Tibet region of China' (BFSP, 161 (1954), p 518): see also Arts 5 and 6 of the Sino-Indian Trade Agreement 1954 (ibid, p 524). From 1950-59 Chinese actions in respect of Tibet occasioned considerable international concern, and were raised at the UN: the voting of some delegations (including that of the UK: ICLQ, 10 (1961), p 557) was affected by doubt as to the international status of Tibet, and consequently whether the matter was within China's domestic jurisdiction. See the International Commission of Jurists' Reports on The Question of Tibet and the Rule of Law (1959) and Tibet and the Chinese People's Republic (1960); Fawcett, R, 53 (1961), pp 409-17; UNYB (1959), pp 67-9, and ibid (1961), p 138-40. See further as to the position of Tibet, Sen, RG, 55 (1951), pp 417-38; Choudhary, Indian Yearbook of International Affairs, 1 (1952), pp 185-96; and Rubin, ibid, pp 812-14.
Still of some contemporary relevance are protectorates. A protectorate arises when a weak state surrenders itself by treaty 9 to the protection of a strong state in such a way that it transfers the management 2 of all its more important international affairs 6 to the protecting state, which becomes responsible for the international relations of the protected state. 7 It may even amount to the beginning of the colonisation of the protected state. 8 Protectorate is, however, a conception which lacks exact legal precision, as its real meaning depends very much upon the special case. The true international concept of protectorate is not always accurately reflected in the terminology used by states for their internal or constitutional purposes, as in the case of those British 'protectorates' formerly exercised over certain African tribes, acquired through agreements with the chiefs of the tribe; 9 those 'protectorates' possessed no international status at all.

§ 82 International position of states under protection  
The position within the international community of a state under protection is defined by the treaty of protection which enumerates the reciprocal rights and duties of the protecting and the protected states. 1 Each case must therefore be treated according to its own merits. Thus the question whether the protected state can conclude certain international treaties and can send and receive diplomatic envoys, as well as other questions, must be decided according to the terms of the particular treaty of protectorate. Recognition of the protectorate on the part of third states is necessary to enable the protecting state to rely on the provisions of the treaty of protection against third states. 2 It is characteristic of a protectorate that the protected state always has, and retains, for some purposes, a position of its own as an international person and a subject of international law. 3 Heads of State and
governments of protectorates enjoy the usual jurisdictional immunities in the courts of the protecting state and, probably, in those of other states. The protectorate is not considered a mere portion of the protecting state. It is, therefore, not necessarily a party in a war waged by the protecting state against a third state; its nationals do not usually have the nationality, with all its incidents, of the protecting state (although they may enjoy diplomatic protection by the protecting state), and treaties concluded by the superior state are not ipso facto concluded for the protected state, which may in certain cases remain capable of concluding treaties for itself. For acts which remain within the exclusive competence of the protected state or which are performed by organs attributable to it, it is that state, not the protecting state, which may be held responsible; otherwise it will be the protecting state which is answerable internally.

When the protectorate terminates the protected state will resume its full sovereign independence, which has been partially in suspense during the protectorate.

§ 83 Recent and existing protectorates

In Europe there is at present one protectorate, namely the Republic of Andorra, which is under the joint protectorship of Spain and France.

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4. Mitchell v Sultan of Jorohe [1894] QB 149; Bey of Tunis v Heirs of Ben Ayed, Sirey [1895], II, p 11; Duff Development Company v Government of Kelantan [1924] AC 797; Government of Morocco v Laurens; AD (1929–30), No 75; Sultan of Jorohe v Abakabah [1952] AC 318. See also Sucharitkul, State Immunities and Trading Activities in International Law [1959], pp 106–12. Under the draft Articles on Jurisdictional Immunities of States and Their Property, provisionally adopted by the ILC in 1986 (YBILC, 1986), ii, pt 2, p 131 a state under protectorate would appear to fall within the scope of the term ‘State’ in Art 3.1. See also § 109, n 14, for the meaning of the term ‘State’ for purposes of jurisdictional immunity; and § 81, n 3, as to immunities of states under sovereignty.

5. See Advisory opinion of the Permanent Court on the Nationality Decree in Tunis and Morocco (1923), Series B, No 4; Cmd 1899 of 1923 (exchange of notes between France and Great Britain on this question subsequent to the Opinion of the Court); and Lindley, pp 304–6. See also Re Montoro, ILR, 18 (1951), No 21. The Ionian Islands, while under British protection, retained their own maritime flag: The Ionian Ships (1885) 2 Spinks 212. See Re Société Générale Marocaine (1961), ILR, 44, p 35; Administration of the Territory of Papua New Guinea v Guba and Dorigna (1972), ILR, 71, p 39. But in Re Secretary of State for Home Affairs, ex parte Duff Development Company (1966) 2 QB 194, Qatar, although a foreign state in which the Crown exercised full sovereignty, was held to be a ‘British possession’ within the terms of the agreement providing for the return of fugitive criminals; see also Re v Amichiya (1964), ILR, 53, p 102. Under the British Nationality Act 1981, a British protected state would be within the definition of ‘foreign country’ in s 50 but not such protected states now exist. A British protected person is, however, not an ‘alien’; see § 7.

6. See the case of The Ionian Ships (1885) 2 Spinks 212; Philimorin c, § 77; Scott, Cases, p 21; Pitt Coppel, Leading Cases on International Law (5th ed, vol ii, 1931), p 50; and see Lindley, p 306, and McNair, Opinions (vol 1, 1956), pp 39–40. See also Karpuzanis v Bulgaria, Recueil TAIL, 7 (1926), p 39. In H C van Hoogstraten v Low Luam Senp the Supreme Court of the Federated Malay States held, in October 1939, that the latter were at war with Germany in view of the unequivocal acts of the British High Commissioner placing them in a state of war; AD, 9 (1939–40), p 40, No 16.

7. Under the British Nationality Act 1948, British protected persons were not aliens (s 32(1)), and they enjoyed certain advantages associated with British nationality; but not the right of entry to the UK (Thakur v Secretary of State [1974] 2 All ER 261) and see also § 379, n 3). Under the British Nationality Act 1981, which largely replaced the 1948 Act, British protected persons as defined in ss 38 and 50(1) are not aliens (ss 50(1), 51(4)), and are eligible for registration as a British citizen on certain conditions being satisfied (s 4). See also the British Protected Persons Order 1982, made under s 38 of the Act, and §§ 411, n 5. See generally on the earlier law, Party, Nationality and Citizenship Laws of the Commonwealth and Republic of Ireland (1957), pp 352–85, and other works cited at §§ 384, n 3. See also Re Ho (1975), ILR, 55, p 547; and §§ 411, n 5.

In Motul v Attorney-General the House of Lords held that a person could be a British protected person and, at the same time, a citizen of the UK and Colonies: The Times, 8 November 1991.

A national of Tunisia, when a French protectorate, has been assimilated to a French national as regards the enjoyment of civil rights in France (Cabinet de Chambre de Bases, ILR, 18 (1951), No 22); but a national of the protected state of Morocco was held not to be equivalent to a national of the French Union so as to be exempt from expulsion (Re Hamou Ben Brahim Ben Mohammed, ILR, 22 (1955), p 60).

8. See § 411, n 5.
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II

States under protection

Internationalpersons

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orate of France and Spain.' Outside Europe3 most of the states which were
formerly under the protectorate of another are now again independent states.
These include Tunis (formerly under French protection) and Morocco4 (formerly part under French, part under Spanish,5 protection); Tangier$ certain states in

France were further regulated by a convention signed in 1951, which was replaced by further
conventions concluded in 1963: RG, 67 (1963). pp 907-1 1,976-86. Monaco is represented in
France by an ambassador, but France only has a consul-general in Monaco: RG, 82 (1978),p900.
Monaco is a member of several international organisations including some specialised agencies,
such as UNESCO, WHO, UPU, IAEA, ICAO, WIPO and ITU, and was separately represented at, eg the Geneva Conference on the Law of the Sea 1958, the Vienna Conference on the
1973-75. Monaco, although 'situated outside the territory of [France]' forms part of the customs
territory of the EEC: see EEC Council Reg 1496/68, Art 2. See generally Callois, Le Rigirne
international de la Princxpauti de Monaco (1964); Rousseau, Droit internationalpublic (vo12,
(2) The Free City of Danzig was created a separate state by Arts 100-8 of the Treaty of Peace
with Germany in 1919 and 'placed under the protection of the League of Nations': see 8th edof
this vol, p, 194, n. For the extensive literature as to the status of the Free City of Danzig while
under Pohsh protectorate before the Second World War, see 7th ed of this vol, p 176, n; and see
Verzijl, International Law in Historical Perspective (vol 2, 1969), pp 510-45; Turack, BY, 43
(1968-69), pp 209-12 (as to passports issued by Danzig); Rousseau, Droit internationa[pub/~
(vol 2, 1974), pp 423-30; Crawford, The Creation of States in International Law (1979), pp
(3)San Marino has been described as aprotectorateof Italy. Seeeg 7th ed of thisvol, p 176,and
Fauchille, § 181. However, see Sottile, La RQublique de Saint Marin (1924). San Marino's
relations with Italy are governed principally by conventions concluded in 1862,1872,1897 and
1939 (BFSP, 143 (1939), p 537: it has been amended several times). It seems that San Marino
concludes treaties in its own name. See eg the Exchange of Notes of 12 September 1949, between
the UK and San Marino on the abolition of visas: TS N o 70 (1949). San Marino is a party to the
Statute of the ICJ (see GA Res 806 (VIII) (1953) and UNTS, 186, p 295), and was separately
represented at eg the Vienna Conferences on Consular Relations 1963 and on the Law of Treaties
1969, as well as at the Helsinki Conference on Security and Cooperation in Europe 1973-75.
Although 'situated outside the territory of [Italy]', San Marino forms part of the customs
territory of the EEC: EEC Council Reg 1496/68, Art 2. San Marino became a member of the
Council of Europe in 1988, and is also a member of the UPU, W H O , UNESCO, ITU and
WIPO.
"is
protectorate is exercised for Spain by the Bishop of Urgel. As regards the international
position of Andorra, see Vilar, L'Andowe (1905); Fauchille, § 177(2); Gouli, in RQertoire,i,pp
562-6; Rousseau in Symbolae Verz$(1958), pp 337-46, and Droit internationalpublic (vol2,
See also the decision of the French Court of Cassation in Re Soidti de Nickel (1933), Sirey
(1935). 3, 1, with a note by Rousseau: AD, 7 (1933-34), N o 21. In Massip v Cruzel, ILR, 18
(1951), N o 23, the Tribunal de Perpignan (France) held that Andorra was neither a foreign state
in relation to France nor a sovereign state, and that an Andorran subject was therefore not bound
to deposit security for costs; and see ILR, 39, p 412, for the decision of the Court of Cassation in
this case, in 1960. See also Re BoedeckerandRonski(1962), ILR, 44, p 176, in which, as in thelast
cited case, Andorra was regarded as a 'fief without international personality'; Elsen v Bouillot,
RG, 72 (1968). p 857- and see Riera, ihid, pp 361-80. See also Re Lothringer (1962), ILR, 44, p
182; Armengol o Mutualitl Sociale Agrrcole de I'NPrarrlt (1966). ILR, 47, p 135; Elsen v 'Le
Patrimoine' (1) and (2) (1971). ILR, 52, p 14; ForneNs v Ministgre Public (1969), ILR, 52, p 26;
Courtiolv Chappard, RG, 88 (1984), p 974, holding that Andorra was not a sovereign state, but
equally that it was not to be treated as part of France (and that therefore decisions of its courts
were not to be treated as French decisions). In Drozd and Janousek v France and Spain (App
12747/87) the European Commission of Human Rights concluded, in its report of 11 December
1990, that the relationship between France and Spain, and Andorra, was such that France and
Spain had not, by virtue of their ratification of the European Convention on Human Rights,

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extended the application of the Convention to the territory of Andorra, and were not responsible
for the actions of the courts of Andorra. Andorra is a party to certain treaties, including the
Universal Copyright Convention 1952, and has signed the ~ o n v e n t i o $for the Protection of
Cultural Property .in the Event of Armed Conflict 1954.
1 . h Panama, the
On the American continent theUSA established for a time a relationship k ~ t Cuba,
Dominican Republic, Haiti and Nicaragua which, while implying the &ht of intervention on
the part of the USA in certain cases (see § 137, n 37) and important restrictions on the freedom of
foreign policy, did not exhibit the characteristics of a protectorate as desdribed above. See Hyde,
(1929), pp 301-4, who regards the relation as one of
i, $9 19-24; and Kunz, Staatenverbind~n~en
'quasi-protectorate.' As to the relationship between the USA and ~ u e r t bRico, see § 84, n 21.
See also the US Act to provide for the complete independence of the Philippine Islands of 24
March 1934 (48 Stat at L 456), which provided in 2(a), para 10, that i n the transitional period
Umited to ten years, foreign affairs would be under the direct supervision and control of theUSA.
SeeToynbee, Survq, (1933), pp 544-74; Documents (1934), pp 419-47; Gilmore, Iowa Law Rev,
pp 639-53; Harrington, International Affairs, 15 (1936), pp 268-88. It was held in 1938, in
Bradford v Chase National Bank of New York, that the Philippine Fommonwealth was a
sovereign state and that its property was, therefore, immune from the jurisdiction of thecourts of
the USA: 24 F Suppl28; AD (1938-40), N o 17. See also ibid, N o 18, ;here, in Suspine et a1 v
Compariia Transatlantica Centroamericana, it was held that citizens of the Philippines were
subject to the US neutrality legislation. In MIV Monusco Inc v oh missioner of Internal
Revenue the USA was regarded as having exercised a protectorate ovdr the Philippines up to
independerice in 1946, so that the Philippines was a'foreign country' for purposes of US tax laws:
ILR, 23 (1956), p 29. The Philippine Commonwealth was invited to the San Francisco Conference in 1945 and is a member of the U N ; the Philippines became formally independent in 1946.
As to Morocco see Arts 141-146 of the Treaty of Versailles, and Rouard de Card, Le Traitd de
Versailles et le protectorat de la France au Maroc (1923). As to Tunis and Morocco see the
Advisory Opinion cited at § 82, n 5, and Winkler, La Nationalit; dans leiprotectorats de Tunisie
et du Maroc (1926), pp 17-52; and the judgment of the ICJ in the case concerning Rights of
United Stater Nationals in Morocco, ICJ Rep (1952), p 185. See also ReSocittC des Phosphates
Tunisiens (1929), decided by the French Conseil d'Etat, AD, 5 (1929-30), N o 12 and Note; and
Morocco, see Rouard de Card, Les Etats-~nisd'AmCrique et leprotectorht de la France en Maroc
(1930). See Fitoussi and Binazet, L'gtat tunisien et leprotectorat francaif(2 vols, 1931). See also
Maresco, Les Rapports des droits publics entre la Mdtropole et les Colonies, Dominions et autres
territoires d'outremer (1937) and De Laubadtre, Etudes Georges Scelle (lo1 i, 1950). pp 315-48.
Tne protectorates over Tunis and Morocco were terminated in 1956: see documents in AJ, 51
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See, for various questions of state responsibility and others connected with that protectorate, the
award of Huber in the Spanish Zone of Morocco Claims case between Great Britain and Spain
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(1924), RIAA, 2, p 615.
The Tangier Zone was a curious specimen of a protectorate. It was administered by an international body under powers delegated by the Sultan of Morocco, which in turn was a French
protectorate. According to the Treaty of 1923 the protection in foreign;countries of Moroccan
subjects of theTangier Zone is entrusted to France (Art 6). O n the other Hand, treaties concluded
by Morocco (ie by France on behalf of Morocco) extend to Tangier only with the consent of the
international legislative assembly of the Zone. Treaties to which all the powers signatories of the
Act of Algeciras were parties apply automatically to the Zone (Art 8). O n I4 June 1940, Spanish
troops invaded the Zone and on 4 November the Spanish army of oc2ppation terminated the
activities of the administration under the Treaty; Great Britain and a number of other signatories
in Paris in 1945 the position as it existed before 1940 was restored: j ~ m d6678 (1945). See
generally on Tangier, TS N o 23 (1924) for the Convention organising tke Tangier Zone; TS N o
25 (1928), for the Convention of 1928; AJ, 23 (1929), Suppl, pp 235-84;see vol I1 of this work
(7th ed), § 72(8), and Ruzi, RI, 3rd series, 5 (1924), pp 590-629; von Gravenitz, Die TangierFrage (1925); Cot, Clunet, 52 (1925), pp 609-27; Weir Brown, JCL, 3rd series, 7 (1925): pp
86-90; Fitzgerald, RG, 34 (1927), pp 145-70; Hudson, AJ, 21 ( 1 9 2 7 ) ) ~231-37
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(the Mtxed
Court); Toynbee, Survey (1929), pp 189-201; Charles, Le Statut de rahger (1927); Stuart, The
International City of Tangier (2nd ed, 1955); Baldoni, La zona di Tangers (1931), and Rivista, 22
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the Persian Gulf, namely Kuwait, Bahrain, Qatar and the Trucial States (all formerly under British protection); the Malay States (formerly under British protection); and Bhutan (formerly under Indian protection).\(^9\) Brunei ceased to be a British protected state after the conclusion of an agreement between the United Kingdom and the Sultan in 1971.\(^10\)


The special international status of Tangier was ended in 1956; see TS No 9 (1957); Gutteridge, BY, 33 (1957), pp 296–302; and AJ, 51 (1957), pp 66–67.


Kuwait was admitted to the UN in 1963, and Bahrain, Qatar and the Union of Arab Emirates in 1971. As to Bahrain see Tadjbakhche, La Question des Illes Bahreini (1960); see also Al Baker v Alfard (1960) AC 786, 804–805. The termination of Bahrain's protected status required prior settlement of the dispute between the UK and Iran as to sovereignty over Bahrain. This was achieved through the good offices of the Secretary-General of the UN; see Al Baharna, ICLQ, 22 (1973), pp 541–2, and documents in ILR, 9 (1970), pp 787–82. Bahrain resumed full international responsibility as a sovereign and independent state in 1971 (TS No 78 (1971)), although Bahrain had, eg, concluded some treaties earlier (see § 82, n 10). See Gordon, AJ, 65 (1971), p 560; Dugard, The Sultan's protected status was formally ended in 1961 (TS No 93 (1961); see also TS No 64 (1968)), although even before then Kuwait had exercised certain international powers herself: eg by becoming, in 1959, a party to the Convention for the Safety of Life at Sea 1948, and, in 1960, a party to the International Civil Aviation Convention 1944, as well as by participating in certain international organisations, such as UPU (in 1960), UNESCO (in 1960), IMCO (1960).

Qatar's protected status (as to which see V Secretary of State for Home Affairs, ex parte Demetrios (1966) 2 QB 194) was ended in 1971 (see TS No 3 (1972)). As to the Trucial States, their protected status was terminated contemporaneously with the establishment as a sovereign and independent state of the Union of Arab Emirates, of which all the Trucial States (with the exception of Ras al Khaimah) were members: see TS No 34 (1972). In Buttes Gas v Hammel (1981) 3 WLR 787 the Foreign Secretary supplied the Court with a certificate stating that between 9 September 1969 and 1 December 1971 (the relevant period for purposes of the Admirality Jurisdiction): the United Kingdom (at that time the United Kingdom of Great Britain and Northern Ireland and the British Indian Ocean Territory and the Trucial States) as an independent sovereign state in special treaty relations with the UK, by virtue of which treaty relations the British Government was generally responsible for the conduct of Sharjah's international relations and for its defence (at pp 800–801).


\(^{3}\) After India became independent in 1947 it was necessary for India to review the relations with Bhutan which had been established while the UK had authority in India. A treaty between India and Bhutan was concluded on 8 August 1949 (for text see Ram Rahoul, Modern Bhutan (1971), p 155) in which Bhutan agreed 'to be guided by the advice of the Government of India in regard to its external affairs' (Art 2). Although this led to doubts about Bhutan's status as an independent state (cf Poulouste, ICLQ, 20 (1971), pp 195–212), Bhutan became a member of the UN in 1971 (GA Res 2973 (XXXVI)).

Sikkim's position had been similar to that of Bhutan, and for the same reasons a treaty between India and Sikkim was concluded on 5 December 1950. This confirmed Sikkim as an Indian protectorate (Art 2). India undertook to maintain for the defence and foreign international relationships of Sikkim (Arts 3 and 4); see also Documents on Foreign Policy of India 1947–58 (1958), p 27 (published by the Indian Parliament). In 1973, India under, an agreement concluded on 8 May 1973, became more closely involved in the administration of Sikkim, and Sikkim became an 'associated state' of India the following year. Sikkim became a full state of India in May 1975. See Fisher, AFDD, 20 (1974), pp 201–14.

\(^{3}\) Cmd 4932, amending an earlier treaty of 1959 (BSFF, 164 (1959), p 38). Under the 1971 treaty

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**DEPENDENT TERRITORIES**


§ 84 Colonies While it is necessary to distinguish from fully sovereign states those which are under some kind of protection, these latter are equally to be distinguished from colonies and other similar overseas dependent territories.\(^1\) In general, while protected states possess in varying degrees some element of separate statehood and are essentially foreign states over which the protecting state has extensive powers of control, particularly as regards foreign relations, colonies and similar dependent territories possess no separate statehood or

the UK was responsible for the conduct of Brunei's foreign relations but Brunei's defence was a matter for consultation rather than an obligation upon the UK. Since 1971 the UK regarded Brunei as an independent Sultanate in treaty relationship with the UK. For the purposes of the British Nationality Act 1948 Brunei retained a protected state for the time being; SI 1978 No 1026. Under an agreement signed on 7 January 1979 Brunei resumed its full international responsibility as a sovereign and independent State at the end of 1983: TS No 21 (1984). Art 6. A Treaty of Friendship and Cooperation was concluded and entered into force on the same dates: TS No 25 (1984). Brunei is a member of the Commonwealth.

\(^{1}\) It has been said that the essential factor distinguishing international states (whether full or part sovereign) from colonies and other dependent territories, blurs the distinction between the different categories of territories.
sovereignty: it is the parent state alone which possesses international personality and has the capacity to exercise international rights and duties. The parent state may, and often does, grant a colony a degree of internal autonomy, and even certain powers in external affairs, but from the parent state's point of view this is a revocable delegation of the exercise of part of the parent state's sovereign powers. Parent states have varied and even annulled the constitution they have previously granted to a colony, as the United Kingdom did in respect of British Guiana in 1953, Southern Rhodesia in 1964, and Anguilla in 1971.

The degree of internal authority possessed by colonial territories varies greatly, as do their legal relationships with their parent state. Often the colony and its parent state are regarded as legally separate, so that, for example, the colony may be regarded as having its own assets and being responsible for its own debts and wrongful acts. 7 This case must be considered on its merits, in the light of the purpose in mind, and in the knowledge that the various classifications of territories are primarily a matter of convenience and cannot be applied inflexibly. It is also important to note that the designation given to a territory as a matter of internal or constitutional law may not reflect its proper characterisation in international law. 9 In particular, the adoption of a constitutional structure by which overseas territories, however distant, are constituted as provinces or departments of the parent state, on an equal footing with provinces or departments in the metropolitan territory of the state, may not be sufficient in itself to render them any the less in substance colonial territories. 10

7 In the Case concerning the Interpretation of the Statute of the Membel Territory (1932) the PCJ held that the grant of autonomy to a territorial unit does not result in a division of sovereignty in a way disturbing the unity of the state. See A/B, No 49, p 313. The grant of even very wide autonomy does not divest the grantor of sovereignty: see the Lighthouses in Crete and Samos Case (1937), PCJ, Series A/B, No 71, and see § 170(2). See also § 34, n 8.


9 Southern Rhodesia Act 1965 and the Southern Rhodesia Constitution Order 1965. Before its illegal declaration of independence in 1965 Southern Rhodesia was constitutionally a very advanced colony: see Fawcett, BY, 41 (1965–66), pp 103–107; Roberts-Wray, Commonwealth and Colonial Law (1966), pp 748–53. Southern Rhodesia was a member of the ITU and the GATT, an associate member of WHO, and a component of the British Overseas Territories member of UPU and WMU. After the illegal declaration of independence in 1965 authority for representation at meetings of those bodies was withheld by the British Government; for the cancellation of Southern Rhodesia’s signature of the Final Act of an ITU plebiscitation conference on the day after Southern Rhodesia’s illegal declaration of independence, the British Government having given notice that Southern Rhodesia’s delegation’s full powers had expired on the date of the illegal declaration, see Blix, HaR, 130 (1970), n 675, n 57. See generally § 55, n 7, as to Southern Rhodesia’s illegal declaration of independence and its consequences.


The position of British colonies is characterised mainly by a prohibition against extra-territorial legislation being enacted by the colonial legislature, and against the enactment of legislation repugnant to laws enacted by the UK which extend to the colony. See the Colonial Laws Validity Act 1865; Macleod v Attorney-General for New South Wales [1891] AC 455; Nadan v R [1926] AC 482; Croft v Dundy [1933] AC 156; O’Connell, LQR, 75 (1959), pp 318–32. For the purposes of UK Acts of Parliament the term ‘colony’ is defined in Sched 1 to the Interpretation Act 1978; see also para 4(3) of Sched 2, and the definition of ‘British possession’ in Sched 1.

Note particularly the distinctive position of the Channel Islands and Isle of Man, which are not part of the UK (although they are included in the term ‘British Isles’), and which enjoy an ancient and substantial local autonomy, and for whose defence and international relations the UK is responsible; see generally on the position of these islands, Roberts-Wray, op cit, pp 672–7; Simmonds, CML Rev, 6 (1968), pp 156–69, ibid, 7 (1970), pp 454–65, and ibid, 8 (1971), pp 475–84; Report of the Royal Commission on the Constitution, 1969–73 (Cmnd 5460), vol 1, pt XI; Parliamentary Debates (Commons), vol 29, cols 172–3 (written answers, 21 October 1982); and § 621, n 4. In Chloride Industrial Batteries Ltd v F & W Freight Ltd (1989) 3 All ER 86 the island of Jersey was held not to be a sovereign state and not competent to enter into an international convention on its own behalf. See also the Gillow Case (1986), ILR, 75, pp 562, 581–3, as to the non-extension of Protocol No 1 to the European Convention on Human Rights to Guernsey. The status of the Channel Islands in relation to the UK, in the context of maritime jurisdiction, was considered in the UK–France Continental Shelf Arbitration (1977), ILR, 54, pp 6, 92–9.

As to the Isle of Man see Case No 32/79, Commission v United Kingdom [1973] ECR 2403, 2423, 2464.

As to the position of Australia’s overseas territories see Castles in International Law in Australia (ed O’Connell, 1965), pp 292–400.

Although a dependent territory is subject to the authority of the metropolitan state, the European Commission of Human Rights has held it not to be within that state’s jurisdiction for the purpose of securing the application to such a territory of a treaty applying to all persons within the state’s jurisdiction, signature of the treaty in question contained a territorial application clause the procedures of which had not been used: Bui Van Thanh v United Kingdom, decided on 19 March 1990.

7 See Montefiore v The Belgian Congo, ILR, 22 (1955), n 226, and subsequent proceedings in ILR, 23 (1956), pp 191 and (1961), ILR, 44, p 72; Etat Belge v Dumont and Etat Belge v Patocs (1966), ILR, 48, pp 8, 20; France v Belgium (Minister of Finance) (1968), ILR, 69, p 24; Foldermans v State of the Netherlands, ILR, 24 (1957), n 69; Syndicat Indépendant des Fonctionnaires du Condominium des Nouvelles Hébrides (1970), ILR, 57, p 116. A colony may also have a form of nationality distinct from that of its parent state, and conferring rights primarily in relation to the territory of the colony and only in a limited degree in relation to the parent state: see eg British Nationality Act 1971, Part II, and § 34, n 3. See also Ministry of Home Affairs v Kemal (1962), ILR, 40, p 191. And see § 66, n 26. See also p 227, and text at nn 23, 24 below, as to the separate international identity of colonies.

8 This is particularly important in interpreting and applying the statutes of a third state: see eg Ting v Kennedy (1961), ILR, 32, p 237, holding Hong Kong a ‘country’ for purposes of a US nationality and immigration legislation.

9 See § 81, n 9, as to British ‘protectorates’ which were not protected states in the true international sense, but were in some ways nearer to colonies in status.

10 French dependent territories overseas were, by the Constitution of the Fifth Republic (1958), given the choice of remaining overseas territories or overseas departments of the Republic, or of becoming overseas departments if not already such, or of becoming, singly or in groups, members of the French Community (as to which see § 74, n 6). On 1 January 1990 Martinique, Guadeloupe, Réunion and French Guiana were overseas territories; Mayotte, and St Pierre and Miquelon had the status of ‘territorial collectivities’; and New Caledonia (with its dependencies), French Polynesia, French Southern and Antarctic Territories, and Wallis and Futuna Islands were overseas territories; French Polynesia was also a separate member of the French Community. The French overseas departments were held to be ‘an integral part of the [French] Republic’ in Case No 148/77 Hansen v HZA Flensburg [1977] ECR 1787. As to French dependent territories generally, see Bleckmann, Das Französische Kolonialrecht und die Gründung neuer Staaten (1969).

As to certain Portuguese colonial territories, see § 85, n 9.
Since colonies have no separate statehood or sovereignty, they cannot send or receive diplomatic emissaries, or conclude treaties, and a treaty concluded by the parent state possessing sovereignty over the colony will generally be binding also in respect of the colony (except in certain circumstances, such as where the treaty expressly or by necessary implication provides otherwise). Colonies are not separately responsible in international law for damage caused by their agents to foreign interests; this too is a matter for the parent state as is the claiming of extraterritorial activity in the activities of the international community, usually in those fields within which they have self-government. They will often in this way be acting formally in the capacity as agent for the parent state, as, for example, when concluding treaties. This is essentially a delegated power, the colony being entrusted with the exercise of the treaty making power vested in the parent state. The entrustment may be either general in relation to certain subjects, or ad hoc in relation to a particular treaty; it will often be expressly recited in the treaty. Again, some colonial territories have certain membership rights in some international organisations. In such cases the colonial territory possesses the limited international position in question not so much by virtue of any inherent international status of its own as by virtue of the express acceptance or confirmation of it by the states concerned (as expressed, for example, in the constituent instrument of the organisation).

In some cases, however, particularly as a dependent territory advances towards full independence, it may not be clear whether a territory is a colony or has already acquired some independent status. The development of the British Dominions between the First and Second World Wars affords several examples of special relationships reflecting the gradual increase in status of a country in its progress towards independence. Similarly, the associated states established by

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the United Kingdom in the Caribbean in 1967 had a status which was neither fully colonial nor fully independent. 19 Somewhat similar relationships, involving full internal self-government and a special association with the quasi-parent state, exist between New Zealand and the Cook Islands, 20 between the United States and Puerto Rico, 21 and between the Netherlands and the Netherlands Antilles and Aruba. 22

(1958), pp 516–17. For an example of a treaty concluded by the Federation, see the Extraterritorial Treaty of 1962 with South Africa, UNTS, 458, p 60. For an opinion by the UN Secretariat that the Federation was not to be considered a ‘State’ see UN Juridical YB (1963), p 170. The Federation came to an end in 1963. See also White, D. (1966) and Eakin, W. (1967). See also Whitman, Digest, 1, pp 515–21. And see M. V. Nonisco Inc v Commissioner of Internal Revenue, I.R., 23 (1956), p 29, holding the Philippines, by its independence from the USA, to be a foreign country for purposes of double taxation legislation, since the Philippines functioned as an independent country, including flying its own maritime flag.

Each associated state had full internal self-government, and its constitution could not be amended unilaterally by the UK. The UK retained responsibility for defence and external affairs (although in certain matters that responsibility was delegated to the states: see eg the Draft Despatch at Annex D of the Report of the St Kitts/Nevis/Anguilla Constitutional Conference 1966, Cmd 3031) and matters of nationality. The association could be terminated at any time unilaterally by either the associated state or the UK, whereupon the state became independent. See the West Indies Act 1967. Six territories became associated states, and later became independent: Antigua (1967, independent in 1981), Dominica (1967, 1978), Grenada (1967, 1974), St Lucia (1967, 1979), St Vincent (1969, 1979), and St Christopher, Nevis and Anguilla (1967, the territory later separated, and St Christopher and Nevis became an independent state in 1983, although Anguilla reverted to colonial status in 1984). See generally the colonial status of the territories in the International Court of Justice (under Art 95 of the International Court of Justice statute) and the International Law Journal, 21 (1973), p 293; and Broderick, ICOJ, 17 (1968), pp 368–403; Lang, ibid, 23 (1974), pp 127–42; Clark, Harv ILJ, 21 (1985), pp 1, 60–64. See also § 85, n 9, as to the status of associated states for purposes of international law (section 3 of the Joint Constitutional Act of the UN for the purpose of the UN Secretariat that the authority delegated to associated states was sufficient to enable them to become associate members of the Economic Commission for Latin America, see UN Juridical YB (1967), p 320. As to the modalities of applying to three of the associated states the provisions of an international community agreement, see ibid (1974), pp 157–9. As to certain aspects of the associated states’ membership of CARICOM see Meiters, Neth IL Rev, 24 (1977), pp 160, 164–71; and as to their treaty relations see Lisztyn, Harv L, 125 (1968), ii, pp 5, 59–61. In 1967 the UK notified the UN and all member states that after the associated status had entered into effect treaties previously applicable to an associated state would continue to apply, and that any new treaty ratified by the UK would only apply to an associated state if it was expressly ratified by the UK in its name. The Cook Islands are in ‘free association’ with New Zealand, are fully internally self-governing (although defence and external affairs are the responsibility of New Zealand), and are entitled to move to full independence at any time by a unilateral act. See the Cook Islands Constitution Act 1964, enacted by New Zealand; Broderick, ICOJ, 17 (1968), pp 368–390; UN Juridical YB (1967), pp 213 and (1979), § 172–4 (treating the Islands under the UN Charter). See also § 85, n 9, as to the status of associated states for purposes of international law (section 85 of the Joint Constitutional Act of the UN for the purpose of the UN Secretariat that the authority delegated to associated states was sufficient to enable them to become associate members of the Economic Commission for Latin America, see UN Juridical YB (1967), pp 320. As to the modalities of applying to three of the associated states the provisions of an international community agreement, see ibid (1974), pp 157–9. As to certain aspects of the associated states’ membership of CARICOM see Meiters, Neth IL Rev, 24 (1977), pp 160, 164–71; and as to their treaty relations see Lisztyn, Harv L, 125 (1968), ii, pp 5, 59–61. In 1967 the UK notified the UN and all member states that after the associated status had entered into effect treaties previously applicable to an associated state would continue to apply, and that any new treaty ratified by the UK would only apply to an associated state if it was expressly ratified by the UK in its name.

Colonies – particularly, but not only, those which have progressed constitutionally to the point at which they have acquired an uncertain degree of independent status – constitute, for certain purposes at least, units which geographically, ethnically, and culturally have an identity of their own, distinct from the parent state; and the parent state is under various international obligations in respect of its colonial territories, partaking of the nature of a ‘sacred trust’, 23 involving some restrictions upon the parent state’s freedom of action in relation to them. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States 24 provides that:

the territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and the status of the colony or other Non-Self-Governing Territory has effect in accordance with the Charter, and particularly its purposes and principles.

Apart from entry into associations of the kind already mentioned, colonies have usually ceased to be such by their accession to independence, whether as a...
result of peaceful evolution, or following belligerent action against their parent states. Their status as colonies may also, however, be terminated in other ways, including their transfer to another state, as will occur with Hong Kong and Macao when they are transferred to China in 1997 and 1999 respectively.

§ 85 Non-self-governing territories and the United Nations Charter Colonial territories have long been a feature of the international community. Nothing in the Charter of the United Nations, or in earlier treaties, regards the existence of colonies as anything other than in accordance with international law, and the Charter itself recognises the legitimacy of activities of administering states in accordance with the Charter. However, since 1945 the international community has shown growing concern with regard to the positions of territories of all kinds which have not attained independence, and the condition of their inhabitants.1 Independence implied the possibility of exploitation of the weak by the strong; and colonial dependence further involved the possibility of subservience to an alien nation, with overtones of conquest and a denial of the right of the indigenous population to manage their affairs for themselves. Self-determination, usually leading to independence, has accordingly become the standard proclaimed by the international community, particularly since the establishment of the United Nations.

For some territories the Charter provided a system of trusteeship, built on the mandates system established by the League of Nations. But an international society committed in its Charter to the encouragement and promotion of fundamental human rights and freedoms cannot disinterest itself in peoples which have not yet attained a condition of self-government and the well-being of which is not safeguarded by the system of trusteeship. From this point of view Chapter XI of the Charter, which bears the title 'Declaration Regarding Non-Self-Governing Territories', is of special significance. In that Declaration members of the United Nations administering territories 'whose peoples have not yet attained a full measure of self-government recognise the principle that the

interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost . . . the well-being of the inhabitants of these territories'. That obligation includes, in particular, the duty, in the language of the Charter:

(a) 'to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses,' and

(b) 'to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement'.2

Initially Chapter XI applied to 74 territories in respect of which Australia, Belgium, Denmark, France, the Netherlands, New Zealand, the United Kingdom and the United States of America in 1946 notified the Secretary-General that they were willing to submit information.3 The list of the territories on which reports under Chapter XI are expected to be submitted has since been frequently revised by the General Assembly both by the addition of territories (eg Oman in 1965)4 and by their removal (usually because they have attained independence and thus have become clearly self-governing, but sometimes in other circumstances, as with the removal from the list of Hong Kong and Macao in 1972).5 On 1 August 1979 the list consisted of 17 territories.6 In some cases it may be unclear whether a territory is to be regarded as non-self-governing, or whether, having once been non-self-governing, it is to be regarded as having ceased to be so.7 Despite Article 2(7) of the Charter, the

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2 Article 73. See also GA Res 9 (I) (1946). In GA Res 1541 (XV) (1960) the General Assembly acknowledged that 'the authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type'.

3 The list of territories will be found in GA Res 66 (I) (1946).

4 GA Res 2073 (XX). Thus also, in 1960, four Spanish and nine Portuguese territories were added, and in 1962 Southern Rhodesia was added. Additions to the list are proposed by the 'Committee of Twenty-Four' (see n 40) but must be approved by the General Assembly before the Committee can begin to examine the position in the territories in question: see UN Juridical YB (1968), p 207.

5 GA Res 2908 (XXVII), approving the report in that sense of the Special Committee of Twenty-Four (see UNYB (1972), p 543).

6 UN Doc A/AC.109/1039/Corr 1. The list consisted (in addition to Namibia and the Trust Territory of the Pacific Islands) of one territory each administered by Spain, Portugal and New Zealand, three by the USA, and ten by the UK; the Spanish and Portuguese territories, and one of the UK territories, were for various reasons regarded by the administering states as no longer appropriate subjects for the transmission of information to the UN.

7 For the view that the Israeli-occupied areas of the West Bank and Gaza Strip can be regarded as non-self-governing territories see Arasbarian, ICLQ, 31 (1982), pp 426–50.

8 Such situations have arisen, for example, in connection with the Netherlands Antilles and Surinam in the light of their participation in the Netherlands Realm (see § 84, n 22); GA Res 945 (X) (1955); UN Répertoire, 4, pp 78–80; Puerto Rico, on achieving 'Commonwealth' status (see § 84, n 21); Alaska and Hawaii, on becoming constituent states of the USA (see GA Res 1469 (XIV)); the associated states in the Eastern Caribbean (see § 84, n 19); the Cook Islands, on entering into a free association with New Zealand (see § 84, n 20; GA Res 206 (1965)); Southern Rhodesia (see next); Portuguese territories in Africa (Jhul); Greenland, on becoming an integral part of Denmark (see GA Res 849 (IX) (1954)).
General Assembly has not regarded itself bound by the administering state's assessment of the degree of self-government possessed by a territory but increasingly asserted its own competence to decide whether or not a territory has attained self-government. The decision as to what constitutes self-government is not always easy; in particular, there is no justification for interpreting that term in the light of the facts and the circumstances of each case to determine whether or not an obligation exists to transmit information under Article 73(e) of the Charter. Included in these principles were the principles that:

(a) an obligation under Article 73(e) to transmit information exists in respect of territories of the colonial type whose peoples have not yet attained a full measure of self-government;

* See eg the penultimate paragraph of the preamble of GA Res 742 (VIII) (1953), the final paragraph of the preamble of GA Res 748 (VIII) (1953), and para 4 of GA Res 297 (XXVII) (1972). Thus in 1960 the Assembly decided that certain territories under Portuguese administration were non-self-governing territories within the scope of Chapter XI (GA Res 1542 (XVII)), notwithstanding Portugal's assertion that they were overseas provinces forming an integral part of the Portuguese nation: Portugal thereafter refrained from supplying to the UN information on the territories in question. In 1962 the Assembly affirmed that Southern Rhodesia was a non-self-governing territory, notwithstanding the assertion by the UK that Southern Rhodesia was self-governing. GA Res 1747 (XVI). As to the position regarding that territory generally, see § 84, n. 4, and as to the position after its illegal declaration of independence in 1965, see § 55, nn 7, 8. In 1967 the UK stated that with the establishment of the Associated States in the Eastern Caribbean (see § 84, n. 19) the territories concerned had attained self-government and the UK would therefore cease to supply information about them under Art 73(e); the Cotonou Assembly did not accept this conclusion. See GA Res 2422 (XXII); Cmnd 4123, paras 297–8; and Cmnd 5568, pp 92–3. The Assembly also continued to consider the situation in Brunei despite the UK's assertion in 1972 that Brunei had attained full internal self-government.

Self-government may be achieved otherwise than by the attainment of independence, as is recognised in eg GA Res 742 (VIII) (1953), and in GA Res 1541 (XV) (1960) and 2625 (XXV) (1970).

Article 73 of the Charter makes no specific mention of independence as an alternative to self-government. A proposal to insert in Art 73 a reference to independence was made, but withdrawn, at San Francisco, on the understanding that such a reference would be included in respect of trust territories: see UNRCIO, 10, pp 453–4; Art 76 of the Charter. An example of a territory ceasing to be classed as a non-self-governing territory for purposes of Chapter XI otherwise than by becoming independent is afforded by the Cocos (Keeling) Islands, which chose integration with Australia: see GA Res 39/30 (1984), and RG, 88 (1984), pp 901–903.

This resolution was adopted on the basis of a report (UN Doc A/4526) of a committee set up by the General Assembly under GA Res 1467 (XIV) (1959). In GA Res 334 (IV) (1949) the Assembly had recorded its view that it was within its responsibility to express its opinion on the principles which have guided or may guide members in enumerating territories for which an obligation to transmit information under Art 73(e) exists. After preliminary attempts to indicate the relevant factors, GA Res 567 (VI) (1952) and GA Res 648 (VII) (1952), the Assembly in 1953 adopted GA Res 742 (VIII), in which the following were considered to be relevant, though not exhaustive, factors to be used as a guide: (a) the political advancement of the population sufficient to enable them to decide the future destiny of the territory by means of democratic processes; (b) the existence of a representative system of government with periodic elections on a democratic basis; (c) enjoyment of individual rights; (d) absence of any pressure or coercion on the population so that it may be in the position to express its views as to the national or international status which it may wish to attain; (d) assurance that the views of the population would be respected. It is doubtful, as decided by it in 1953, the General Assembly, acting by simple majority, is the proper body to answer questions of that complexity.

(b) the obligation continues until the peoples concerned attain a full measure of self-government, and ceases upon it being attained;12

(c) prima facie the obligation arises in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it, and in that event other elements may be brought into consideration, and if those additional elements affect the relationship between the metropolitan state and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination they support the presumption that an obligation to transmit information exists;

(d) a full measure of self-government can be said to have been reached by emergence as a sovereign independent state, free association with an independent state, or integration with an independent state; and

(e) while the transmission of information may be limited by constitutional or security considerations, this does not avoid the obligation to transmit information but only limits the quantum of information to be transmitted.

While the terms of Chapter XI rest on the concept of self-government, the spirit in which that Chapter has in practice been applied has drawn its inspiration from the wider principle of self-determination, to the development of which that practice has in turn greatly contributed. That principle is now established as one of the major forces in the contemporary development of international law and practice relating to non-self-governing territories. While Article 1(2) of the Charter, including the provisions of the United Nations, acknowledges 'the principle of equal rights and self-determination of peoples', this 'principle' has been gradually transformed, not without question,13 into a 'right'.14
In 1960 the General Assembly, in an attempt to accelerate the emancipation of non-self-governing territories, adopted, as GA Res 1514 (XV), a Declaration on the Granting of Independence to Colonial Territories.17 This Declaration, one of whose main objectives was 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations', inter alia declared that 'All peoples have the right to self-determination', and that 'Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom'.18 In 1966 self-determination clearly acquired the character of a legal right in Article I of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights,19 both adopted in that year.

Article 1 states: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. The principle is embodied in the 1970 Declaration on Principles of International Law concerning Internationally Recognized National Territorial Entities, which principles are declared to 'constitute basic principles of international law'.20 In elaboration of the principle of equal rights and self-determination of peoples, the Declaration states:

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and
(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned,

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to paragraph 1 of the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it, and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the
self-determination,' Justice has emphasised the need to pay regard to the freely expressed will of the territories or the right of the people of the territory to use force in pursuit of rules of international law. Thus questions are raised as to the parent state's right these instruments, is that self-determination must respect the freely expressed interests of the inhabitants are 'paramount'; and the International Court of

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whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.¹

An important element in the principle of self-determination, recognised in these instruments, is that self-determination must respect the freely expressed wishes of the people in question. Article 73 of the Charter lays down that the interests of the inhabitants are 'paramount'; and the International Court of Justice has emphasised the need to pay regard to the freely expressed will of the peoples concerned.² Normally their wishes will be established by the usual political processes of the territory, but in some circumstances it may be necessary to make special arrangements, for example by holding a referendum or arranging for a United Nations mission to verify the expression of the people's views.³ The legal implications of the principle, or right, of self-determination are not entirely clear, particularly since in some areas it appears to conflict with other rules of international law. Thus questions are raised as to the parent state's right to use force to resist the pursuit of self-determination by its dependent territories⁴ or the right of the people of the territory to use force in pursuit of self-determination,⁵ and as to the legitimacy of another state aiding a liberation movement which is striving for self-determination, notwithstanding that similar aid in other cases would be contrary to that state's obligation of non-intervention: the fifth paragraph in the Friendly Relations Declaration's elaboration of the principle requires support to peoples acting in pursuit of the exercise of their right of self-determination to be in accordance with the purposes and principles of the Charter, which in turn impose considerable restraints upon the scope of such support.⁶ A broad distinction may perhaps be drawn between humanitarian aid (which practice shows is generally regarded as permissible), aid, such as economic assistance, which is not overtly military in character (which in practice is often given) and military aid such as the provision of weapons or the supply of military personnel (which is of doubtful legality). The unlawfulness of aid to a liberation movement in part at least may turn on the status of the movement as a government in the territory in question, which is another matter on which the principle of self-determination has an uncertain bearing. The recognition of a liberation movement as a government may be thought to promote the self-determination of the peoples in question; but the grant of such

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the possibility that wars of national liberation against colonial or other similar alien powers are subject to special consideration, and the related question of the international status of liberation movements, see § 49, n 4ff.

²⁷ For discussion of the use of force to aid liberation movements see Dugard, ICLQ, 16 (1967), pp 157–90; Higgins in The Future of the International Legal Order, vol 3 (eds Black and Falk, 1971), pp 103–6; Islam, Indian JIL, 25 (1985), pp 424–47, especially p 440ff; and see also Friel in International Law of Civil War (ed Falk, 1971), p 213–18, as to the application of these considerations in the Algerian civil war. See also § 131, para (4) on intervention.

The General Assembly has on several occasions affirmed the legitimacy of the struggle of colonial peoples and peoples under alien domination to exercise their right of self-determination by all the necessary means at their disposal, and has urged moral and material assistance to national liberation movements in colonial territories; the Assembly has also condemned the practice of using mercenaries against national liberation movements as a criminal act, and has called on states to prevent the organisation of mercenaries in their territories and to prevent their nationals serving as mercenaries. See eg GA Res 2621 (XXV) (1970), 2908 (XXVII) (1972) and 3103 (XXVIII) (1973). See also the seventh paragraph of the elaboration of the first principle set out in Principles on Principles of International Law concerning Friendly Relations and Cooperation among States, GA Res 2625 (XXV) (1970). In GA Res 32/36 (1977) the Assembly called on the specialised agencies to assist liberation movements in southern Africa. But where an organisation's powers are limited to aiding 'countries' it may not be able to aid a liberation movement: see UN Judicial YB (1975), p 176. As to the treatment of those fighting for liberation movements as prisoners of war, and the application to them of the Geneva Conventions, see § 49, mn 24, 25 and eg GA Res 2621 (XXV) (1970) and 2918 (XXVII) (1972).

The question of aid to liberation movements arose particularly in connection with the liberation movements in the Portuguese territories in Africa. The Assembly, from 1966 onwards, appealed to all states to give the peoples of those territories the moral and material support necessary for the restoration of their inalienable rights, and, after 1968, it recognised the legitimacy of the struggle of the peoples of those territories to achieve those rights. At the same time, the Assembly requested all states, particularly Portugal's NATO allies, not to give Portugal assistance enabling it to maintain its colonisation of the territories. The General Assembly later affirmed that the national liberation movements in the Portuguese territories were the 'authentic representatives' of the true aspirations of the peoples of the territories and recommended that in matters appertaining to the affairs of the territories their representation by the liberation movements in an appropriate capacity should be ensured: GA Res 2918 (XXVII) (1972).

The Assembly has adopted similar resolutions in respect of other liberation movements, particularly in relation to South Africa.


²⁴ See, eg as to UN supervision of elections in the Cook Islands, GA Res 2005 (XIX) (1965), and UN Repertoire, vol 3, suppl 3 (1974), p 94; as to UN participation in the ascertainment of the wishes of the people of Sabah and Sarawak, ibid, p 98, and of West Irian and Bahrain see Morand, AFDI, 17 (1971), pp 513–40; and as to the referendum held in the Ellice Islands (now Tuvalu) in 1974 in the presence of UN observers, GA Res 3288 (XXIX) (1974). As to Namibia's independence, in 1990, see § 88, nn 44, 48. See also § 92, n 16.

In respect of Gibraltar, however, the General Assembly disregarded the outcome of a referendum in 1966 in which the people expressed their wish to retain their links with Britain, and, for negotiations between the UN and Spain to put an end to the colonial situation in Gibraltar on a basis which, by reference in the resolution to the 'national unity' of Spain, would have implied Gibraltar becoming part of Spain; the Assembly also imposed an arbitrary (and unrealistic) date by which the colonial situation in Gibraltar was to be terminated. The UK could not agree to conduct negotiations on such a basis. See GA Res 2533 (XXII) (1957) and 242 (XXII) in 1966, UNYB (1967), pp 668–76, and ibid (1968), pp 745–50 and Cmd 412, p 93, 181–2 (for the text of the UK representative's statement). See generally Eisenmann, Der Streit um Gibraltar (1974).

See § 127, n 10, and § 130, n 22. As to the right of the parent state to seek assistance from other states, and of the parent state's right to respond to such a request, see § 130, nn 20, 21.

²⁵ See Schwebel, Hag R, 116 (1972), ii, pp 483–6; Klein, ZDPV, 36 (1976), pp 618–22; Wilson, International Law and the Use of Force by National Liberation Movements (1988), especially pp 91–136; and see § 127, n 10, and § 131, para (4). The General Assembly has on several occasions affirmed the 'legitimacy' of, or otherwise supported, the armed struggle of certain liberation movements in pursuit of their right to self-determination: see eg GA Res 2918 (XXVII) (1972), 3034 (XXVII) (1972) and 31/46/16 (1976). As to the right of a national liberation movement to seek assistance from third states, and their right to respond to such a request, see § 27, and § 131, para (4).

These questions are closely related to the law applicable to civil wars: see § 49, n 2, and, as to
recognition before the movement can reasonably be regarded as effectively established as the government of the territory will, apart from being unrealistic, be premature and amount to intervention against the parent state.28

Also uncertain is the precise scope of the 'peoples' to whom the principle of self-determination applies,29 and in particular to what extent that principle may be invoked to justify the secession of part of a state. The principles of self-determination, and of respect for territorial integrity, are potentially in conflict. In the penultimate paragraph of the elaboration of the principle quoted above it seems clear that it is not intended to encourage the dismemberment of states.30

However, while the normal colonial situation (to which the principle applies) may appear readily distinguishable from that of a unified state, in practice, as the secession of Bangladesh from Pakistan in 1971 has shown,31 the point at which the principle of self-determination begins to apply is more difficult to determine. The problem is part of the larger question whether the right of self-determination is limited to the colonial and similar situations in which it had its origins, or whether (particularly as the colonial content of the principle becomes primarily a matter of history) it is a concept of continuing and universal application.32

28 See § 41.
29 The matter is discussed in many of the works cited at n 14; and see Dinstein, ICLQ, 25 (1976), p 102, 103–10; Crawford (ed), The Rights of Peoples (1988); and § 428 (as to minorities and indigenous peoples). As to the Algiers Declaration of the Rights of Peoples 1976, see Rigaux, and Falk, in UN Law: Fundamental Rights (ed Cassese, 1979), pp 211–24 and 225–36. This Declaration was the product of work by a number of eminent individuals. It was followed by the adaption in 1981 of the African Charter of Human and Peoples' Rights (§ 444) as to the concept of 'peoples' in that Charter, see Kiwanuka, AJ, 82 (1980), pp 80–101. See also § 22, n 7, as to the position generally of native peoples. As to the application of the principle of self-determination in respect of the transfer of eastern areas of Poland to the Soviet Union in 1939, see Ginsburgs, AJ, 52 (1958), pp 78–80; in respect of the Palestinian people, see Mallison and Mallison, The Palestine Problem (1986), p 188–204; and in respect of Mayotte, see Orain, Rev Belge, 17 (1983), pp 655–98. In its Advisory Opinion on the Western Sahara the ICJ declined to regard the 'Mauretanian entity' as a personality or corporate entity distinct from the several emirates and tribes composing it, or as enjoying some form of sovereignty in the Western Sahara: ICJ Rep (1975), p 63. See also AD v Canada (1984), ILR, 79, p 261. And see § 375, n 6.
31 See Chowdhury, The Genesis of Bangladesh (1972); International Commission of Jurists, The Events in East Pakistan 1971 (1972); Nanda, AJ, 66 (1972), pp 321–6; Review of the International Commission of Jurists (June 1972), pp 42–52; Saxena, Self-Determination from Biafra to Bangladesh (1978); Buchheim, Secession: The Legitimacy of Self-Determination (1978); and § 41, n 6. The travaux préparatoires of the Charter and the subsequent practice of states suggest that the principle of self-determination is primarily applicable to colonial situations rather than to cases involving secession from a state (in which context, however, it may be noted that international law does not make civil war illegal). In 1920 the Committee of Jurists' Report on the Aaland Islands disputes observed that positive international law did not recognize the right of self-determination of peoples to separate themselves from the state to which they belonged (OHJ (1920), Special Suppl 3, pp 3–19.
32 The addition to the colonial situations, circumstances in which self-determination may be relevant include those where (a) part of a state, having a distinct local identity, seeks to determine for itself its own political and constitutional structure, or by asserting a degree of autonomy or independence (in 1990 the response of many states to the assertion of independence by Lithuania (see § 40, n 3) was couched in terms of the right of the Lithuanian people to self-determination); (b) the people within a state seek to overthrow the government which has obtained or retained, power otherwise that by democratic means (eg the situation in many East European states in 1989 and 1990, leading to the overthrow of communist regimes); and (c) a state is effectively invaded by another state, in which case those resisting may claim to be acting in exercise of their right to self-determination (see, eg, as to the resistance movement in Afghanistan after the Soviet Union's invasion in 1979–80 (§ 130, n 14), Reisman, AJ, 81 (1987), p 906–9, and Rafiqul Islam, Neh II Rev, 39 (1990), pp 1–21). The issue assumes particular importance in relation to the question whether in these non-colonial situations the same consequences follow (eg as regards the possible rights of armed movements to fight in support of self-determination, and of other states to assist) as are said to follow in relation to colonial situations by virtue of the priority which the right of self-determination is argued to give over the normal rules which apply in relation to civil war and intervention. See on self-determination in the post-Colonial period, Rao, Indian JIL, 28 (1988), pp 58–71.
33 Article 73(e).
34 The Assembly's Fourth Committee normally deals with these matters.
36 GA Res 142 (II). The form was revised in 1951 (GA Res 551 (VI)). On a voluntary basis some, but not all, administering states have provided information on constitutional and political developments, although this went wider than the provisions of the Charter. The General Assembly has repeatedly encouraged the submission of this kind of information. Thus, in 1952 the General Assembly recommended that the administering states should voluntarily include in their reports information as to details relating to the extent of self-determination in the territories in question, in particular regarding their political progress and the measures taken to develop their capacity for self-determination and to satisfy their political aspirations and to promote the progressive development of their free political institutions (GA Res 637 B (VII)): see also GA Res 144 (II) (1947), 327 (IV) (1949), and 469 (IX) (1954). In 1959 the Assembly repeated its request to administering authorities to supply this voluntary information, and also requested them to include information on the establishment of intermediate timetables leading to the attainment of self-government: GA Res 1468 (XIV). The UK offered as a gesture of goodwill, and not as a
After the adoption in 1960 of the Declaration on the Granting of Independence to Colonial Territories a Special Committee on the Implementation of the Declaration was established. This Committee, after being enlarged in 1962 to twenty-four members, became known as the Committee of Twenty-Four. Since 1963 it has been the Committee which considers the information submitted under Article 73(e). Apart from considering and reporting on that information, its task is to examine the application of the Declaration, to make suggestions and recommendations on the progress and extent of the implementation of the Declaration and to report to the Assembly, and to inform the Security Council of developments in any territory examined by it which might threaten international peace and security. The Committee has power to establish its own procedures (including the establishment of sub-committees), and to send visiting groups to territories within its scope.

In 1970 the General Assembly adopted a programme of action for the full implementation of the Declaration. The Assembly declared the further con-
mation of colonialism in all its forms and manifestations to be a crime which constitutes a violation of the Charter, the Declaration, and the principles of international law, and reaffirmed the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial powers which suppress their aspiration for freedom and independence; the Assembly adopted a programme of action by which member states were to assist in a variety of ways to achieve the independence of colonial and other non-self-governing territories. The resolution reiterated the Special Committee of Twenty-Four’s role in matters of decolonisation; stated that questions of territorial size, geographical isolation and limited resources should in no way delay the implementation of the Declaration, and that where that Declaration has not been fully implemented with regard to a given territory the General Assembly shall continue to bear responsibility for that territory until such time as the people concerned has had an opportunity to exercise freely its right of self-determination and independence in accordance with the Declaration; and called upon international organisations within the United Nations system to take steps to realise the full implementation of the Declaration. In 1980 the General Assembly adopted a further ‘plan of action’ to intensify efforts to bring colonialism to an end, and in particular to assist southern Africa in its struggle for self-determination.

In 1970 the General Assembly adopted a programme of action for the full implementation of the Declaration. The Assembly declared the further con-

...
The political content of many of the anti-colonial resolutions, their lack of realism in certain respects, and the degree to which they require the extension of the Assembly's powers under the Charter and are themselves of doubtful consistency with the terms of the Charter, cast doubt on the extent to which they may be considered to constitute rules of international law.57

MANDATED AREAS


§ 86 The general features of the mandate system The mandate system was adopted at the end of the First World War for dealing with the colonies and some other territories of Germany and Turkey which it was decided to detach from...
them. It was embodied in Article 22 of the Covenant of The League of Nations, which was an integral part of the treaties of peace with Germany, Austria, Bulgaria, and Hungary. Under this system these detached territories were not in the ownership of any state, but were entrusted to certain states called 'mandatory states,' to administer on behalf of the League upon the conditions laid down in written agreements, called mandates, between the League and each mandatory. In conformity with the Charter of the United Nations the system of mandates has been replaced by the international trusteeship system, described below.

The territories to be placed under the mandates system were at varying stages of political development. Accordingly, Article 22 of the Covenant provided for three categories of mandate, known as — in descending order of political individuality — Type 'A', 'B' and 'C'.

A territory, by being placed under a mandate was not thereby annexed by the mandatory. The mandatory was precluded by the terms of the mandate from doing a number of things which an owner of territory can lawfully do. That Germany and Turkey divested themselves of all rights of ownership in the mandated areas was clear. That the mandates did not acquire all of those rights equally was true. This was so even in the class of mandates most closely associated with the territory of the mandatory. Thus in the case concerning the Status of South West Africa ICJ held that the concession of the mandate over that territory upon South Africa did not involve any cession or transfer of territory to the Union of South Africa. Type 'A' mandates possessed a sufficient degree of separate status to enjoy a limited-making capacity.

1 For a fuller account of the mandate system see 8th ed of this vol, pp 212–22.
2 As regards Turkey see Art 16 of the Treaty of Lausanne 1923.
3 For confirmation by the ICJ that the 'Mandate for South West Africa', in fact and in law, is an international agreement having the character of a treaty or convention; see South West Africa Cases (Preliminary Objections), ICJ Rep (1962), pp 319, 330–32. But see the joint dissenting opinion of Judges Fitzmaurice and Spender regarding a mandate as 'a quasi-legislative act of the League Council' (ibid, at p 490). As regards those clauses in the mandates defining the mandatory's powers and obligations in respect of the inhabitants of the territory and towards the League and its organs (the 'conduct provisions'), the ICJ held that no legal right or interest was vested in other members of the League of Nations individually (South West Africa Cases (Second Phase), ICJ Rep (1966), pp 6, 29, 51): as regards those clauses conferring rights directly on members of the League as individual states, or in favour of their nationals (the 'special interests' provisions), the matter was left open (ibid, p 22). The terms of a mandate have been held not to be directly enforceable in the courts of the mandated territory: State v Tuhadeleni (1968), ILR, 52, p 29; Administrator of the Territory of Papua and New Guinea v Blasius Tirupia (1971), ILR, 55, p 55.
4 §§ 89–95.
5 The mandates were distributed, and accepted by the mandates, as follows:
   Type A: Iraq — Great Britain; Palestine (and Transjordan) — Great Britain; Syria and Lebanon — France.
   Type B: British Cameroons — Great Britain; French Cameroons — France; British Togoland — Great Britain; French Togoland — France; Tanganyika — Great Britain; Ruanda Urundi — Belgium.
   Type C: South West Africa — Union of South Africa; Samoa — New Zealand; Nauru — British Empire (Great Britain, Australia, and New Zealand jointly); other Pacific Islands south of the Equator — Australia; Pacific Islands north of the Equator — Japan.

The distribution of the mandates ('A', 'B' and 'C') was effected by decisions of the Principal Allied Powers which were communicated to the Council of the League and are recorded in the preamble of the mandates. In its Opinion in the Namibia (South West Africa) Legal Consequences Case the ICJ was unable to find any construction which would attach to 'C' mandates an object and purpose different from those of 'A' or 'B' mandates: ICJ Rep (1971), p 32. In that Opinion the Court (at p 28f.) considered in some detail the nature of 'C' mandates.

Note upon sovereignty in relation to the mandates — Widely differing views were held upon the question, Where does sovereignty in respect of the mandated areas lie? The following are among the numerous answers that were given: (a) In the mandate: see Rolin, RI, 3rd ser, 1 (1920), pp 329–63, Lindley, pp 263, 267, and R v Jacobus Christiaan (AD 1923–24), No 12), where the Appellate Division of the Supreme Court of South Africa held that the government of the mandatory — that is, the Government of the Union of South Africa — had sufficient internal majestas to support a conviction of one of the inhabitants of the 'C' mandated area of South West Africa for high treason under Roman-Dutch common law. That sufficed to uphold the conviction, but the judgments are also cited in support of the theory of full sovereignty in the mandated area. With reference to the claim of General Herzog, Prime Minister of the Union of South Africa, for full sovereignty in respect of the mandated area of South West Africa subject to the terms of the mandate see The Times (London) newspaper of 9 June and 13 August 1927, the Minutes and Report of the Tenth Session (1926) of the Permanent Mandates Commission, pp 82–6, 182, of the Eleventh Session (1927), Minutes of and Council meetings of March and September 1927, Off J, 8 (1927), pp 347 and 1116–20; and Round Table (December 1927), pp 217–22. See also § 88, for subsequent developments in relation to South West Africa.

The mandate's virtually full legislative and administrative powers over the mandated territories were confirmed in several cases (eg Bodnai v Administration de l'Enroregistrement, AD, 11 (1922), 1; On the Long Run v The Commonwealth, ILR, 19 (1952), p 327); but subject to the terms of the mandate (see Jerusalem-Jaffa District Gombor v Suleman Murra (1926) AC, 321; Ahmed Shukri El Kharbutli v Minister of Defence, AD 16 (1949), No 19; but cf Rozenblait v Register of Lands (Haifa), AD, 14 (1947), No 11; and State v Tubadeleni (1968), ILR, 52, p 29, holding that South African legislation extending to South West Africa could not be invalidated for being contrary to the terms of the mandate (see ICLQ, 18 (1969), p 789, and Dugard, AJ, 64 (1970), pp 19–41) and Binga v Administrator-General for South West Africa (1988), ILR, 82, p 465. In Stampf v Attorney-General, ILR, 23 (1956), p 284, Palestine was held to be a British possession for purposes of a particular law. See also § 87, n 8, as to the effects of a New South Law having the effect of treating the mandated territory of Western Samoa as if it were part of New Zealand.

(b) In the mandatory, 'acting with the consent of the Council of the League'; see Wright, AJ, 17 (1923), pp 691–703; ibid, 18 (1924), pp 306–15; ibid, 20 (1926), pp 768–72;

(c) In the principal allied powers;

(d) In the League (see H Lauterpacht, Analogies, § 86, while admitting that the exercise of sovereignty rests with the mandatory); see Attorney General v Goralschvlt, mentioned in AJ, 20 (1926), p 771 (AD, 3 (1925–26), No 33); Redlob, Théorie de la Société des Nations (1927), pp 196, 197; Corbett, BY (1924), p 134; Bentwich, The Mandates System (1930), p 19; Seville, J, pp 170, 171;

(e) In the inhabitants of the mandated area, but temporarily in suspense: see Stoyanovsky, La Théorie générale des mandats internationaux (1925); Pelchct, La Personnalité internationale des collectivités sous mandat (1932) at p 183; Pic, RG, 30 (1923), pp 321–71. In the resolution adopted by the Institute of International Law in 1931 the communities under mandate are described as subjects of international law; see AJ, 26 (1932), p 93;

(f) In abeyance; see Judge McNair's dissenting opinion in the Status of South West Africa Case, ICJ Rep (1950), at p 150.

French courts have denied the responsibility of the Government of France for acts of the authorities in territories under French mandate: Re Bernard, ILR, 22 (1955), p 88 (for the similar attitude taken regarding states under French protection, see § 82, n 11).
The dominant element was that of trusteeship for the inhabitants of the mandated area: 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world.' In the words of the International Court of Justice in the case concerning the Status of South West Africa: 'the Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilization'... The international rules regulating the Mandate constituted an international status for the Territory. For that reason, amongst others, the principal obligations of the mandatory, including those relating to international supervision, were held not to have been abrogated by the dissolution of the League of Nations.11

The acceptance of a mandate involved the assumption of legal, and not merely moral, obligations, and, as a corollary of the trust, securities for its performance in the form of legal accountability for its discharge and fulfilment. The mandate system was under the supervision of the Council of the League, advised and assisted by the Permanent Mandates Commission. The inhabitants of a mandated area had a right to petition the League, through procedures which were laid down. All the mandates contained a clause providing that any dispute between a mandatory and a member of the League which could not be settled by negotiation could be referred by either party to the Permanent Court of International Justice.12

§ 87 National status of the inhabitants Article 22 of the Covenant did not directly touch on the question of the national status of the inhabitants. However, the renunciation by Germany and Turkey of their rights in respect of the territories placed under mandate, suggested a dereliction rather than a cession:2 and it seems that the effect of these clauses was to divest the inhabitants of these territories (apart from the special case of the German subjects of European origin)3 of their former German or Turkish nationality and not to invest them automatically with any new nationality. In April 1923 the Council of the League adopted certain resolutions4 with regard to the national status of the inhabitants of 'B' and 'C' mandated areas, the substance of which was that they had a distinct status from that of the mandatory's nationals and, while not disabled from obtaining individual naturalisation from the mandatory, did not automatically become invested with its nationality. In the case of the 'C' mandated area of South West Africa, the mandatory, with the consent of the Council of the League and with the assent of the German Government, passed legislation offering collective naturalisation to all persons of German origin, subject to the right of any of them to decline the British nationality offered to them.5

In the case of all the 'A' mandates the inhabitants of the mandated areas acquired a new nationality: in Iraq (which was then a mandated territory), as the result of the Iraq Law of 9 October 1924; in Palestine, where by a British Order in Council of 24 July 1925, Palestine 'citizenship'6 was created; and in Syria and Lebanon, in which case the existence of a distinct nationality was recognised by

2 See R v Jacobus Christian in the Appellate Division of the Supreme Court of South Africa in 1923, summarised by Mackenzie in BY (1925), pp 211–19, and in AD, 2 (1923–24), No 12; Matthews, JCL, 3rd series, 6 (1924), pp 245–54; and Emmett, ibid, 9 (1927), p 117. As to the bearing of this decision on the question of sovereignty, see § 86, n 6. As to the effects of cession on nationality, see § 249.

3 Article 122 of the Treaty of Peace with Germany appeared to assume the continuance of the German nationality of German subjects of European origin in mandated areas – a view which finds support in the Minutes of the Permanent Mandates Commission, Second Session (cited by Wright in AJ, 18 (1924), at p 313) and was assumed to be correct in the negotiations between the Governments of the Union of South Africa and Germany preceding the automatic and collective naturalisation Act of 1924 (see Emmett, JCL, 3rd series, 9 (1927), pp 111–22, and By (1925), pp 188–91). See also Minister of the Interior v Bechler, AD, 15 (1940), No 67, and Ex parte Schusterer, ibid, No 86.

4 Off J (1923), p 604.

5 Act 28 of 1922, as amended by Emmett, JCL, 3rd series, 9 (1927), and By (1925), pp 188–91, and Van Pitius, Nationality within the British Commonwealth of Nations (1930), pp 177–201; Steinberg, Archiv der Völkerrecht, 31 (1954), pp 456–69. By the Naturalisation and Status of Aliens Amendment Act 1942 any person who was a British subject exclusively by virtue of the provisions of the Act of 1922 became an automatic British subject. The South African Citizenship Act 1949 (as amended in 1961) provided that people belonging to South West Africa became, in most cases, South African citizens as 1(1)(a), 2, 3, 5 and 6. See generally Parry, Nationality and Citizenship (1957), ch 12.

6 Which is equivalent to nationality: see Bentwich, BY (1926), at p 102. See also Feinberg, ZS, 1 (1929), pp 200–11. See also R v Ketter, holding that the appellant, a resident of Palestine, who had been issued with a passport entitled 'British Passport, Palestine,' was not a British subject: [1940] 1 KB 787; and Attorney-General v Goralshwili, AD, 3 (1925–26), No 33. In Klauser v Lego (1936), the Court of Appeals of a US court not to be a citizen of a foreign state, the position of a state was not a state while under British mandate: Whiteman, Digest, 2, p 655. But see Ketter v Delle, ILR, 20 (1953), p 251, for a decision in a contrary sense. See also Palestinian Nationality Case, ILR, 18 (1951), No 25. Israeli courts have held Palestinian citizenship to have ceased to exist upon the establishment of the State of Israel: Hasuan v Governor of Acre Prison, ILR, 25 (1950), p 112; Naquara v Minister of the Interior, ILR, 20 (1953), p 29.

7 But as to Transjordan, see Bentwich, op cit in n 6, at p 106.
Article 3 of the mandate, and was established by decrees of the French High Commissioner. On the other hand, the 'B' and 'C' mandated areas did not mint a nationality of their own.  

§ 88 South West Africa (Namibia) It was envisaged that, with the dissolution of the League of Nations and the creation of the United Nations, those mandated territories which had not become independent should be placed under the trusteeship system of the United Nations.1 South Africa alone of the mandatory powers refused to place her 'C' mandated territory of South West Africa2 under the trusteeship system, and invoked the special position of her mandated territory as a reason for making it part of her territory, subject to the proposed nationality of their persons.  

On the other hand, the 'B' and 'C' mandated areas did not mint a trusteeship system of the United Nations.3 South Africa alone of the mandatory Powers; see also O'Connell, BY, 31 (1954), pp 588–61. Note, however, the effect of certain New Zealand legislation which, despite an earlier decision in a contrary sense in Leawo v Immigration Department [1979] 2 NZLR 74, was held by the Privy Council to result in a person born in Western Samoa being regarded for purposes of nationality as having been born within the Crown's dominions in the same way as a person born in New Zealand, and so acquiring British (and later New Zealand) nationality: Falema'i Leta v Attorney-General of New Zealand [1983] 2 AC 20. The far-reaching consequences of the decision were, following the conclusion of an arrangement. The Court added that 'the degree of supervision to be exercised by the mandatory States would follow, the conclusion of an agreement between Western Samoa and New Zealand, largely limited by the passage in New Zealand of the Citizenship (Western Samoa) Act 1982. See Crawford, BY, 53 (1982), pp 268–73.  

1 See § 90, n 3.  


3 In 1946 the First General Assembly declined to accede to the request of South Africa that the mandated territory of South West Africa should be incorporated in South Africa. The request followed upon a vote of the inhabitants of the territory expressing their desire for incorporation. The decision of the General Assembly was based on the view that the inhabitants of South West Africa had not yet reached a stage of political development 'enabling them to express an considered opinion which the Assembly could recognise on such an important question as incorporation of their territory'. The Assembly recommended that the territory be placed under the system of trusteeship and invited South Africa to submit a trusteeship agreement for the territory: GA Res 65 (I) (1946), and see UNYB [1946–47], p 205–8. While refusing to accept this recommendation, South Africa expressed its intention to continue to administer the territory as an integral part of South Africa in accordance with the principles laid down in the mandate and to submit regularly to the Secretary-General of the United Nations, in accordance with Art 73(e) of the Charter, 'for information purposes, subject to such limitations as security and constitutional considerations may require' statistical and other information of a technical nature relating to the economic, social and educational conditions of South-West Africa'. But in 1949 South Africa informed the UN that it would submit no more reports: see GA Res 337 (IV) (1949). The Second General Assembly maintained its previous recommendation that South West Africa be placed under the trusteeship system: GA Res 141 (III); and see UNYB (1947–48), pp 142–7. For a presentation of the South African view, see Gey van Pittius, International Affairs, 23 (1947), pp 202–9. See also Wright, ibid, pp 209–12; Duncan Hall, BY, 24 (1947), pp 385–9. In 1948 and in subsequent years the General Assembly reiterated its previous recommendations that South West Africa be placed under the trusteeship system and recommended that South Africa should continue to supply annual information on its administration of the country. It also reaffirmed, on repeated occasions, its view that the placing of the territory under the trusteeship system by means of a trusteeship agreement was the proper way of modifying its status (see Res 227 (III) (1948), 337 (IV) (1949), 570 A and B (VI) of 1951).  


While the Court was of the opinion that 'it was expected that the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements', it was unable 'to deduce from these general considerations any legal obligation' (ibid, p 140). It declined to pronounce on the moral or political duties involved in these considerations.  

Although two judges dissented from this part of the Opinion, the Court was unanimous in holding that the judicial supervision continued and that, having regard to Art 7 of the Mandate and Art 37 of the Statute of the Court, the reference to the PCIJ was to be replaced by a reference to the ICJ. See § 86, n 13. The Court reaffirmed this view in the South West Africa Cases (Preliminary Objections), ICJ Rep (1962), pp 319, 334, in which it also reaffirmed the continuation of the mandate's obligations in general (pp 332–5, 338–42). But see also n 16, as to the Second Phase of the case.  

5 ICJ Rep (1950), p 137. See also the Namibia (South West Africa) Legal Consequences Case, ICJ Rep (1971), pp 32–43, for confirmation of the continuation of the Mandate.
the General Assembly should not exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League.9 South Africa continued to maintain that the mandate had lapsed and refused to accept that the United Nations had any supervisory functions over the territory's administration, and refused to cooperate with the United Nations in carrying out the Court's Opinion. South Africa acknowledged, however, that South West Africa had a separate international status, and did not claim sovereignty over the territory.10

The General Assembly adopted the Court's Opinion as the basis for supervision of the administration of South West Africa,11 and by GA Res 749 A (VIII) (1953) established a Committee on South West Africa to exercise certain of the supervisory functions which the Court considered the United Nations to possess; the Committee's functions were so far as possible to be analogous to those of the Permanent Mandates Commission of the League.12

The General Assembly's supervisory functions twice occasioned a further reference to the Court in order to ascertain whether the United Nations' supervisory function was being exercised in accordance with the Court's 1955 Opinion. In these cases the Court's Opinion was that although unanimity had been required in the Council of the League in these matters, it was in order for decisions on South West Africa to be taken by the General Assembly by a two-thirds majority, as an 'important' question;13 and that although the Permanent Mandates Commission had never in fact granted oral hearings to petitioners from mandated territories, the South West Africa Committee could do so.14

In 1961 the General Assembly proclaimed15 (and often subsequently reaffirmed) the inalienable right of the people of South West Africa to independence and national sovereignty. South Africa's persistent refusal to acknowledge the United Nations' rights in connection with South West Africa led in 1960 to Liberia and Ethiopia, both former members of the League of Nations, instituting contentious proceedings before the International Court of Justice against South Africa, complaining of South Africa's failure to observe certain obligations of the mandate. However, in 1966 the Court held (by the President's casting vote) that Ethiopia and Liberia had not established any legal right or interest appertaining to them in the subject matter of their claims, and accordingly rejected them.16

This decision of the Court caused grave concern on the part of those states which most strongly objected to South Africa's continued control of South West Africa. In October 1966 the General Assembly17 reaffirmed 'that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence'; declared 'that South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory ... has, in fact, disavowed the Mandate'; decided 'that the Mandate is therefore terminated, that South Africa has no other right to administer the Territory ... and that henceforth South West Africa comes under the direct responsibility of the United Nations'; and resolved that the United Nations must discharge those responsibilities.18 In 1967 the Assembly established a United Nations Council for South West Africa (later to become the Council for Namibia) to administer the territory until it achieved independence,19 which was to be attained by June 1968, and provided for the appointment of a United Nations Commissioner for South West Africa. Some states (including the United Kingdom) did not accept that the General Assembly had the power to establish a Council or Commissioner with the powers envisaged in this case.

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South Africa refused to cooperate with the Council, which accordingly could not discharge its responsibilities effectively; and the situation was further aggravated by the enactment by South Africa in 1967 of the Terrorism Act which, notwithstanding GA Res 2145 (XXI), applied in respect of South West Africa (with retroactive effect to 1962) and which was invoked in that sense in a trial of 37 South West Africans which began in September 1967. These events occasioned condemnation of South Africa by the United Nations. In 1968 the General Assembly changed the name of the territory to 'Namibia.' After the enactment by South Africa of the Development of Native Nations in South West Africa Act 1968, which in effect established apartheid in Namibia, the Security Council considered the matter further in 1969 and adopted two further resolutions, calling on South Africa to withdraw from the territory.

South Africa's failure to comply with these resolutions led the Security Council to adopt SC Res 276 (1970) declaring the continued presence of the South African authorities in Namibia to be illegal, and establishing an ad hoc sub-committee of the Security Council to study ways and means by which the relevant resolutions of the Council could be effectively implemented in accordance with the proper provisions of the Charter, in the light of the flagrant refusal of South Africa to withdraw from Namibia. The sub-committee produced a report containing a number of proposals, including proposals that states should refrain from any relations with South Africa, diplomatic, consular or otherwise, implying recognition of South African authority over Namibia; and that states should discourage investment and trade with Namibia. The Security Council thereupon passed SC Res 283 and 284 (1970) calling on all states to implement the measures advocated in the ad hoc sub-committee's report, and asking the International Court of Justice for an Advisory Opinion on the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970).

The Court's Opinion in answer to that question was:

'(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory; (2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration; (3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.'

The Court regarded the General Assembly's finding in GA Res 2145 (XXI) (namely that South Africa had acted in breach of the mandate and had 'in fact, disavowed the mandate' and that therefore the mandate was terminated) as an exercise of the right to terminate a relationship because of deliberate and persistent violation of obligations which destroyed the very object and purpose of that relationship; the Council of the League of Nations could similarly have terminated the mandate, and therefore the General Assembly was not acting in excess of powers derived from the League; the General Assembly's assertion that, the mandate having terminated, South Africa had no other right to administer the territory did not constitute a transfer of territory but was merely a formulation of a legal situation in reliance on prior decisions of the Court; and the finding by the Security Council in SC Res 276 that South Africa's continued presence in South West Africa was illegal was within the powers of the Security Council and member states must comply with it. This involved for the member states various obligations to recognise the illegality and invalidity of South Africa's continued presence in Namibia, and to refrain from lending support or any form of assistance to South Africa with reference to its occupation of Namibia.

The General Assembly welcomed the Opinion of the Court, condemned South Africa for refusing to end its illegal occupation and administration of Namibia, called upon all states to refrain from all direct or indirect relations with South Africa concerning Namibia and not to recognise as legally valid any rights or interests in Namibian property or resources acquired from the South African Government after the termination of the mandate. The Security Council adopted a similar resolution, declaring South Africa's continued illegal presence in Namibia to be an internationally wrongful act and a breach of international obligations, and that South Africa remained accountable to the international community for any violations of its international obligations or the rights of the people of Namibia, calling upon all states to abstain from various specific dealings with South Africa in relation to Namibia, and declaring that franchises, United Nations areas
rights, titles or contracts relating to Namibia granted to individuals or companies by South Africa after the termination of the mandate were not subject to protection by their states against claims of a future lawful government of Namibia. South Africa, however, remained in occupation of Namibia and continued to be de facto the administering authority.

The United Nations took further steps to assert and establish Namibia's separate existence. From 1972 the South West African People's Organisation (SWAPO) was allowed to participate as an observer in General Assembly discussions relating to Namibia, and in 1973 SWAPO was recognised by the General Assembly as the 'authentic representative of the Namibian people'. The General Assembly, furthermore, requested international organisations within the United Nations' system to take steps to enable the Council for Namibia to participate fully on behalf of Namibia in the work of those organisations, and requested that invitations to international conferences be extended to the Council to participate in an appropriate capacity whenever rights and interests of Namibia were involved. In accordance with these requests, the Council has represented Namibia at several international conferences and in certain international organisations. In September 1974 the Council for Namibia attempted to reinforce the earlier efforts by the General Assembly and Security Council to protect the natural resources of Namibia by adopting Decree No 1 for the Protection of the Natural Resources of Namibia. This Decree, adopted by the Council in exercise of its authority to administer Namibia pending its independence, prohibited exploration for or exploitation of the natural resources of Namibia without the permission of the Council; any permission for such exploration or exploitation granted by any other person or authority, including the Government of South Africa, was declared 'null, void and of no force or effect'; Namibian natural resources were not to be exported, as might any vehicle, ship or container carrying them; and anybody acting in contravention of the Decree 'may be held liable for damages by the future government of an independent Namibia'. Both the practical effect and the legal validity and consequences of this Decree have been uncertain. 35

35 GA Res 3031 (XXVIII); UNYB (1972), p 612.
36 GA Res 3111 (XXVIII).
38 Thus in 1977 the Council was admitted, as representing Namibia, to membership of the FAO, and in 1978 to membership of UNESCO and the ILO; it was also admitted to observer status in WMO, and to associate membership of WHO. The Council also participated in the Vigna Conference on Succession of States in Respect of Treaties, and in the Law of the Sea Conference.
40 See n 20.
43 The Netherlands. The UK regarded the decree as null and void; see Parliamentary Debates (Lords), vol 82, col 1044 (23 February 1988); so did France (AFDI, 26 (1980), p 947).
45 One of the problems concerned the status, and future, of the port and settlement of Walvis Bay. Walvis Bay was formerly part of the British colony of the Cape of Good Hope, and thus became part of the sovereign territory of the Union of South Africa in 1910. By the South West Africa Affairs Act 1922 Walvis Bay was administered as if it were part of South West Africa. In 1977 the South African Government took steps to reassert its sovereignty over Walvis Bay and retain its administration to South Africa. This action was seen by many states as 'annexation' and was so referred to in General Assembly resolutions; it was also regarded as inconsistent with maintaining the 'territorial integrity' of Namibia. In GA Res 32/9D (1977), paras 6–8, the Assembly declared the 'annexation... illegal, null and void'; see also GA Res S-9/2 (1978); para 11. SC Res 432 (1978) did not repeat these declarations of illegality, but took note that Walvis Bay was an integral part of South West Africa and supported the initiation of steps to secure the 'reintegration of Walvis Bay into Namibia'. See the statement on behalf of the 'Contact Group', and the statement by South Africa, at ILM, 17 (1978), pp 1307–11; and see generally on Walvis Bay, Marshall, ICLQ, 27 (1978), pp 883–8; RG, 82 (1978), p 892–4; Goerke, K (1988), pp 92–106.
TERRITORIES UNDER THE SYSTEM OF TRUSTEESHIP


§ 89 In general At the end of the Second World War it was felt generally that the basic principles of the mandates system had stood the test of experience, that they were in conformity with the great humanitarian objects which official declarations and public opinion included among the major purposes of the War, and that they ought to be made an integral part of the new international organisation of the United Nations. Accordingly, there was substituted for the mandates system a new machinery with a different name – that of trusteeship – but with essentially similar purposes.1

§ 90 Territories under the trusteeship system Article 75 of the Charter lays down that the United Nations shall establish under its authority an international trusteeship system for the administration and supervision of trust territories. Article 77 provides that 'the trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements':

(a) territories previously held under a mandate in conformity with Article 22 of the Covenant;‡

1 The system of trusteeship was agreed upon in principle in February 1945 at the Conference at Yalta between the Heads of the British, Russian and US Governments. For the general history of the adoption of the proposal see the Official American Commentary on the Charter, *Hearings before the Senate Foreign Relations Committee*, pp 112-18, and *Haas, International Organisation*, 7 (1953), pp 1-21.

‡ But Art 78 lays down expressly that the trusteeship shall not apply to territories which have become members of the United Nations (ie to Syria and Lebanon). Reference may be made here to Art 80 of the Charter which lays down that, until the individual trusteeship agreements have been concluded, 'nothing in this Charter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties'.

It is further provided, in Article 79, that the terms of trusteeship for each territory placed under the system shall be agreed upon by the states directly concerned and approved either by the Security Council in the case of so-called strategic areas (Article 83) or by the General Assembly in the case of other trust territories (Article 85).

Although the Charter imposed no legal obligation upon states which were mandatory in virtue of Article 22 of the Covenant to place the territories in question under the system of trusteeship,3 at the first Assembly of the United Nations in 1946 the United Kingdom, Australia, New Zealand, Belgium, and, with some qualifications, France,4 made declarations announcing their intention to place their mandated territories under the trusteeship system. South Africa, however, did not do so as regards the mandated territory of South West Africa.5

§ 91 The objects of the trusteeship system The objects of the trusteeship system are set out in some detail in Article 76 of the Charter. It is a primary purpose of the system 'to promote the political, economic, social and educational advancement of the inhabitants of the trust territories'. This is the paramount obligation of the trustee powers. In contrast to the corresponding provisions of the Covenant, the duty of ensuring equal treatment for all members of the United Nations and their nationals in social and economic matters6 is made subject to the obligation to safeguard the interests of the inhabitants. The idea, which runs throughout the Charter, of encouraging 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,' is expressly adopted as one of the objects of the trusteeship system.7 Article 76 of the Charter recognises, in language of some elasticity, as one of the objectives of the trusteeship system the promotion of the progressive development of the trust territories 'towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned and as may be

2 See § 93.

3 Note, however, the resolution adopted on 18 April 1946 at the final session of the Assembly of the League of Nations: UNTB (1946-47), p 575. In a unanimous resolution on 9 February 1946 the First Assembly invited the states administering territories now held under mandate to undertake practical steps . . . for the implementation of Article 79 of the Charter‡: GA Res 9 (1).

4 See for these declarations *Records of the First Assembly*, 1st Session (1946), pp 176, 234, 248, 253 and 264. See also ibid, pp 482-89. The British declaration included an announcement of the intention to recognise the independence of Transjordan. See also *Duncan Hall in International Affairs*, 22 (1946), pp 199-213 and GA Res 9 (1) (1946).

5 See § 88.

6 Article 76(d). It will be noted that, unlike in the Covenant, the principle of equality of opportunity is not limited to certain categories of trust territories.

7 Article 76(c).
provided by the terms of each trusteeship agreement.3 Finally—a provision which appears first in the enumeration of the aims of the system—the Charter lays down that the object of trusteeship is 'to further international peace and security'. This somewhat general statement implied the abandonment of the drastic limitations which the Covenant imposed upon the mandatory in respect of recruitment in and fortification of the mandated territories.

§ 92 The trusteeship agreements

As had been true also of mandates, the provisions of the Charter with regard to the system of trusteeship are of a general character. The terms of the administration of the trust territories' shall be agreed upon by the States directly concerned— a phrase of obvious elasticity—subject to the approval of the General Assembly in the case of ordinary trust territories and of the Security Council in the case of strategic areas.2 Similar agreements and approval are required for the alteration or amendment of the trust instruments. The Charter provides expressly that the authority administering the trust territories shall be either one or more states or the United Nations as a whole.3 The First General Assembly approved, in December 1946, trusteeship agreements4 submitted to it in respect of the following eight trust territories, hitherto subject to the mandates system: Tanganyika, British Togoland,5 and the British Cameroons,6 to be administered by the United Kingdom; French Togoland7 and

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3. The manner in which this provision is qualified is expressive of the inherent complexities of the problem. It appears that while some governments at San Francisco favoured express reference in the Charter to eventual political independence of trust territories, others considered the 'development of self-government' to be an adequate formulation of the purpose of the Charter. See Cameron, Commentary on the Charter, Department of External Affairs, Conference of San Francisco, No 2, p 50. See § 95, n 10, as to the meaning given by the UN to the concept of 'self-government' and 'independence'. The General Assembly adopted in 1952 a resolution (558 (VI)) requesting the administering states to supply information, inter alia, as to 'the measures taken or contemplated, which are intended to lead the Trust Territory, in the shortest possible time, to the object of self-government or independence' and 'the period of time in which it is expected that the Trust Territory shall attain the objective of self-government or independence'.


5. The effect in domestic law of a trusteeship agreement is likely to be determined by the manner in which the state in question treats the effect in domestic law of treaties (as to which see generally § 19). Thus in Pauling v McElroy a US District Court held a trusteeship agreement to be self-executing; AJ, 53 (1959), p 446; see also Alig v Trust Territory of the Pacific Islands (1967), 1LR, 61, p 89; but cf People of Saipan v United States Department of the Interior (1974), 1LR, 61, p 113, holding the Trusteeship Agreement to be the Constitution of the Territory, possessing the relevant factors enabling it to confer enforceable rights on individuals. In the course of the discussion of the terms of the trusteeship agreement concerning the former Japanese mandated territories the representative of the USA in the Security Council wished it to be recorded as the view of the USA that the trusteeship agreement is 'in the nature of a bilateral contract between the United States, on the one hand, and the Security Council on the other': Security Council Official Records, Second Year, No 23 (1947), p 474. This statement, it is believed, accurately expresses the legal position. See § 86, as to the nature of mandates.

6. See § 93.

7. Article 81. Although no trust territories have been placed under administration by the UN, provision has sometimes been made in other treaties to take account of the possibility: see eg Art XIX of the Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (TS No 77 (1975)).

8. Notwithstanding some variations of language, the principal provisions of the several trusteeship agreements followed a uniform pattern. Thus in Art 3 of the Trusteeship Agreement for the

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British Cameroons the 'Administrating Authority' undertook to administer the territory in such a manner as to achieve the basic objectives of the international trusteeship system as laid down in Article 76 of the Charter and to collaborate with the General Assembly and the Trusteeship Council in the discharge of their functions defined in Art 87 of the Charter in the matter of reports and petitions, and to facilitate, at times to be agreed upon, any periodic visits to the territory which these organs may deem necessary. The administering authority was responsible for the peace, order, good government and defence of the territory. In order to fulfil their obligations the administering authority possessed full powers of legislation, administration and jurisdiction in the territory (as to whether legislation contrary to the trusteeship agreement is ultra vires and null and void, see Westcott v Republic (1969), ILR, 68, p 26; People of Saipan v US Department of the Interior (1974), ILR, 61, p 113; in Societa ABC v Fontana and Della Rocca, ILR, 22 (1955), p 76, it was held that the laws of the authority administering the territory were not 'foreign' laws in the eyes of the administering state, whose courts could hear appeals from courts in the territory; and see Trafiffico v Ministry of Defence and Others (1961), ILR, 40, p 37, distinguishing between acts of that authority in its capacity as the highest authority within the territory and in its capacity as an organ of the administering state). The trusteeship agreements entitled the administering authority to constitute the territory into a customs, fiscal or administrative union or federation with adjacent territories under its sovereignty or control. In order to ensure that the territory 'shall play its part in the maintenance of international peace and security' the administering authority, unlike in the case of mandated territories, was entitled to establish naval, military and air bases, and to erect fortifications, and to station its own forces there and, generally, to take such measures as were in its opinion necessary for the defence of the territory. However, so far as the native population was concerned, only volunteer forces might be used for that purpose.

The agreements contained provisions obliging the administering authority to promote the development of free political institutions suited to the territory and to give the inhabitants a progressively increasing share in the government of the country with a view to their eventual advancement to self-government and eventual independence in accordance with Art 76(b) of the Charter. Provision was made for safeguarding native laws and customs (see Malekutinitan v Jeraj, ILR, 22 (1955), p 81) as well as native land and resources in the interest of the native population. Although the administering authority was entitled to create monopolies, these had to be worked within a purely fiscal character in the interest of the territory or calculated to promote the economic advancement of its inhabitants. Although the administering authority was bound to refrain from economic discrimination against the nationals of any member of the United Nations, it was expressly provided that such equality of treatment was contingent upon the indigenous territory receiving most-favoured-nation treatment in the territories of the state concerned. The trusteeship system thus avoided the unconditional 'open-door' principle adopted in some of the mandates, a system which proved highly disadvantageous to the territories concerned. The administering authority was under no obligation to ensure in the territory complete freedom of conscience and, so far as consistent with the requirements of public order and morality, freedom of religious teaching and the free exercise of all forms of worship. Subject to requirements of public order it was to guarantee to the inhabitants freedom of speech, of the press, of assembly, and of petition. Effective provision was to be made for the educational advancement of the inhabitants. According to most trusteeship agreements, disputes between the administering authority and another member of the United Nations concerning the interpretation or application of the provisions of the trusteeship agreement were to be submitted, if they could not be settled by negotiation or other means, to the ICJ. In 1961 Cameroon instituted proceedings against the UK under the jurisdictional clause in the trusteeship agreement relating to Cameroons under British Administration: Northern Cameroons Case, ICJ Rep (1963), p 15 (see §§ 95, 96, para 2).

TS No 19 (1947); UNTS, 8, p 91.

TS No 21 (1947); UNTS, 8, p 151.

TS No 20 (1947); UNTS, 8, p 119.

TS No 67 (1947); UNTS, 8, p 165.
the French Cameroons, 9 to be administered by France; Ruanda Urundi, 10 to be administered by Belgium; Western Samoa, 11 to be administered by New Zealand; New Guinea, 12 to be administered by Australia. In 1947 the Security Council approved the trusteeship agreement in respect of the Territory of the Pacific Islands, a strategic trust area comprising islands which were formerly administered by Japan as a mandated territory. 13 In the same year the Second General Assembly approved the trusteeship agreement for Nauru. 14 In 1950 the General Assembly approved the trusteeship agreement for Somaliland, to be administered by Italy – the only non-member of the United Nations entrusted with that function. 15 Of the 11 trust territories, all but part of the Pacific Islands had, by 1 January 1991, become, or had become part of, independent states and had ceased to be trust territories. 16

9 TS No 66 (1947); UNTS, 8, p 135.
10 TS No 64 (1947); UNTS, 8, p 105.
11 TS No 65 (1947); UNTS, 8, p 21.
13 TS No 76 (1947); UNTS, 8, p 189. See § 93.

Other Japanese territories in the Pacific were dealt with differently. By Art 3 of the Treaty of Peace with Japan the USA, without being granted sovereignty, was granted the right to exercise administrative, legislative and judicial powers over, inter alia, the Ryukyu Islands, which include Okinawa. The Japanese Supreme Court held that the transport of goods from Okinawa to Japan involved import into Japan: Hitsuji Hiraide v Yawshide Nisztatu (1956), ILR, 53, p 281; see also Re Shimabukuro (1967), ILR, 54, p 214, and Williamson v Allbridge (1970), ILR, 56, p 229. See generally on the status of Okinawa, Eisenmann, AFDI, 17 (1971), pp 255–78.

14 TS No 89 (1947); UNTS, 10, p 3. While Australia, New Zealand and the United Kingdom were the administering authority, Nauru was to be administered by Australia in accordance with an agreement concluded by the three governments concerned. In 1989 Nauru instituted proceedings before the ICJ against Australia arising out of (inter alia) Australia’s alleged failure to fulfil its obligations under the Trusteeship Agreement: Case Concerning Certain Phosphate Lands in Nauru.

15 UNTS, 118, p 255. This was consistent with the terms of Art 81 of the Charter which provides that the administering authority may be ‘one or more States or the Organisation itself’. However, the provision of Art 86(1) relating to the Trusteeship Council as composed of members of the United Nations left room for no such latitude. Italy was not a member of the Trusteeship Council except to the extent that it took part, without the right to vote, in the deliberations of the Council concerning the trust territory for Somaliland and general questions affecting the operation of the trusteeship system.

The trusteeship agreement with Italy concerning Somaliland was the only instrument to set a definite limit to the duration of the trusteeship, namely, a period of ten years.

16 General Assembly resolutions providing for termination of the trusteeship agreements were: 1642 (XVI) for Tanganyika; 1044 (XI) for British Togoland; 1416 (XIV) for French Togoland; 1608 (XV) for British Cameroons; 1349 (XIII) for French Cameroons; 1746 (XVI) for Ruanda Urundi; 1626 (XVI) for Western Samoa; 1418 (XIV) for Somaliland; 2347 (XXII) for Nauru; and 3284 (XIX) for New Guinea. In the case of British Togoland, French Togoland, British Cameroons, Ruanda Urundi and Western Samoa the termination of the trusteeship agreement was preceded by a referendum or plebiscite conducted by, or with some other form of participation by, the UN. As to Togo, see Luc, Le Referendum du Togo (1955), (1958). See generally on termination of trusteeship Marston, ICLQ, 18 (1969), pp 1–40; Rauschning, Jahrbuch für Internationales Recht, 12 (1965), pp 158–85; UN Juridical YB (1974), pp 181–2; Crawford, The Creation of States in International Law (1979), pp 335–55, 426–8.

Once the trusteeship has ended, and in the absence of a separate agreement providing otherwise, French Cameroons held themselves no longer able to bear appeals from courts of a former French trust territory in respect of events occurring before the ending of the trusteeship: Re Mbounya (1961), ILR, 40, p 36; Re Union des Populations du Cameroun (1962), ILR, 44, p 36.
failed to accept the compact by a sufficient majority. With regard to the territories for which agreements had entered into force the Trusteeship Council determined that the peoples in question (other than Palau) had exercised their right to self-determination and that it was appropriate for the trusteeship agreement to be terminated.9 The agreement of the Security Council is, however, needed before a trusteeship agreement for a strategic trust territory can be terminated,10 and that agreement was forthcoming in Resolution 683 of 22 December 1990 in respect of the Marshall Islands, the Federated States of Micronesia and the Northern Mariana Islands.11

§ 94 The Trusteeship Council The normal function of supervision of the administration of trust territories was conferred upon the Trusteeship Council — one of the six principal organs of the United Nations. In particular, the Trusteeship Council was authorised under the authority of the General Assembly:

(a) to consider reports submitted by the administering authority;
(b) in consultation with the latter to accept and examine petitions12 from the inhabitants of trust territories;
(c) to arrange for periodic visits to trust territories at times agreed upon with the administering authority;13

The various trusteeship agreements required the administering authority to make to the General Assembly an annual report on the basis of the questionnaire drawn up by the Trusteeship Council — such reports to include information bearing on the measures taken to give effect to the suggestions and recommendations of the General Assembly and the Security Council. The administering authority was also required to designate a representative to attend the sessions of the Trusteeship Council at which the annual reports were considered.

The Charter provided that the Trusteeship Council would consist of states members of the United Nations each of which has one vote,2 and that the representatives of these states must be persons 'specially qualified'.3 The states in question were:

(a) those which administer trust territories;
(b) such permanent members of the Security Council as do not administer trust territories;
(c) states elected by the General Assembly for a period of three years.

In this last category as many states were to be elected as was necessary to ensure that the total number of members of the Trusteeship Council was divided equally between those members of the United Nations which administered trust territories and those which did not. This last provision became inapplicable in 1968 when the number of states administering trust territories became less than the number of permanent members of the Security Council who were not administering states.7
§ 95 Sovereignty over trust territories

In considering the question of sovereignty over trust territories, sovereignty (or what may be described as residuary sovereignty) must be distinguished from its exercise. The latter is clearly vested with the trustee states subject to supervision by and accountability to the United Nations. Thus, as the trustee states wield full power of jurisdiction as well as of protection, internal and external, over the inhabitants of the trust territories, the governments of these territories are entitled to exact allegiance from the inhabitants although these do not possess the nationality of the trustee states.

For it is fundamental that trust territories do not form part of the territory of the states entrusted with their administration. For this reason the trustee state cannot cede or otherwise alter the status of trust territories except with the approval of the United Nations in which the residuary sovereignty must be considered to be vested.

The governing consideration is that, in the language of the Charter, it is the United Nations which establishes under its authority the system of trusteeship with the approval of the United Nations in which the residuary sovereignty must be distinguished from its exercise. The latter is terms of legal connotation implying a fundamental limitation of authority, on the part of the state exercising sovereignty is that of 'the administering state'.

In essence the position is the same as in the corresponding case of mandates. The terms 'trust' and 'trustee' (in the French text of the Charter) are terms of legal connotation implying a fundamental limitation of authority, on the part of the state concerned. At any rate this aspect of the legal situation is of the essence of the international system of trusteeship.

Although the majority of trusteeship agreements provided that the territories in question were to be administered as an 'integral part' of the administering state, it was made clear at the time of the approval of the agreements that that phrase did not imply any claims to sovereignty over the trust territories. That fact of delegation implied also the ultimate power of revocation in case of abuse or failure of the trustee state in the administering state. Finally, the provisions of the various trusteeship agreements pointing to the eventual self-government or independence of the trust territories emphasised the absence of intention to transfer sovereignty to the administering states. The inhabitants of trust territories did not acquire the nationality of the administering state. Treaties concluded by it did not apply automatically to the trust territory, although provision was made for their application if, in the opinion of the administering authority, they were appropriate to the needs of the trust territory and were conducive to the

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1 See Roche, RG, 58 (1954), pp 399–437.
2 See the statement of the British Prime Minister in the House of Commons on 23 January 1946, to the effect that such persons have the status of British protected persons. They were included in the definition of that term in s 32(1) of the British Nationality Act 1948, and Orders made thereunder. See also Weis, Nationality and Statelessness in International Law (2nd ed, 1979), pp 202–5; and the British Nationality Act 1981, s 38(1), and the British Protectorates, Protected States and Protected Persons Order 1982 (SI 1982, No 1070).
3 See the observation in Aranda vs Hogan, ILR, 24 (1957), p 57, that a trust territory 'is primarily under the sovereignty and jurisdiction of the United Nations'. In Porter v United States (1974), ILR, 61, p 102, the view was preferred that sovereignty rested in the people of the territory and was held in trust for them by the administering authority.
4 Article 81. When the Charter was drafted there was no disposition to rule out the possibility of the UN transferring the trust territory in case of a violation of the trusteeship agreement or of the withdrawal or expulsion of the trustee power from the UN. See Canadian Commentary on the Charter, p 52.
5 See § 86.
6 The terms used are 'régime international de tutelle', 'territoire sous tutelle', 'accords de tutelle', 'Conseil de Tutelle'. The Spanish text refers to 'administración fiduciaria', 'territorios fideicomisitos', 'consejo de administración fiduciaria'. For this reason there may be some difficulty in accepting as helpful the reasoning of the ICJ in its Advisory Opinion concerning the Status of South West Africa where, apparently in answer to the contention of South Africa to the effect that the obligations of the mandate had terminated with the dissolution of the League of Nations, the Court stated that it is 'not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other [corresponding] legal conception of private law': ICJ Rep (1900), p 132. See the observations on the subject in Judge McNair's Separate Opinion, ibid, p 148. He refers, in this connection, to 'rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions'. It is probable that in these cases, the rules and principles are not essentially different. The notion of delegation of powers, and the concomitant obligation of accountability, are general principles of law. See Schwarz-Liebermann, Vormundschaft und Treuhand (1951).

4 Article 4 of the agreement for New Guinea used the expression 'as if it were an integral part of Australia'. The expression 'as an integral part' did not occur in the agreement for Tanganyika -- probably for the reason that the latter was a self-contained territory of substantial size, while Tangol and the Camerons were composed of narrow strips of territory adjoining, respectively, the Gold Coast and Nigeria; they had been administered in the past as integral parts of the latter territories, subject to the provisions of the mandates. Finally, the phrase did not occur in the agreement for Western Samoa, or in the relevant Art 3 of the agreement for the Pacific Islands administered by the USA (see § 93); it appeared in the draft submitted by the USA to the Security Council but was deleted by common agreement. It will be noted that the expression in question was used in 'B' and 'C' mandates.

The French and Belgian delegates to the General Assembly stated that 'it was the interpretation of their Governments that the words "as an integral part" were necessary as a matter of administrative convenience and were not considered as granting to the Governments of Belgium and France the power to diminish the political individuality of the Trust Territories'. The British delegate stated that the retention of the words "as an integral part" in the trusteeship agreement for Tangol and the Camerons under British administration 'did not involve administration as an integral part of the United Kingdom itself and did not imply British sovereignty in these areas' (General Assembly, Doc A/258, 12 December 1946, p 6). It may be noted that it was language requiring the mandated territory of Western Samoa to be treated as an integral part of New Zealand which gave rise to the decision of the Privy Council in Falma's Lease Attorney-General of New Zealand referred to at § 87, n 8.


Since a trust territory is not itself a sovereign state, and is not within the sovereignty of the administering state, the government of a trust territory has been held by a New Zealand court to enjoy immunity from suit: Marine Steel Ltd v Government of the Marshall Islands (1981) 2 NZLR 1; AJ, 77 (1983), p 158. But see People of Saipan v US Department of the Interior, above, holding a trust territory to have qualified sovereignty entitling it to some measure of sovereignty immunity; see also Alig v Trust Territory of the Pacific Islands, above, and Morgan Guaranty Co v Republic of Palau, above. See also Bank of Hawaii v Balos, AJ, 83 (1989), p 583, holding the Republic of the Marshall Islands to have become de facto an independent state even though the trusteeship agreement was still in force (see also § 93, n 10).
accomplishment of the principles of the trusteeship system. Whether the establishment of a customs, fiscal or administrative union of the trust territory with other territories subject to the sovereignty or control of the administering state was compatible with the principles of the trusteeship system depended upon the circumstances of each case. In 1949 the General Assembly adopted a resolution requesting the Trusteeship Council to recommend to the administering governments that the flag of the United Nations be flown over all trust territories side by side with the flag of the administering authority concerned and the territorial flag, if any. The resolution, inasmuch as by implication it denied any right of exclusive sovereignty of the administering power, was in accordance with the legal position of the trust territories.

**NEUTRALISED STATES**


10 That question has been the subject of examination by the General Assembly and Committees appointed by it and the Trusteeship Council. For an account of the work of the Committee on Administrative Unions, see Huang, AJ, 43 (1949), pp 716–732. See also Mathiot, *Etudes Georges Sevole* (vol i, 1950), pp 349–64; Mulembe, *La Tractile internationale et les problemes des unions administratives* (1951). The Committee on Administrative Unions ceased to operate in 1961. The General Assembly has resolved that administrative, fiscal or customs unions should not in any way compromise the evolution of any trust territory towards self-government or independence, or change the distinct character of a trust territory. In 1952 the General Assembly asked the administering authorities to continue to transmit detailed information to the Trusteeship Council on the operation of all administrative unions, indicating the advantages derived by the indigenous inhabitants from such unions. It also expressed the hope that the administering authorities would consider the freely expressed wishes of the population on the subject and that they would consult the Trusteeship Council on any changes in the existing unions or any proposals to establish new unions (GA Res 649 (VII)). Unions of this kind were in 1961. The General Assembly has resolved that administrative, fiscal or customs unions should not in any way compromise the evolution of any trust territory towards self-government or independence, or change the distinct character of a trust territory. The Committee on Administrative Unions ceased to operate in 1961. The General Assembly has resolved that administrative, fiscal or customs unions should not in any way compromise the evolution of any trust territory towards self-government or independence, or change the distinct character of a trust territory.

11 See ILQ, 3 (1950), p 279. As to the UN flag see GA Res 325 (IV) (1949), and § 289.

**§ 96 Concept of neutralised states** A neutralised state is a state whose independence and integrity are guaranteed by treaty, on condition that such state binds itself not to enter into military alliances (except for defence against attack) and not to enter into such international obligations as could indirectly involve it in war. The precise incidents of neutrality will depend upon the terms of the treaty relating to the state in question and other particular circumstances of the case. A neutralised state may cease to have that status either by itself acting in violation of the conditions on which its neutrality is established and guaranteed, or by the consent of the guarantor states. Thus Belgium and Luxembourg ceased after the First World War to be neutralised states, which they had been by virtue of treaties concluded in, respectively, 1831 and 1867. Not to be confused with neutralisation of states is, in the first place, neutralisation of parts of states, of
rivers, canals, and the like, which has the effect that war cannot lawfully be made or prepared there;' secondly, the special protection arranged, for the term of the war, in special conventions for certain establishments; and thirdly, the unilateral declaration of a state, made as a matter of policy or embodied in some legal instrument, that it will always remain neutral. The principal neutralised states now in existence are Switzerland and Austria, which are discussed further below.

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**Neutralised states**

$§ 97 Switzerland The Swiss Confederation, which was recognised by the Westphalian Peace of 1648, has pursued a policy of neutrality since that time. During the French Revolution and the Napoleonic Wars, however, it did not succeed in keeping up its neutrality. French intervention brought about in 1798 a new constitution, according to which the several cantons ceased to be independent states and Switzerland turned from a confederation of states into the simple State of the Helvetic Republic, which was, moreover, through a treaty of alliance, linked to France. It was not till 1814 that Switzerland became again a confederation of states, and not till 1815 that it succeeded in becoming permanently neutral. On 20 March 1815, at the Congress at Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia signed the declaration in which the permanent neutrality of Switzerland was declared and collectively observed, and Switzerland acceded to this declaration. Article 84 of the Act of the Vienna Congress confirmed this declaration, and an Act, dated 20 November 1815, of the powers assembled at Paris after the final defeat of Napoleon, recognised it again. Since that time Switzerland has always succeeded in maintaining its neutrality. It has maintained strong armed forces, and in January 1871, during the Franco-Prussian War, it disarmed a French army of more than 80 thousand men who had taken refuge on its territory, and guarded them till after the war. The 'unique situation' of Switzerland-
land was recognised by the Council of the League of Nations when it was admitted as an original member on the understanding that it 'shall not be forced to participate in a military action or to permit the passage of foreign troops or the preparation of military enterprises upon her territory'. The Charter of the United Nations admits of no such latitude, and although Switzerland has become a member of many specialised agencies and a party to the Statute of the International Court of Justice it has remained outside the United Nations. In becoming a member of some international organisations, however, Switzerland has entered a general reservation to the effect that its participation in the work of the organisation, particularly as regards relations between it and the United Nations, cannot exceed the role assigned to Switzerland by its position as a neutral state.

7 Switzerland signed a special relations agreement with the European Economic Community in 1972 but has not concluded an association agreement with it.

§ 98 Austria: Austria, now generally regarded as a permanently neutral state, became such after prolonged negotiations between Austria and, on the other hand, France, the Soviet Union, the United Kingdom and the United States after the end of the Second World War. As a result of discussions between Austria and the Soviet Union in April 1955 they signed a memorandum in Moscow in which Austria undertook to make a declaration in a form which will oblige Austria internationally to practice in perpetuity a neutrality of the type maintained by Switzerland; to take all suitable steps to obtain international recognition of this declaration; and, Austria having declared that she would welcome a guarantee by the Four Powers of the inviolability and the integrity of Austria's territory, to seek to obtain such a guarantee from the governments of France, the United Kingdom and the United States. In the memorandum, the Soviet Government declared that it was prepared to recognise the declaration concerning the neutrality of Austria. The State Treaty for the Re-establishment of an Independent and Democratic Austria, which was signed a month later by Austria and the Four Powers, made no express mention of Austria's permanently neutral status, although the Four Powers declared that they would respect the independence and territorial integrity of Austria as established in the Treaty. In October 1955 Austria enacted a Constitutional Federal Statute on Austria's neutrality.

8 See reservations made in respect of the IAEA (TS No 19 (1958)) and IMCO (TS No 54 (1958)). In 1955 Switzerland became a party to the Convention for the Establishment of a European Convention for Nuclear Research. In its message of 15 August 1953, the Federal Council declared on the opinion of leading Swiss international lawyers to the effect that international law does not prohibit a permanently neutral state from providing accommodation in its territory for an international laboratory devoted to purely scientific objects.


10 As to the position with regard to the UN, see Guggenheim in Neua Schweizer Rundschau, November and December 1945; Volkerband, Dumhart Omak, and die schweizerische Neutralitat (1945); and in Ann. of Swiss, 2 (1945), p. 9–47. See also Hagermann, Die neuen Tendenzen der Neutralitat und die volkewechtliche, Stellung des Schweiz (1945). See also Lalove, By. 24 (1947), pp. 87–9, and Huber, Ann. of Swiss, 5 (1948), pp. 9–28. As to Swiss participation in the National Supervisory Commission established by the Korean Armistice Agreement 1955, see Duff, Das Mandat der Neutralen Uberwachungskommission in Korea (1960). The possibility of Switzerland becoming a member of the UN has been under active consideration by the Swiss Government: see RG, 86 (1982), pp. 820–23, and 88 (1984), pp. 284–5, 964.

11 Although Switzerland was invited to conform with UN sanctions against Southern Rhodesia, in accordance with Security Council resolutions addressed to all states, Switzerland concluded that 'for reasons of principle, Switzerland, as a neutral State, cannot submit to the mandatory sanctions of the United Nations'. Without recognising any legal obligation, however, Switzerland has taken various steps to avoid Switzerland being used as a means whereby Rhodesian trade could avoid UN sanctions (see UN Doc S/6781 of 21 February 1967). On 12 December 1977 the Federal Council passed a law, entering into force on 1 January 1978, prohibiting persons domiciled in Switzerland from entering into certain transactions which would involve using Switzerland as a means of avoiding UN sanctions on Rhodesia. And see (1972), pp. 193–4. When the Security Council adopted SC Res 418 (1977), imposing a mandatory arms embargo on South Africa, Switzerland, without recognising any obligation to do so, adopted 'for its own initiative' an embargo on weapons and war materials: UN Doc S/8264 of 13 April 1978. In response to SC Res 661 (1980), imposing economic sanctions on Iraq following its aggression against Kuwait, Switzerland took certain measures corresponding in substance with those called for by the resolution, but stated that they 'were taken independently', and that 'as a non-member of the United Nations, Switzerland is not in fact legally bound by the decisions of the Security Council nor, in this case, by Resolution 661 (1990): UN Doc S/21585, 22 August 1990. See also § 627.
permanent neutrality. This provides, in Article 1, that 'Austria, of its own free will, declares herewith its permanent neutrality. Austria will maintain and defend it with all means at its disposal'; furthermore, 'Austria will never in the future accede to any military alliance nor permit the establishment of military bases of foreign States on its territory'.

Although this statute is in form a mere unilateral declaration on the part of Austria, it was enacted pursuant to international undertakings in the Moscow Declaration, and its international effects have been accepted, the Four Powers, as well as many other states, having subsequently recognised Austria's permanent neutrality.

Notwithstanding Austria's neutral status, however, Austria has become a member of the United Nations, without any special provision being made to take account of Austria's neutrality. In adopting resolutions providing for mandatory sanctions against Southern Rhodesia and South Africa the Security Council made no special exception for Austria (as might have been possible under Article 48.1 of the Charter). In relation to measures against Southern Rhodesia, Austria took certain steps to prevent aid and encouragement to the regime in Southern Rhodesia, but did so expressly:

"without prejudice to the question of principle, whether Austria as a permanently neutral State member of the United Nations is automatically bound by decisions of the Security Council regarding mandatory sanctions - a question which in the opinion of the Federal Government of Austria can only be decided in each single case on the basis of the specific situation and with due regard to the obligations which result on the one hand from the membership of Austria in the United Nations and on the other hand from its permanent neutrality, which had previously been notified to all States members of the United Nations".

After the Security Council had adopted SC Res 418 (1977), imposing an arms embargo on South Africa, Austria reiterated those considerations of principle.

§ 99 The former Papal States

When international law began to grow among the states of Christendom, the Pope was the monarch of one of those states - namely, the so-called Papal States. Throughout the existence of the Papal States, until their annexation by the Kingdom of Italy in 1870, the Pope was the monarch of one state, and, as such, the equal of all other monarchs. His position was, however, even then anomalous, as his influence and the privileges granted to him by the different states were due not alone to his being the monarch of a state, but also to his being the Head of the Roman Catholic Church. But this anomaly did not create any real difficulty, since the privileges granted to the Pope only concerned matters of precedence.

§ 100 The Italian Law of Guarantee 1871

When, in 1870, Italy annexed the Papal States and made Rome its capital, it had to create a position for the Holy See and the Pope which was consonant with the latter's importance as Head of the Roman Catholic Church. It seemed impossible that the Pope should become an ordinary Italian subject and that the Holy See should be an institution under

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7 A list of 57 states which recognised Austrian neutrality is given in Ermacora, Österreichische Staatsterritorialität (1957). As for the UK, see Parliamentary Debates (Commons), vol 600, col 340 (18 February 1959).
8 UN Doc S/798 of 28 February 1967.
10 For Austrian rejection of a warning from the Soviet Union that Austrian association with the EEC would be a violation of Austrian neutrality, see Whiteman, Digest, 1, p 352. See also RG, 94 (1990), p 127. For discussion of the issues, in the light of Austria’s application in 1989 to join the European Communities, see Kennedy and Schütte, CML Rev, 26 (1989), pp 615–42; Kennedy and Specht, Harv ILJ, 31 (1990), pp 407–61; Zemanek, Germ YBIL, 33 (1990), pp 130–65. See § 118, n 2, as to the Austro-German Customs Union case (1931), in which similar issues were raised. See also § 97, n 8.
11 Misc No 49 (1972); Cmd 5159.

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THE HOLY SEE

the territorial supremacy of Italy. To meet the case the Italian Parliament in 1871 passed an Act regarding the guarantees granted to the Pope and the Holy See, which is commonly called the Law of Guarantee.\(^1\) No Pope recognised this Italian Law of Guarantee, nor had foreign states an opportunity of giving their express consent to the position of the Pope in Italy created by that law. But in practice foreign states as well as the Pope himself — although the latter never ceased to protest against the condition of things created by the annexation of the Papal States — made use of the provisions\(^2\) of that law. Several foreign states sent, side by side with their diplomatic envos accredited to Italy, special envos to the Pope, and the latter sent envos to foreign states.\(^3\) They concluded with the Holy See agreements, usually called concordats,\(^4\) which they treated in most respects as analogous to treaties. The question of the legal position of the Holy See was widely discussed in the literature of international law, and many writers, including the author of this work, were of the view that although the Holy See was not an international person, it had by custom and tacit consent of most states acquired a quasi-international position.\(^5\)

### § 101 The Lateran Treaty 1929

The previously controversial international position of the Holy See was clarified as the result of the Treaty of 11 February 1929, between the Holy See and Italy — the so-called Lateran Treaty.\(^6\) In that treaty Italy acknowledged the sovereignty of the Holy See in international matters as inherent in its nature and as being in conformity with its tradition and the requirements of its mission in the world (Article 2). At the same time Italy recognised the State of the Vatican City under the sovereignty of the Supreme Pontiff (Article 26).\(^7\) Italy also recognised the passive and active right of legation as belonging to the Holy See in accordance with international law (Article 12).\(^8\) Article 24 of the treaty contained a declaration by the Holy See with regard to the sovereignty belonging to it in international matters. It was stated there that the Holy See does not desire to take and shall not take part in temporal rivalries between other states and in international conferences concerned with such matters 'save and except in the event of such parties making a mutual appeal to the pacific mission of the Holy See, the latter reserving in any event the right of exercising its moral and spiritual power'. Accordingly, the same Article provided that the Vatican City shall in all circumstances be considered as neutral and inviolable territory.\(^9\) The Law of Guarantees of 1871 was formally abrogated. The Holy See declared the Roman question to be definitely and irrevocably settled, and recognised the Kingdom of Italy with Rome as the capital of the Italian State. The treaty was accompanied by a concordat and by a financial convention which, in consideration of the material injury suffered by the Holy See by reason of the loss of the Patrimony of St Peter in 1870, provided for the payment of a substantial sum by Italy to the Holy See. This concordat, and the financial arrangements accompanying it, were substantially revised in a new concordat (with accompanying protocol) signed on 18 February 1984 and new financial arrangements signed on 15 November 1984, instruments of ratification of which were exchanged on 3 June 1985.\(^10\) Article 1 of the new concordat reffirms 'that the State and the Catholic Church are, each in its own order, independent and sovereign'.

### § 102 The status of the Vatican City in international law

The Lateran Treaty marks the resumption of the formal membership, interrupted in 1871, of the Holy See in the society of states. Undoubtedly, the constituent elements of statehood are, in the case of the Vatican City, highly abnormal or reduced to a bare minimum. The territory of the Vatican City is only about 100 acres. Its population is about 1,000 inhabitants and is composed almost exclusively of

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\(^1\) Its principal provisions (Martens, NRG, xvii, p 41) will be found in the 4th ed of this work, p 277.

\(^2\) But the Pope never accepted the allowance provided by the Law of Guarantee.

\(^3\) See Strupp-Schlochauer, Wört (1962), II, p 225.

\(^4\) As to concordats, see § 101, n 3.

\(^5\) On the position of the Holy See before 1929 see 8th ed of this vol, p 252, n 3, for an extensive bibliography; and also Verzijl, *International Law in Historical Perspective*, 2 (1969), pp 305–302, 308–308.

\(^6\) For the texts of the Lateran Agreements see Documents (1929), pp 216–41; AJ, 23 (1929), Suppl, pp 187–95. The Lateran Agreements are cited in the Italian Constitution of 1947, Art 7, although not in such a way as to give their terms the same status as other provisions of the constitution.

\(^7\) This is a repetition of Art 3 in which Italy 'recognises the full ownership, exclusive dominion, and sovereignty of the Holy See over the Vatican'. The immunities guaranteed by international law to foreign embassies are accorded to certain properties of the Holy See situated on Italian territory: Art 15. See also Padri Benedettini della Basilica di S Paolo v Nanz, ILR, 24 (1957), p 214; Barone v Ospedale del Bambino Gesù, ibid, p 215. In Special Representative of the State of the City of the Vatican (1982), ILR, 78, p 120, the Court of Cassation accepted the Vatican's entitlement to jurisdictional immunity from suit.

\(^8\) As to the jurisdiction exercised by the Holy See, see Seyersted, ICLQ, 14 (1965), pp 43–7. For several cases in Italian courts concerning acts injurious to the Pope, see RG, 63 (1959), pp 102–4. As to the attempted assassination of the Pope in the Vatican City in 1981, and the trial of the accused in an Italian court, see RG, 85 (1981), pp 915–17. In 1987 the Italian authorities wished to question Cardinal Marcinkus and two other persons, who were all resident in the Vatican City, in connection with alleged financial irregularities, and sought their extradition, but their request was refused: see Oellers-Frahm, ZStV, 47 (1987), pp 489–504. In July 1987 the Italian Court of Cassation held that the trial of the Cardinal by an Italian court would be illegal. See RG, 92 (1988), pp 147–9, 998–9; and Monaco, AFBD, 33 (1987), pp 370–8.


\(^10\) As to concordats see Bierbaum, *Das Konkordat* (1928); Lange-Ronsberg, *Die Konkordate* (1929); Giannini, *I concordati post-bellici* (1930); Huber, *Verträge zwischen Staat und Kirche im Deutschen Reich* (1930); Wagnon, *Concordats et droit international* (1935); de la Briere, Hag R, 62 (1938), ii, pp 371–464; Ehler, Hag R, 104 (1961), iii, pp 1–63 (with bibliography at p 65); Lucien-Brun, AFBD, 18 (1972), pp 225–33. In a case decided in 1934 the Supreme District Court of Bavaria based its decision on the view that concordats had the same internal validity as treaties: *Re a Nun's Dress*, AD, 7 (1933–4), No 176. See also *Concordat (Germany)* Case, ILR, 24 (1957), p 592. The Holy See has signed and ratified the Convention on the Law of Treaties 1969.

As to passports issued by the Vatican City, see Turack, BY, 43 (1968–69), pp 212–14.

\(^3\) See above, § 96, n 8. On the immunity of the property of the Vatican City in connection with military operations, see Herbert Wright, AJ, 38 (1944), pp 452–57.

persons residing therein by virtue of their office. Its independence as a government, while somewhat impaired by the close association with the Italian state, has a peculiar character by reason of the nature of the spiritual purpose for the better fulfilment of which it exists. Also, having regard to the wording of the treaty, it is not always easy to decide whether sovereign statehood in the field of international law is vested in the Holy See or in the Vatican City. In fact there are writers who maintain that, far from there being one international person, there exist as the result of the Lateran Treaty two international persons - the Holy See and the Vatican City - the main point in dispute being whether these two persons are united by a personal or a real union.

The strict view ought probably to be that the Lateran Treaty created a new international state of the Vatican City, with the incumbent of the Holy See as its Head; but the practice of states does not always sharply distinguish between the two elements in that way. Nevertheless it is accepted that in one form or the other there exists a state possessing the formal requirements of statehood and constituting an international person recognised as such by other states.

Thus many states have diplomatic relations with it, it has participated in many major international conferences of states, is a party to some major multilateral treaties, and is a member of some international organisations. Its true significance in international law lies in the fact that international personality is here recognised to be vested in an entity pursuing objects essentially different from those inherent in national states such as those which have hitherto composed the society of states. A way is thus opened for direct representation in the sphere of international law of spiritual, economic, and other interests lying on a plane different from the political interests of states.
Chapter 3

Position of the states in international law

BASES OF STATEHOOD


§ 103 International personality

A state, upon becoming a member of the international community, acquires international personality. This signifies the state’s capacity to possess rights and duties in international law, its capacity to operate upon the international plane, its acquisition of a persona in the contemplation of international law, and its status as a subject of international law. Although the typical and principal subject of international law is the sovereign state, the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and the international legal system is no exception. The possession of international rights and duties involves, pro tanto, the possession of international personality; but the possession of international personality does not necessarily involve the possession of the full range of international rights and duties. The degree of international personality (and the extent of the particular international rights and duties) possessed is in each case a matter for inquiry. In the normal case of a sovereign state, the degree of international personality and the extent of rights and duties possessed will be the same as for all other sovereign states. But there are many variations in the extent of international personality, as in the case, for example of states under protection and international organisations. Nevertheless the typical international person – a state – possesses all those numerous rights and duties which constitute the accepted body of rules of international law. Certain of those rights and duties, however, may be conveniently regarded as representing various general characteristics which reflect the essential position of states in their mutual coexistence as members of the international community. These general characteristics are equality, dignity, independence, territorial and personal authority, intercourse, self-preservation, non-intervention, and jurisdiction. It is with each of these that the present chapter is concerned.

§ 104 The legal bases of statehood

It is, however, first necessary to inquire whether, from a strictly legal point of view, there are any legal rules or principles (whether or not included in the general characteristics just referred to) which may justifiably be regarded as the foundation of the legal position of states. Until the last two decades of the 19th century there was general agreement that membership of the international community necessarily bestowed so-called fundamental rights on states, which were regarded as self-evident consequences of the fact that the international community consisted of sovereign states. But no unanimity existed with regard to the number, the appellation, and the contents of these alleged fundamental rights, and the notion of fundamental rights fell into disfavour.

1 These were chiefly enunciated as the rights of existence, of self-preservation, of equality, of independence, of territorial supremacy, of holding and acquiring territory, of intercourse, and of good name and reputation.

2 As to the fundamental duties of states, see Brierly, BY (1926), pp 20, 21, and Pearce Higgins, AS Proceedings (1927), pp 17–22. It will be observed that the very notion of fundamental rights, if it is not abused as a cover for breaches of the law or for purely political assertions, implies and brings into prominence the corresponding duty to respect the fundamental rights of international personality. Insofar as it does that, the notion of fundamental rights is beneficent and not wholly tautologous.

3 Contrast, for instance, Pillet, RG, 5 (1898), pp 66 and 236, and ibid, 6 (1899), p 503, with Kaufmann, Das Wesen des Völkerrechts und die Clausula rebus sic stantibus (1911), pp 106–204. See the same in Hag R, 55 (1935), iv, pp 574 et seq. See also Allarco, Hag R, 97 (1959), ii, pp 95–176. See also the Declaration of the Rights and Duties of Nations proclaimed by the American Institute of International Law in 1916, at its first meeting at Washington; see AJ, 10 (1916), p 212, and the Report. This Declaration is repeated in Project No 7 of the American Institute of International Law for the codification of ‘American International Law’; see AJ, 20 (1926), Special Suppl, pp 311, 312. See also for a similar declaration the resolution of the Interparliamentary Union of August 1928, quoted and commented upon by Bruns, ZV, 1 (1929), pp 14 et seq. See also the Convention on Rights and Duties of States adopted at Montevideo by the Seventh Pan-American Conference in December 1933; AJ, 28 (1934) Suppl, p 75; Hudson, Legislation, vi, p 620; ZV, 4 (1934), p 650. The Bogotá Charter of the Organization of American States of 30 April 1948, includes a chapter on the fundamental rights and duties of states (UNTS, 119, p 49; AJ, 46 (1952), Suppl, p 45). The degree of usefulness of statements of that character may be gauged from a survey of the Articles of that Charter. Article 6 lays down the principle of jurisdictional equality, in respect both of rights and duties, independently of the power of the state to ensure respect for its rights. Article 7 provides that every American State has the duty to respect the rights enjoyed by every other State in accordance with international law. Article 8 lays down that the fundamental rights of States may not be impaired in any manner whatsoever. Articles 9 and 10 lay down the principle of the declaratory nature of recognition (see § 39). Article 11 provides that the right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State. Article 12 lays...
With the establishment of the United Nations, the need to inquire into the fundamental legal principles regulating the relations of states as members of the international community received a fresh impetus. In 1949 the International Law Commission formulated a draft Declaration of Rights and Duties of States, which, however, was largely based on earlier conceptions of the matter. It was referred to the General Assembly by governments from their consideration, and no further action has been taken on it. Thereafter many new states attained independence and became members of the United Nations. Their cultural, legal and political assumptions were often different from those of the fundamentally like-minded states in Western Europe and certain other parts of the world which had been responsible for the development of the earlier stages of modern international law. Additionally, the 20th century has seen in Marxist-Communism the development of a new ideology which struck at the roots of international law as a body of rules of universal application and caused a deep rift in the political structure of the international community. These two influences called into question (and in more extreme moments, suggested the rejection of) many of the rules of international law other than those to which states have expressly consented. The lacuna which would thereby have been left in the legal rules regulating international intercourse should, it was questioned (and in more extreme moments, suggested the rejection of) many of the fundamental legal principles regulating the relations of states as members of the international community. These two influences called into question (and in more extreme moments, suggested the rejection of) many of the rules of international law other than those to which states have expressly consented. The lacuna which would thereby have been left in the legal rules regulating international intercourse should, it was principally suggested, be filled with the principles of 'peaceful coexistence' - a concept the legal content of which was down 'the jurisdiction of States within the limits of their national territory is exercised equally over all inhabitants, whether nationals or aliens'. Article 13 affirms the right of each state 'to enjoy its cultural, political and economic life freely and independently'. Article 17 lays down the principle of indivisibility of territory and non-renunciation of territorial title acquired by force. In Art 18 the parties bind themselves to refrain from the use of force except in self-defence.

3 YBILC, 1st Session (1949), p 286. For somewhat formal criticism see Kelsen, AJ, 44 (1950), pp 259-76. See also Alfaro, Hag R, 97 (1959), pp 95-176. There may be legitimate doubt as to the usefulness of instruments of this nature which, if sufficiently comprehensive, must tend to assume the complexion of a codification - or proposals for change of a very general character of the principles of international law. Drafts on this subject see Preparatory Study concerning a Draft Declaration on the Rights and Duties of States (UN Publications (1948), Doc A/CN 4/2).

4 GA Res 375 (IV) (1949); 596 (VI) (1951).

5 The emphasis sometimes placed in Marxist theory on the need for consent to rules of international law is to be noted. It is asserted that although the state will eventually wither away, in the 'transition' (or temporary) period to come it is sovereign, that states will continue (temporarily) to have dealings with each other, but that an aspect of their sovereignty is that they cannot be legally bound by rules to which they have not expressly consented. Although in their extreme form these views are now less often advanced, even in a more moderate form they downgrade customary international law in favour of freely concluded treaties recording the express consent of the states concerned, and weaken the legal force of all rules of international law which have not been expressly consented to by all states. Such an emphasis on universally expressed consent underestimates the extent to which in actual fact rules of conduct which are generally even if not universally accepted are regarded as law. It also creates a legal vacuum in those areas presently regulated by customary international law, large parts of which depend on the implied consent of states. Their replacement by the alleged basic principle of 'peaceful coexistence' between states is an unsatisfactory and inadequate alternative.
principles already enshrined in the Charter were authoritatively elaborated. The fact that the Declaration was prepared within the framework of the United Nations after extensive inter-governmental discussion, and was adopted by acclamation and without dissenting vote by the General Assembly, gives the seven principles contained in it a pre-eminent value in contemporary international law. The principles embodied in the Declaration were in fact declared by the General Assembly to constitute 'basic principles of international law'. Although their substance is more appropriately considered elsewhere, the seven principles may be enumerated here:

1. States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

2. States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

3. The duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter.

4. The duty of states to cooperate with one another in accordance with the Charter.

5. Equal rights and self-determination of peoples.


7. States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

In adopting these seven principles the General Assembly declared that in their interpretation and application they were interrelated, and each was to be construed in the context of the others; and that nothing in the Declaration was to be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of member states under the Charter or the rights of peoples under the Charter, taking into account the elaboration of those rights in the Declaration.

§ 106 Economic rights and duties of states

The increase in the number of independent states over the last 30 years has drawn attention to the economic disparities between members of the international community. At one extreme are a relatively few economically developed, industrialised states; at the other is a much larger number of developing, non-industrialised states, many of which had formerly been colonial or other dependent territories. Many states, particularly the developing states, held the view that the developed states had maintained their economic advantage by various practices which had involved the exploitation of the natural resources of the developing states; and in particular the rules of international law about the treatment of investments in another country were regarded as reflecting the standards and interests of the developed states rather than those of the developing states. It was further argued that for any state the full enjoyment of the additional rights of statehood was dependent upon its satisfactory economic development. At a time when world economic conditions demonstrated the dependence of the economies of the developed countries on those of the developing countries, and in particular on the supplies of raw materials available from the developing countries, the latter sought a qualitative shift in the balance of world economic forces, involving greater rights for the developing countries and corresponding responsibilities to assist them on the part of the developed countries.

A special session of the United Nations General Assembly was held in 1974 at which a Declaration, and a Programme of Action, on the Establishment of a
objections when pressed to extremes, and although it is sometimes departed from in circumstances which require account to be taken of undeniable inequalities in political and economic power (eg as with the permanent membership of certain major states in the Security Council and their so-called power of veto over certain decisions of the Council, even though the Charter of the United Nations is professedly based on the principle of ‘sovereign equality’ of states), the principle of juridical equality is formally established as one of the basic principles of international law. It is affirmed not only in the Charter of the United Nations, but also, for example, in the Charter of the Organisation of American States and of the Organisation of African Unity. It was included in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. The principle was elaborated in the following terms:

‘All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(a) States are juridically equal,

(b) Each State enjoys the rights inherent in full sovereignty,

(c) Each State has the duty to respect the personality of other States,

(d) The territorial integrity and political independence of the State are inviolable;

(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.’

1. As in some of the arguments advanced in relation to certain aspects of the immunity of states from the jurisdiction of foreign courts: see § 109.

2. See 8th ed of this vol., §§ 116a, 116b and 116e: the matter will be treated in the projected vol III of this work. See also § 575, as to voting procedures at international conferences.

An earlier example of permanent membership of an international organ occurred at the end of the First World War when the special importance of Great Britain, France, Italy, the USA and Japan, who were described in the Treaties of Peace as the ‘Principal Allied and Associated Powers’, was recognised by Art 4 of the Covenant of the League in the composition of the Council, whereon Great Britain, France, Italy, and Japan (the USA having abstained from joining the League of Nations) acquired permanent seats.

Other, less formally established, groupings of the more politically and economically powerful states include the so-called ‘Economic Summit Seven’, comprising the USA, Canada, Federal Republic of Germany, France, Italy, Japan, the UK, and the USA – whose leaders meet periodically to discuss mainly global economic matters.

For a critical examination of this term see Kelsen, Yale LJ, 53 (1944), pp 207–20.

4. Article 6 (UNTS, 119, p 49). See also Art 4 of the Montevideo Convention on the Rights and Duties of States 1933 (AJ, 28 (1934), Suppl, p 75), and the Act of Chapultepec adopted in March 1945 by the Inter-American Conference on War and Peace, which laid down in simple language that ‘all sovereign States are juridically equal among themselves’: AJ, 39 (1945), p 110.

5. Article III.1; ILM, 2 (1963), p 766.


7. Article 5 of the ILC’s Draft Declaration on Rights and Duties of States provides that ‘every State has the right to equality in law with every other State’: YBILC (1949), p 288. See also Fitzmaurice, Annuaire: Livre du Centenaire 1873–1973 (1973), p 230. The ‘New International Economic Order’ (see § 106) is also based on the sovereign equality of states.

§ 108 Equality of States and International Legislation

The legal equality of states as international persons has a number of important consequences.

1. The first is that, whenever a question arises which has to be settled by consent, every state has a right to a vote, but, unless it has agreed otherwise, to one vote only.

2. The second consequence is that legally the vote of the weakest and smallest state has, unless otherwise agreed by it, a vote just as the largest and most powerful has. Any alteration of international law by treaty has legal validity for the signatory states and those only who later on accede expressly or are bound by virtue of the treaty’s provisions becoming customary law. Accordingly, one result of state equality – or, as some will prefer, of state sovereignty – in the international sphere is that, in the absence of prior agreement by treaty, international law as at present constitutes knows of no legislative process in the proper sense of the term, in the immediate imposition of legally binding rules upon a dissenting state or minority of states.

§ 109 Equality of States and Immunity from Jurisdiction

It is often said that a third consequence of state equality is that – according to the rule juric non habet imperium – no state can claim jurisdiction over another. The jurisdictional immunity of foreign states has often also been variously – and often

1. The principle of non-intervention has also been ‘presented as a corollary of the principle of the sovereign equality of States: Military and Paramilitary Activities Case, ICJ Rep (1986), at p 106. Similarly the principle of non-discrimination: see § 114, n 1.

2. See § 32; and § 757.

3. See § 11, n 12, and particularly § 10, nn 30–32 as regards the possibility of so-called ‘instant’

4. Assuming that the foreign state and its government have been duly recognised by the state in whose courts the proceedings are being taken: see § 47, n 6, and note in particular Wulfsohn v Russian Socialist Republic, cited there (immunity granted to an unrecognised but de facto government). Many of the cases cited at §§ 38–56, are relevant to this section.


simultaneously3 – deduced not only from the principle of equality but also from the principles of independence and of dignity of states. It is doubtful whether any of these considerations supplies a satisfactory basis for the doctrine of immunity. There is no obvious impairment of the rights of equality, or independence, or dignity of a state if it is subjected to ordinary judicial processes within the territory of a foreign state – in particular if that state, as appears to be the tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it.4 The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection.

However, the practice of states over a long period has established that foreign states enjoy a degree of immunity from the jurisdiction of the courts of another state. This practice has consisted primarily of the application of the internal laws of states by judicial decisions, taking into account, in some states, communications made to the courts by the executive branch of government.5 Consequently the decisions reached have varied in points of detail, and sometimes in substance,6 according to the laws of the different states concerned. Despite


Many cases on sovereign immunity are reported in the successive volumes of the AD and ILR, especially vols 63–65 which are devoted to this subject.

See also, as to public ships engaged in commerce, § 565.


See eg in the UK, the Crown Proceedings Act 1947. There is room for the view that a state which commits a tort or a breach of contract in the territory of another state and claims the right to escape legal liability by reference to the doctrine of immunity in effect impairs the independence of that state as expressed in the normal functioning of its judicial institutions. See also the support given by the Supreme Court of the United States in Larson v Domestic and Foreign Corporps (1949), 337 US 682, 703, to the view that 'the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited whenever possible'.

See § 460.

As regards the application of the rule of absolute immunity or the rule of restrictive immunity whereby immunity is not granted for acts later gestion: see § 110.

Before the question of immunity can arise it must first be established that the court would have jurisdiction over the defendant, both as a matter of its substantive rules as to jurisdiction (apart from questions of immunity) and as a matter of its procedural rules relating to service of process. These rules also differ from state to state, and may therefore also lead to different results in different states. As to the position in the UK regarding service under the State Immunity Act 1978, see s 12; and also Westminster City v Government of the Islamic Republic of Iran [1986] 1 WLR 979. For the USA, the Foreign Sovereign Immunities Act 1976 contains complex provisions governing the jurisdiction of US courts, including so-called 'long arm' jurisdiction based on activities conducted in or having effects in the USA: see § 139, n 42; Delaune, AJ, 74 (1980), pp 640–55; Carey v National Oil Corp and Libyan Arab Republic, ILM, 17 (1978), p 1180, AJ, 73 (1979), p 694; Upton v Empire of Iran, ILM, 18 (1979), p 103; East European International Sales Corporation v Terra, IL, 18 (1979), p 977; Tobs P Gonzalez Corp v Consejo Nacional de Produccion de Costa Rica, AJ, 74 (1980), p 939; Chicago Bridge & Iron Co v Islamic Republic of Iran, ILM, 19 (1982), p 1436. For decisions of Swiss courts denying, on grounds of want of jurisdiction rather than immunity, the right to attach a foreign state's assets, see Kingdom of Greece v Banque Julius Bari et Cie, ILR, 23 (1956), p 195; Socialist People's Libyan Arab Jamahiriya v Libyan American Oil Co, ILM, 20 (1981), p 154.

The Art 15 of the European Convention on State Immunity 1972, s 1604 of the Foreign Sovereign Immunities Act 1976 of the USA and s 11 of the State Immunity Act 1978 of the UK all prescribe a general rule of immunity to which there are specified exceptions within which proceedings may be brought against the foreign state. As to the practice in other countries, a number of works cited at n 2, contains full summaries; and also §§ 110, n 8, and 110, n 12.


Apart from provisions dealing with the circumstances in which there is no immunity from jurisdiction (see § 110) the Convention also lays down certain procedural rules to be followed in proceedings against a foreign state (Arts 16–19), and provides certain obligations for states to give effect to judgments given against them, although still precluding measures of execution or preventive measures against state property (Arts 20–23). There is also an optional provision for states to declare that their courts may exercise jurisdiction against foreign states even in cases not covered by Arts 1–13 (Arts 24–26). Certain general provisions include savings as regards such matters as proceedings concerning social security, customs duties, taxes or penalties (Art 29), ships (Art 30), visiting forces (Art 31) and diplomatic and consular immunities (Art 32). There is an optional Additional Protocol establishing procedures for the settlement of disputes arising from the application of the Convention.

Austria, Belgium, Cyprus, Federal Republic of Germany, Luxembourg, the Netherlands, Switzerland and the UK, Portugal has signed but not ratified the Convention. The Additional Protocol to the Convention had, by the same date, been ratified by Austria, Belgium, Cyprus, Luxembourg, the Netherlands and Switzerland; and signed, but not ratified, by the Federal Republic of Germany and Portugal.
New International Economic Order were adopted. Both instruments are concerned primarily with economic matters, but their influence is wider and in a number of fields affects the legal position of states as members of the international community. The Declaration states that the new international economic order is to be based on 'equity, sovereign equality, interdependence, common interest and cooperation among all States'. It is to be founded on full respect for certain principles, including the 'sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States', and 'full permanent sovereignty of every State over its natural resources and all economic activities'. Both the Declaration and the Programme of Action envisaged the later adoption of a Charter of Economic Rights and Duties of States to be an effective instrument towards the establishment of the 'new system of international economic relations based on equity, sovereign equality, and interdependence of the interests of developed and developing countries'.

That Charter was adopted by the General Assembly later in 1974, with the 'fundamental purpose' of promoting the establishment of the new international economic order. Chapter I states that the economic as well as political and other relations among states shall be governed, inter alia, by the following principles: sovereignty, territorial integrity and political independence of states; sovereign equality of all states; non-aggression; non-intervention; mutual and equitable benefit; peaceful coexistence; equal rights and self-determination of peoples; peaceful settlement of disputes; remedies of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development; fulfilment in good faith of international obligations; respect for human rights and fundamental freedoms; no attempt to seek hegemony and spheres of influence; promotion of international social justice; international cooperation for development; and free access to and from the sea by land-locked countries within the framework of the above principles.

Chapter II sets out the economic rights and duties of states. Every state is said to have the right to choose its economic system as well as its political, social and cultural system (Article 1; see also Article 7); every state has and shall freely exercise full permanent sovereignty over its wealth, natural resources and economic activities (Article 2); every state has the right to engage in international trade and other forms of economic cooperation (Article 4), to associate in organisations of primary commodity producers (Article 5) and to participate in sub-regional, regional and inter-regional cooperation in pursuit of their economic and social development (Article 12); all states are juridically equal, giving them, as equal members of the international community, the right to participate, fully and effectively, in the international decision-making process in the solution of world economic, financial and monetary problems (Article 10); and all states have various other rights and duties which further the development of international trade, the improvement of international economic relations, the spread of the benefits of new technology, and the promotion of economic and social progress throughout the world, particularly for the benefit of developing countries. The emphasis throughout these provisions of the Charter is on the rights of the developing states and the duties of the developed states to assist them, in some respects by discriminating in their favour. Chapter III states that the seabed and ocean floor and the subsoil thereof, beyond the limits of national
The right to fair compensation in accordance with international law is a necessary part of the assertion of an unfettered right to expropriate the assets of those who are working those resources, does not encourage the development of those resources and the necessary investment from other countries than on the assertion of 'rights' which tend to have the opposite effect. Thus emphasis on the control (or instruments represent (save insofar as they restate existing rules of international law) the balanced expansion of the world economy (Article 31), promotes the use by any state of economic, political or any other type of pressure to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights (Article 32) and reaffirms that the Charter is not to be construed as impairing or derogating from the provisions of the Charter of the United Nations or actions taken in pursuance thereof (Article 33). Provision was also made for effective consideration of the implementation of the provisions of the Charter (Article 34), a task entrusted in 1975 to the Economic and Social Council of the United Nations.

The legal effect of these three principal instruments, which lay the foundation of the 'new international economic order', is uncertain. In form they are resolutions of the General Assembly and therefore do not directly establish legal rights and obligations for all states, although in many of its provisions the Charter uses ostensibly binding treaty language. The Declaration and Programme of Action were adopted without a vote but subject to formally expressed dissent on a number of important points by some states; the Charter was adopted by 120 votes in favour, six against, with ten abstentions, those 16 non-affirmative votes representing developed states which would be directly affected by many of the provisions of the Charter. It seems probable that at the present time the three instruments represent (save insofar as they restate existing rules of international law) formally expressed aspirations of the international community rather than legally binding rights and obligations. While improvements in the economic conditions of developing countries are desirable, their realisation is dependent more on the existence of an orderly and acceptable framework which will encourage the necessary investment from other countries than on the assertion of 'rights' which tend to have the opposite effect. Thus emphasis on the control (or sovereignty) of states over their resources, if carried to the extreme of an assertion of an unfettered right to expropriate the assets of those who are working those resources, does not encourage the development of those resources so as to assist the economic advancement of the state whose resources they are; the right to fair compensation in accordance with international law is a necessary part of the balance. So too the 'right to development' requires, for its counterpart, proper provision to protect the interests of donors of aid to developing countries and to provide investment guarantees for overseas investors.

EQUITY OF STATES IN INTERNATIONAL LAW


§ 107 Equality an inference from the basis of international law Since international law is based on the common consent of states as sovereign communities, the member states of the international community are equal to each other as subjects of international law. States are by their nature certainly not equal as regards power, territory and the like. But as members of the community of nations they are, in principle, equal, whatever differences between them may otherwise exist. This is a consequence of their sovereignty in the international sphere. Although the abstract principle of state equality is open to certain

See § 330.
13 For voting details see ILM, 14 (1975), pp 263–5. For the UK's reasons for voting against the Charter, see Conn 5907, pp 81–4.
14 See § 407.
on a statutory basis by a number of countries, including the United Kingdom in the State Immunity Act 1978, and the United States of America in the Foreign Sovereign Immunities Act 1976. The general rule that states are immune from the jurisdiction of foreign courts is also confirmed in the draft Articles on Jurisdictional Immunities of States and their Property, provisionally adopted by the International Law Commission in 1986. Immunity from jurisdiction is invoked primarily in proceedings in which a foreign state or government is in the position of defendant. Other defendants may also benefit from state immunity. Thus a provincial authority (to be distinguished from a member state of a federation) may sometimes be regarded as in effect part of the government of a state so as to partake of its immunity.


For the recognition and enforcement of judgments given abroad against states other than the UK, see Civil Jurisdiction and Judgments Act 1982, s 31.

See generally as to the former rules of English law, Dicey, Conflict of Laws (9th ed, 1973), Rule 19; Halsbury, Current Legal Problems, 8 (1955), pp 1–23; Dunbars, Hag R, 132 (1971), pp 258–351; Johnson, Aust YBIL, 6 (1974–75), pp 1–51. For an early assertion of the immunity of foreign sovereigns in English law, see De Haber v The Queen of Portugal (1851) 17 QB 171. Other leading English cases, many of which are still relevant even after the enactment of the State Immunity Act 1978, are cited in the following pages:


For State Department regulations concerning service on foreign states, see ILM, 15 (1976), p 159; and ibid, p 1437, for the text from a letter from the Legal Adviser to the State Department on how the Department will in future treat questions of state immunity; and ILM 18 (1979), p 1177 for a State Department memorandum giving guidance on service of process on foreign states. But see New England Merchants National Bank v Iran Power and Transmission Co, AJ, 75 (1981), p 374, allowing service by telex in the exceptional circumstances of US-Iran relations at the time; and comment by Cher, Harv JL, 20 (1981), pp 775–84. But of the somewhat different conclusions reached by an English court in broadly analogous circumstances in Westminster City Council v Government of the Islamic Republic of Iran [1986] 3 WLR 979. One of the major procedural changes made by the Foreign Sovereign Immunities Act 1976 is that after its entry into force (19 January 1977) questions of entitlement to immunity are determined by the courts and not by the State Department, whose former practice of issuing ‘suggestions’ of immunity, which were generally treated as binding on the courts, has now been discontinued. Despite this change, however, the State Department still, from time to time, makes its views known to the courts, either in response to requests from the courts or by filing an amicus curiae brief. See also AJ, 81 (1987), pp 643–6; The Act permits suits by alien plaintiffs against foreign states: Verlinden BV v Central Bank of Nigeria, 103 S Ct 1962, ILM, 22 (1983), p 647.


14 The provisions of the European Convention on State Immunity are in terms of ‘a Contracting State’ being (or not being) entitled to immunity from the jurisdiction: that term is not defined, except by the exclusion of separate legal entities (Art 27: see p 348). The draft articles provisionally adopted by the ILC in 1986 (YBILC, 1986, ii, pt 2, p 8) provide that the term ‘State’ comprehends (a) the state and its various organs of government, (b) political subdivisions of the state, (c) the sovereign or any public act or session in the exercise of the functions of the state, (d) public or commercial bodies, or agencies or instrumentalities of the state, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the state, and (d) representatives of the state acting in that capacity: Art 3.1. See also Art 7.3, to the effect that proceedings instituted against any of the above are to be considered as having been instituted against the state.

For the UK s 14(1) of the State Immunity Act 1978 provides that the immunities from jurisdiction provided for in Part I of the Act ‘apply to any foreign or Commonwealth State other than the United Kingdom, and references to a State include references to (a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department or agency of the government of the State which is distinct from the executive organs of the government of the State and capable of suing or being sued: as to those separate entities, see n 23. In the USA the Foreign Sovereign Immunities Act 1976 refers to ‘a foreign State’ as entitled (or not to) immunity, but by way of a definition only provides in 1602(a) that the term ‘includes a political subdivision of a foreign State or an agency or instrumentality of a foreign State as defined in subsection (b)’ (as to which, see n 23).

See further § 451, as to the immunity of Heads of State. See also, as to the identification of ‘sovereigns’ for purposes of sovereign immunity, Vargas, Harv JL, 26 (1985), pp 103–54.

15 As to which see § 75, n 12. See also § 82, n 4, as to immunity from suit of states under protection; § 84, n 11 as to colonies; and § 95, n 9, para 3, as to territories under trusteeship. As to the particular, and in some respects anomalous, position of Berlin, with the members of the Allied Kommandatura, Berlin, being part of the Government of the continuing State of ‘Germany’, see Traunvik v Gordon Lennox [1985] 2 All ER 368; and Heidelmeyer, ZOV, 46 (1986), pp 519–36; and see generally § 40, n 35ff.

16 Swiss–Israel Trade Bank v Government of Salta [1972] 1 Lloyd’s Rep 497 (granting immunity to a provincial government in Argentina, which the court treated as a unitary and not a federal state). It is a question to be decided in each case whether the authority in question is sufficiently closely connected with the government of the state to justify the conclusion that the proceedings against the authority are tantamount to proceedings against the government. In Schneider v City of Rome, AD, 15 (1948), p 131, and Roatze and Matter v Banque d’Espagne, AD (1935–37), No 67, the City of Rome and the Basque Province of Spain, respectively, were held not entitled to immunity.
Similarly a person or body acting on behalf of a state, as an agent or official, may in some circumstances be entitled to claim state immunity when sued in a foreign court in respect of his activities on behalf of the state, since in such circumstances an action against that person can be regarded as impeding the state. So too semi-governmental agencies or corporations may, within limits which are not too clearly defined, be regarded as in effect part of the apparatus of government of the state so as to be entitled to state immunity. In some cases the matter may be regulated by an agreement between the states concerned. But in the absence of any such agreement entitlement to immunity will primarily depend upon an organ of the state or a department of government will, especially if it has no separate legal personality, usually enjoy immunity, its possession of a separate legal personality not necessarily preclude such a conclusion if it may nevertheless be regarded as so closely linked to the state as to constitute a department of state. The possession of separate legal personality does, however, tend against entitlement to immunity, suggesting that the entity concerned is autonomous and cannot really be regarded as part of the organisation of the state. In those jurisdictions which refuse immunity in matters of re gestion, the possession of a separate legal personality may indicate that the entity was created to act and was acting in re gestion, or alternatively the finding that the matters in issue are in re gestion can lead to a rejection of a plea of immunity irrespective of the position of the semi-governmental or corporate body.

Under Art 27 of the European Convention on State Immunity 1972 a political sub-division of a state which is both distinct from the state and capable of suing and being sued may be sued except in respect of acts performed by it in the exercise of sovereign authority. For the UK Art 14 of the Law of State Immunity Act 1978 is to similar effect. For the USA a 160(a) of the Foreign Sovereign Immunities Act 1976 includes political sub-divisions in the definition of "foreign State" so that they enjoy immunity in the same circumstances as a state. See in 14, to the ILC’s draft articles 1986.

Inequality of states in international law

Corps (1971) 2 All ER 593; Matter of Sedco Inc, ILM, 21 (1982), p 318 (as to Petróleos Mexicanos, the national oil company of Mexico); First National City Bank v Banco para el Comercio Exterior de Cuba, 83 S Ct 2591, ILR, 22 (1983), 840 (as to the Cuban credit institution for foreign trade); Dayton v Czechoslovak Socialist Republic, AJ, 82 (1988), p 585 (as to a Czech state trading company); G Tredex Trading Corp v Central Bank of Nigeria (1972) QB 529, holding the Central Bank not to be a department of the Government of Nigeria; Swiss-Israel Trade Bank v Government of Salta (1972) 1 Lloyd’s Rep 487; Casiraghi Ltd v Rolimpes (1979) AC 351 (as to the Polish State sugar marketing enterprise); Qureshi v USSR, ILM, 20 (1981), p 1060 (as to the Soviet Trade Representation in Pakistan); O’Connell Machinery Co v MVAmerica, AJ, 78 (1984), p 897 (as to a shipping line indirectly owned by the Italian Government.

the nature of the entity’s relationship with the state, or even despite a finding that the entity is a public agency of the state. 22

Article 27 of the European Convention on State Immunity 1972 provides that ‘any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions’ is not included in the definition of ‘Contracting State’. Such a legal entity may accordingly be sued in the courts of another contracting state in the same manner as a private person, except in respect of acts performed by it in the exercise of sovereign authority; and in any event the entity may be sued if the courts would in corresponding circumstances have had jurisdiction if the proceedings had been instituted against a contracting state. 23

Even if the foreign state is not itself named as defendant, immunity will also be granted to prevent proceedings which indirectly implicate the foreign state, where the state would have enjoyed immunity had the proceedings been brought against it. 24 This may occur, for instance, where proceedings are brought against or affecting property owned by or in the possession or control of a foreign state (such as a suit in rem brought against a vessel belonging to the state). 25


23 The ILC’s draft Articles on Jurisdictional Immunities of States and their Property (YBILC 1986), ii, p 2, p 8 provide for ‘agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the Sovereign authority of the State’ to be comprised within the meaning of the term ‘State’ for the purpose of those articles: Art 3.1(c). See also Art 7.3.

24 By s 6(4) of the State Immunity Act 1978 a court in the UK may not entertain proceedings against a person other than a state if they relate to property which is in the possession or control of a State or in which a state ‘claims an interest’ (which claim is admitted or supported by prima facie evidence), provided that the state would have been immune had the proceedings been brought against it. In the USA the Foreign Sovereign Immunities Act 1976 applies only to affect the laws in the matter in relation to certain suits in admiralty: see s 1605(b).

25 The ILC’s draft Articles on the Jurisdictional Immunities of States and their Property (YBILC 1986), ii, p 2, p 8 provide that proceedings are to be considered as having been brought against a state, whether or not it is named as a party, if the proceedings in effect seek to compel the state either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect its property, rights, interests or activities, or if the proceedings are designed to deprive the state of its property or of the use of its property in possession or control: Art 7.2 and 3.

26 The Exchange v McDuff (1812) 7 Cranch 116, Scott, Cases, 300; De Haber v The Queen of Portugal (1841), 17 QB 171; Vanasse v Knupp (1878) LR 9 Ch D 351; The Constitution (1879) 4 PD 39; The Pavlement Beige (1879) 4 PD 129, (1880) 5 PD 197; The Cristina (1938) AC 485; The Amazing Kreskin, No 20 (1939), AC 266; Esta Maritima Brasileira v S S Canada a Conqueror (1962) 34 DLK 2d 628; AJ 57 (1963), p 440; Spact v Crowe, IL, 13 (1974), p 436 (see also ibid, p 120, and Leigh, AJ, 68 (1974), pp 280–9). See also below § 110, n 6. US courts have attached great weight to the property being actually in the possession of the foreign state, not being merely claimed by it. Thus a vessel owned by a state, but chartered to a private company, has been held not entitled to immunity in proceedings arising out of its use by the charterer: Republic of Mexico v Hoffman (1945), 324 US 30; see also The Navemar (1938), 303 US 68. Under the Foreign Sovereign Immunities Act 1976 ships owned by foreign states are immune from arrest, but the in rem jurisdiction over the vessel’s owner which is thus precluded is replaced by an in personam jurisdiction limited to the value of the vessel and cargo: see § 1605(b), and Velador v L/P/G Benghazi, IL, 21 (1982), p 621. In The Annette (1919) 105 the foreign state involved claimed only possession of the vessel, not being at the time in possession, and a claim to immunity was rejected. In I Congresso del Partito (1983) AC 244 it was held that international law did not entitle a state to immunity where an action in rem was brought against a private company, not a state, as a result of which the claims arose was itself a private commercial act, rather than a sovereign act. As to questions of sovereign immunity which arose over the requisition of ships during the Spanish Civil War, see Pearse, AJ, 35 (1941), pp 263–81.

27 See also ibid, p 120, and Leigh, AJ, 68 (1974), pp 280–9. See also below § 110, n 6. US courts have attached great weight to the property being actually in the possession of the foreign state, not being merely claimed by it. Thus a vessel owned by a state, but chartered to a private company, has been held not entitled to immunity in proceedings arising out of its use by the charterer: Republic of Mexico v Hoffman (1945), 324 US 30; see also The Navemar (1938), 303 US 68. Under the Foreign Sovereign Immunities Act 1976 ships owned by foreign states are immune from arrest, but the in rem jurisdiction over the vessel’s owner which is thus precluded is replaced by an in personam jurisdiction limited to the value of the vessel and cargo: see § 1605(b), and Velador v L/P/G Benghazi, IL, 21 (1982), p 621. In The Annette (1919) 105 the foreign state involved claimed only possession of the vessel, not being at the time in possession, and a claim to immunity was rejected. In I Congresso del Partito (1983) AC 244 it was held that international law did not entitle a state to immunity where an action in rem was brought against an ordinary trading ship owned by it, if, in the light of the whole context, the acts as a result of which the claims arose was itself a private commercial act, rather than a sovereign act. As to questions of sovereign immunity which arose over the requisition of ships during the Spanish Civil War, see Pearse, AJ, 35 (1941), pp 263–81.

28 Position of the states in international law
Execution or other forms of attachment are sometimes permitted when the property is not dedicated to public purposes of the state and the proceedings relate to state acts *jure gestionis*. The European Convention on State Immunity 1972 thus, under optional provisions of the Convention, permits execution against state property to enforce a final judgment in proceedings brought against the state in circumstances where the Convention provides for no immunity from jurisdiction, so long as the proceedings related to an industrial or commercial activity in which the state was engaged in the same manner as a private person, and the property in question was used exclusively in connection with such an activity.

A state, although in principle entitled to immunity, may waive its immunity. It may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of a particular dispute.
which has already arisen, or by consent given in advance in a contract or international agreement. Where a state has agreed in a contract to submit disputes arising out of the contract to arbitration, courts will usually reject a claim by the state to immunity either in the arbitration proceedings or in proceedings to enforce the arbitration award against it. A state may also be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case. Failure by a state to appear in proceedings against it need not prevent the court from being required to give effect to the state’s immunity if...
the circumstances are such that the state is entitled to immunity. 41 A state is not regarded as having waived its immunity if it appears in proceedings against it in order to assert its immunity, or to assert an interest in property which is the subject of proceedings to which it is not a party and where it would have had immunity if the proceedings had been brought against it. 42 Where a foreign state has waived its immunity it is subject to the ordinary incidents of procedure. 43 Where it has itself instituted proceedings, the foreign state is taken to have waived any immunity in respect of a counter-claim which arises out of the same matter in dispute or which concerns a matter in respect of which it would not have been entitled to immunity if it had been sued in separate proceedings. 44 In some cases counter-claims arising out of largely separate circumstances from those giving rise to the principal proceedings have been allowed. 45 The submission to the jurisdiction in any particular proceedings is usually also considered to extend to any appeal. 46

§ 110 Exceptions to jurisdictional immunity Although at one time the immunity of a foreign state from the jurisdiction of national courts was regarded by some states, particularly the United Kingdom and the United States of America, as virtually absolute, certain exceptions have been recognized whereby a foreign state's interests could lawfully be affected by judicial proceedings were widely acknowledged, for example where they related to the administration of a trust or similar fund in which a foreign state might have an interest, or to real property owned by the foreign state in the territory of the state of the forum (unless such property was itself in a privileged position, being, for example, diplomatic premises). 3

41 European Convention on State Immunity 1972, Art 15; and for the UK, State Immunity Act 1978, s 12(2). See also Art 9.3 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property (YBILC 1986), ii, pt 2, p 8, providing that failure by a state to enter an appearance shall not be considered as consent to the exercise of jurisdiction against it; and Art 25, as to default judgments against a state. Note however, in a different sense, the circular of 20 December 1973 issued by the Federal German Ministry of Foreign Affairs, ILM, 13 (1974), p 217.

42 European Convention on State Immunity 1972, Arts 3.2 and 13; Art 9.2 of the ILC's draft articles, and also Art 14.2, loc cit in n 41; and for the UK, the State Immunity Act 1978, s 2(4). See also para 4 of the Circular issued by the Federal German Ministry of Foreign Affairs, cited in note 41 above.

43 Thus, for instance, courts have granted against a foreign state an order for security for costs (Republic of Costa Rica v Erlanger (1876) 3 ChD 62), an order for payment of costs (Queen of Holland v Drucker (1928) Ch 877) and an order for discovery (Proioleanul National de Cuba v British American Tobacco Co (1925) LR 2 Eq 659; Republic of Peru v Wegelin (1875) LR 20 Eq 140).

44 It has been held by an American court that litigation concerning the immunity of a vessel owned by a foreign state with which diplomatic relations have been broken off is suspended: Dade Drydock Corp v M/T Mar Caribe (1961), ILM, 32, p 70. An American court has also held that the existence of a state of war does not deprive the opposing belligerent of the jurisdictional immunity prescribed by the Foreign Sovereign Immunities Act 1976 of the USA; and see Kalamazoo Spice Extraction Co v Provisional Military Government of Socialist Ethiopia, ILM, 24 (1985), p 127; Alberti v Empresa Nicaraguense de la Carne, ILM, 22 (1983), p 835; De Sanchez v Banco Central de Nicaragua, AJ, 80 (1986), p 658; West v Multibanco Comercio, AJ, 81 (1987), p 660. More widely, the US Supreme Court has held that the Alien Tort Claims Act (enacted in 1789), which gives US courts jurisdiction over civil actions by aliens for a tort only, does not give jurisdiction over a foreign state, the exclusive basis for which lies on the Foreign Sovereign Immunities Act: Argentine Republic v Amerada Hess Shipping Corp (1989), ILR, 81, p 658 (see Janney, Harv ILJ, 31 (1990), pp 368-76 and, on earlier stages of this case, Montgomery, Harv ILJ, 29 (1988), pp 215-22); Kirgis, AJ, 82 (1982), pp 323-30. See generally on the Alien Tort Claims Act at § 19, n 3.

45 Even in a strictly related counter-claim the defendant has been held unable to recover any excess over the amount for which he is being sued by the foreign state (USSR v Belgaw (1925) 42 LR 21), but see also Alkal Karmim v RNS International Sales Corp (1960), ILM, 31, p 247. See also United States v National City Bank of New York, AD, 8 (1935-37), No 82. As to the limits of set-off, see United States v New York Trust Co, AD, 13 (1946), No 12. As to counter-claims, see Belgium v EAG de Batisse, AD, 1, 1919-22, No 85; Republic of China v Pang Tsu Moon (1950) 105 P Surnp 411; National City Bank of Property (YBILC 1986), ii, pt 2, p 8. As to the extent of the jurisdictional immunity prescribed by the Foreign Sovereign Immunities Act, see Argentina Republic v Amerada Hess Shipping Corp (1989), ILR, 81, p 658 (see Janney, Harv ILJ, 31 (1990), pp 368-76 and, on earlier stages of this case, Montgomery, Harv ILJ, 29 (1988), pp 215-22); Kirgis, AJ, 82 (1982), pp 323-30. See generally on the Alien Tort Claims Act at § 19, n 3.

46 As eg, as to the UK, State Immunity Act 1978, s 26(6).
certain other cases, such as any proceedings in rem against property in which a foreign state claimed an interest, the mere assertion, unsubstantiated by proof, by that state of its interest was not sufficient to oust the jurisdiction of the court. So too with regard to loans contracted by governments abroad, the predominant view appears to be that the principle of immunity from jurisdiction does not entail the exemption of such governmental transactions from the operation of the law of the country where they were made. Special arrangements have also been made by treaty for withholding, as between the contracting parties, jurisdictional immunity from state-owned ships engaged in commerce. As regards proceedings made by treaty of the insignia of Poland: AD, 4 (1927–28), No 104. See also Rosignol v State of Czechoslovakia, ILR, 16 (1949), No 40, and Robine v Consul of Great Britain, ILR, 17 (1950), No 38, for the grant of immunity by French courts in proceedings relating to real property, and similarly Mahé v Agent Judiciaire du Trésor Français (1965), ILR, 40, p 80; Municipality of the City and County of St John, Logan and Clayton v Fraser-Brace Corp, ILR, 26 (1958–59), p 165.

For denial of immunity in proceedings relating to diplomatic premises where no interference with the mission's functions would result, see Jurisdiction over Yugoslav Military Mission (1962), ILR, 38, p 162; and in proceedings relating to the operation of state-owned and state-operated ships used for commercial purposes, or relating to the carriage of cargo on board such ships: Art 18.

Thus s 1605(a)(5) of the US Foreign Sovereign Immunities Act denies immunity in cases in which damages are sought against a foreign state for personal injury or death occurring in the USA and caused by the tortious act or omission of the foreign state or its officials. See Law v Republic of China, ILR, 29 (1990), p 192. See also, for the UK, s 5 of the State Immunity Act 1978; European Convention on State Immunity 1972, Art 11; ILC's draft Articles on State Immunity (1986), Art 13.


In 1952, in the so-called 'Tate letter', the Department of State of the US announced, as a matter of its future policy, that it would no longer favour claims to immunity on the part of foreign governments in respect of their commercial transactions: for the text see Whitman, Digest 6, pp 569–71. See Bishop in AJ, 47 (1953), pp 93–106, and Drachter, AJ, 58 (1960), pp 790–802. Thereafter, if asked to provide for use in court a 'suggestion of immunity' (as to which practice, and the binding character of the suggestion, see § 460) the State Department acted in accordance with the policy laid down in the Tate letter. If no request to the State Department for a 'suggestion of immunity' was made by the parties the courts decided for themselves whether the foreign state was entitled to immunity, and in several cases held that the foreign state was not entitled to such immunity. See also the survey of the position by Lauterpacht in his The Legal Aspects of Abstainences and Transports (1964), ILR, 35, p 110; Ocean Transport Co v Government of the Republic of Ivory Coast, AJ, 62 (1968), p 197.

The matter is now regulated by statute, s 1605(a)(2) of the Foreign Sovereign Immunities Act.
increasing hesitation and criticisms,10 in the United Kingdom until the enactment of the State Immunity Act 1978.11 Other states12 which have assumed

1976 providing that a foreign state is not immune in any case 'in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States'. After the entry into force of the Act the State Department discontinued the practice of making 'suggestions' of immunity, the matter being henceforth for decision by the courts on the basis of the Act. In applying the 'commercial activity' test US courts look to the nature of the course of conduct or particular transaction, not to its purpose.


The Act was based on the European Convention on State Immunity 1972, and its enactment enabled the UK to ratify the Convention. The Act entered into force on 22 November 1976, in accordance with s 2(3). It does not apply to proceedings in respect of matters occurring before that date: s 2(3)

The Act, in s 2-11, lists various exceptions to the general immunity from jurisdiction enjoyed by foreign states, covering - submission to the jurisdiction; commercial transactions and contracts to be performed in the UK; contracts of employment; personal injuries and damage to property; ownership, possession and use of property; patents, trademarks, etc; membership of bodies corporate, etc; arbitrations; ships used for commercial purposes; and value added tax, customs duties, etc; 'basic commercial activity' exemption is in s 3(1), providing: 'A State is not immune as respects proceedings relating to (a) a commercial transaction entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed by wholly or partly commercial transactions defined in s 3(3). Note an important series of judgments in the English courts in 1987-89 in which creditors of the International Tin Council sued the UK and the 22 other member states of the Council in respect of debts owed by the Council. The claim by the member states (other than the UK) to sovereign immunity (notwithstanding the Council's quasi-commercial nature) was not decided at the highest level since the House of Lords held the Council to have separate legal personality and to be, alone, liable on its contracts: see Macaulay Watson & Co Ltd v Department of Trade and Industry [1989] 1 All ER 507.

For summaries of further decisions in a number of states, see Neth YBIL, 10 (1979), pp 35-289; Sinclair, Hg R, 167 (1980), pp 121-34, 146-96; UN Legislative Series, Materials on Jurisdictional Immunities of States and the Property (ST/LEG/SE4/IES B/20) (1982), Lewis, Social and Diplomatic Immunities (2nd ed, 1985), pp 138-56. See also n 4. The Commission of the European Communities was subscribed to the restrictive regime of immunity: Re Aluminium Imports from Eastern Europe [1987] 3 CLMLR 815, 875-6.

10 Italian courts have for long refused to grant immunity to foreign states in respect of their acts jure gestionis, and there have been many decisions to that effect, amongst which see Storili on French Republic, AD, 2 (1923-24), No 66; Persuccetti on Paig & Cassaro, AD, 4 (1927-28), No 247; De Semoenoff on Railway Administration of the Norwegian State, AD, 8 (1935-37), No 32; Government of Bolivia in Italian Association for Aeronautical Exports, AD, 15 (1939), No 4; Le Mercantile on Kingdom of Greece, ILM, 22 (1973), pp 340; Hungarian Paper Republ in Oronti, ILM, 23 (1986), pp 203; Hungarian Papla Institute v Hungarian Institute (Academy) in Rome (1960), ILM, 40, p 59.

As in Italy, Belgian courts have for a long time drawn a distinction between acts jure imperii and those jure gestionis, denying immunity to both a jurisdiction in respect of the latter. Among the many decisions to that effect see Societe Generale v Bernard on France, AD, 4 (1927-28), No 112; Brussel v Republic of Greece, AD, 6 (1931-32), No 85; SA 'Dilemelle et Masavel v Banque Centrale de la Republique de Turquie (1963), ILM, 45, p 85.
A few countries, however, seem still to apply the rule of absolute immunity. Such arrangements include most of those which would be regarded as acts jure gestionis, as well as certain others, such as waiver of immunity, which are generally admitted to permit proceedings against a foreign state. Broadly speaking, and subject to numerous qualifications written in to the various articles, the Convention provides for a foreign state to be subject to the jurisdiction of the courts where the proceedings relate to an obligation of the state which by contract falls to be discharged in the state of the forum (Article 4); where they relate to a contract of employment between the state and an individual when the work has to be performed on the territory of the state of the forum (Article 5); and where they relate to certain matters arising out of the state's participation with private persons in a company, association or other legal entity having its seat, registered office, or principal place of business in the state of the forum (Article 6); where the state has in the state of the forum an agency, or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency, or establishment (Article 7); where the proceedings relate to certain matters concerning patents, trade marks and similar rights (Article 8); where they relate to the state's rights or interest in, or its use or possession of, immovable property situated in the territory of the state (Article 9); where they relate to the state's rights in movable or immovable property arising by way of succession, gifts or bona vacantia (Article 10); and where they relate to personal injury or damage to property, if the facts occasioning the injury or damage occurred in the territory of the state of the forum and if the author of the injury or damage was present there when those facts occurred (Article 11); or where they relate to certain aspects of an agreement by the state to arbitrate a dispute arising out of a civil or commercial matter (Article 12).

The abandonment of the rule of absolute immunity has been confirmed by the International Law Commission, in the draft Articles on Jurisdictional Immunities of States and Their Property, provisionally adopted in 1986. Although they provide that a state enjoys immunity from the jurisdiction of the courts of another state (Article 6), they go on to provide exceptions to this rule. These exceptions relate, broadly speaking and subject to qualifications written in to the various articles, to commercial contracts (Article 11) and also Articles 2.1(b) and (2), contracts of employment (Article 12), personal injuries and damage to
property (Article 13), ownership, possession and use of property (Article 14), patents, trade marks and intellectual or industrial property (Article 15), fiscal matters (Article 16), participation in companies or other collective bodies (Article 17), state-owned or state-operated ships engaged in commercial service (Article 18) and arbitration agreements entered into by the state (Article 19).

Although the distinction between acts jure imperii and those jure gestionis has thus become generally accepted in principle, it is not always easy to overcome certain difficulties in practice in applying that distinction. The borderline between the two categories of act is not clear; and even the enumeration of various classes of acts in respect of which jurisdiction may be exercised over a foreign state (as in the European Convention on State Immunity 1972), although helpful, does not remove all uncertainties. In states where the distinction between acts jure imperii and jure gestionis has adopted, it is not infrequently happens that courts (even in the same country) reach apparently inconsistent conclusions. Acts which have been held to be governmental or sovereign acts justifying a claim to immunity if they are the basis of proceedings against the state have included the exchange by a bank of new currency notes for old, acts of armed forces during a coup (including torture), nationalisation of foreign property, the supply of tobacco for the armed forces; a contract in furtherance of a national interest in the pursuit of a claim to territory; establishing and operating a naval base; a lease of premises for a State Tourist Office; and contracts for the purchase of equipment for a state’s armed forces. On the other hand, acts jure gestionis have been held to include leasing property to be used for diplomatic purposes; operating a hostel for students at a state-owned academy; and entering into a contract for the repair of embassy premises, or for the construction of a railway, or for the purchase of cement even if for the use of armed forces.

§ 111 Equality of states and government action affecting state property

While states thus have considerable immunity from the jurisdiction of the courts of other states, there is a question whether considerations of state equality require that a state must grant any special exemption from the action of its executive authorities affecting the property in its territory in foreign states.

Usually state property in another state will be diplomatic or consular property, or the property of visiting armed forces, or the property of state agencies covered by special agreements. Such property is subject to special and generally accepted rules, or to the provisions of specific agreements. However, a foreign state’s property may extend, for example, to buildings owned for its investment purposes or to provide accommodation for that state’s official visitors, or former diplomatic premises not yet assigned to a new use, or bank accounts in the state’s name and used for purposes ranging from commercial investment to reserves for the state’s currency. While a state must respect such property in its territory belonging to a foreign state, and will no doubt treat it with special considerations of courtesy and prudence, there does not seem to be any general requirement in international law that all such property be granted, just because it is state owned, any special inviolability or other exemption from governmental action by the state in which it is situated. Thus it would seem to be liable to
temporary seizure or to expropriation, may be the subject of orders restricting the foreign state's freedom to deal with the property or requiring it to deal with the property in a certain way, and may be subject to taxation. These and similar respects the local governmental action must not be arbitrary and must comply with whatever requirements may be laid down by international law in relation to private foreign-owned property generally, for example as to compensation in the case of expropriation.

A distinction must, however, be drawn between the absence of any inviolability or exemption for the foreign state from such actions, and the enforcement of such actions against it. In many circumstances, and in many states, action of the kind mentioned above would either require the institution of judicial proceedings, or would offer the foreign state the possibility of having recourse to the courts. This would raise considerations of sovereign immunity generally and of limitations on execution upon state property, and also any procedural or other requirements prescribed by the forum state's laws.

7 It is sometimes said that one state may not levy taxation on another state's property, although it is uncertain whether this is attributable to considerations of the equality and independence of states or to the impropiety of taking any measures of enforcement against a state should it refuse to pay the tax levied. Generally, taxation is not levied on foreign state property devoted to public or governmental purposes, and exemption from taxation on other state property is often granted at least as a matter of courtesy.

In the UK a foreign state is not immune from the jurisdiction of the courts in respect of proceedings relating to its liability for value added tax, any customs or excise duty or agricultural levy, or rates in respect of premises occupied by it for commercial purposes: State Immunity Act 1978, s 11. Such proceedings are, by virtue of s 16(3), the only proceedings relating to taxation to which that Part of the Act applies, with the apparent result that the general rule of immunity prescribed in s 1 is inapplicable to proceedings in relation to liability for other taxes. But note the observations of Dillon LJ in R v Inland Revenue Commissioners, ex parte Camacq Corp [1990] All ER 173, 189-90.

In Municipality of the City and County of St John, Logan and Clayton v Fraser-Brace Overseas Corp property held by a Canadian firm on behalf of the US Government for defence purposes was denied immunity from taxation: ILR, 26 (1958–11), p 163. See also Yin-Tso Hsiang v Toronto, ILR, 17 (1950), No 40, and §§305 and 550(5), as to taxation of diplomatic and consular property. Compare Governo di Italia in Sec v Consejo Nacional de Educacion, AD, 10 (1941–42), No 52, holding tax exemption to be a matter of courtesy only. Exemption from local real property taxes in respect of immovable property used by a foreign government for commercial purposes was denied in County Board of Arlington v Government of German Democratic Republic, ILM, 17 (1978), p 1402, but reversed on appeal in the light of evidence of non-commercial use (1982), ILR, 72, pp 625. See generally Bishop, AJ, 46 (1952), pp 239–58, esp 247–54; Paone, Int'l YBII, 2 (1976), pp 273–84. For an unusual, and unsuccessful, action before the Polish courts against the German Treasury and the City of Berlin for alleged illegal exactions of rates and taxes, see German Immunities in Poland Case, AD (1935–37), No 95. Certain 'taxes' are in fact no more than charges for specific services rendered, and there would seem no justification for exemption of foreign states from such charges. For a refusal to grant the State of New York immunity from federal taxes in respect of the state's activities of a non-governmental character, see New York v United States (1946), and note by Kuhn, AJ, 40 (1946), pp 374–6. See generally Restatement (Third), i, pp 447–52. The European Convention on State Immunity 1972 does not apply to proceedings concerning taxes: Art 29. Article 16 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property would permit immunity to be invested in a state before an otherwise competent court of another state in proceedings which relate to the fiscal obligations for which it may be liable under the law of the state of the forum, such as duties, taxes or other similar charges: YBILC (1986), ii, pt 2, p 8.

8 See § 109, n 30ff.

The right of a state to take action against a foreign state's property in its territory is acknowledged where the two states are at war, or even if they are engaged in a lesser degree of armed conflict or hostilities. There are also examples in state practice of a state taking action against a foreign state's property in other circumstances, usually involving serious tension or differences between the states concerned. The circumstances justifying such action are unclear, as are the permissible limits of the action taken, but blocking the foreign state's assets, a requirement to register such assets, and a prohibition upon financial transactions with the foreign state except under licence are not unusual in this context.

§ 112 State equality and recognition of foreign official acts: 'act of state' A fourth consequence of equality — or independence — of states has become known as the 'act of state' doctrine. This is to the effect that the courts of one state do not, as a rule, question the validity or legality of the official acts of another sovereign state or the official or officially avowed acts of its agents, at any rate

9 See vol II of this work (7th ed).


11 As to US action in blocking Iranian Government property in 1979, see the President's Executive Order 12170 of 14 November 1979, and the consequential regulations: ILM, 18 (1979), p 1549. This order, by virtue of the Doctrine of jus cogens, the only proceedings relating to taxation to which that Part of the Act applies, with the apparent result that the general rule of immunity prescribed in s 1 is inapplicable to proceedings in relation to liability for other taxes. But note the observations of Dillon LJ in R v Inland Revenue Commissioners, ex parte Camacq Corp [1990] All ER 173, 189-90.

12 See generally as to measures of economic coercion against other states, § 129, nn 13, 14.

13 Assuming that the state and its government have been recognised by the state of the forum: see § 47, on 8–11. A member state of a federation may be a state for purposes of the act of state doctrine (Carl Zeiss Stiftung v VEB Carl Zeiss (1968–70), ILB, 61, p 35) as may a protected state (Occidental Petroleum Corp v Batsis Gas & Oil Co (1972), ILR, 57, p 13, Batsis Gas & Oil Co v Hammer [1981] 3 WLR 797) but not a city council (Re Adoption by McElroy [1975], ILR, 66, p 163).

14 See to the rule generally, The Exchange v McFadden (1812) 2 Cranch 116, Scott, Cases, 300; Underhill v Hernandez (1897) 168 US 250, 18 Sup Ct 83; Wulffohn v Russian Socialist Republic (1923) 234 NY 372, 138 NE 24; A M Luther Co v Sagar & Co [1921] 3 KB 532; Russian Commercial and Industrial Bank v Composor d'Escompte (1949) 2 KB 630, and Banque Internationale a Luxembourg, ibid, p 682 (both reversed, but without affecting the principle stated in the texts, [1925] AC 112 and 150); Re Helibert Wagg & Co [1956] Ch 323; Bank Indonesia v Senembah Maatschappii en Tuentsche Bank (1959), ILR, 30, p 28; Pons v Republic of Cuba (1961), ILR, 32, p 10; Banco Nacional de Cuba v Sabbatino (1964) 367 US 398; ILR, 35, p 2; Epoche Reynolds v Ministre des Affaires Etrangeres (1965), ILR, 47, p 53; French v Banco
insofar as those acts involve the exercise of the state's public authority, purport to take effect within the sphere of the latter's own jurisdiction and are not in themselves contrary to international law. The classic statement of the principle was made by the United States Supreme Court in Underhill v Hernandez:

'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of government of another done within its own territory. Redress of grievances by


See also § 378, as to the grant of a state's nationality; and § 380, as to the creation and dissolution of companies.

Where the act which it is sought to put in question is raised in proceedings against a foreign state's officers or against a foreign state itself, the issue will fall to be considered in the light of the applicable rules of sovereign immunity: see §§ 109–10; and Ackhurst, BY, 46 (1972–3), pp 145, 240–44. See also § 148 as to the inability of a person accused of a war crime to plead that his acts were those of his state, for which only the state can be held responsible.

See Alfred Dunhill of London Inc v Republic of Cuba (1976), ILR, 66, p 212, denying the applicability of the rule of law to an act committed by a foreign state in the course of its commercial operations. National American Corp v Federal Republic of Nigeria, ILM, 17 (1978), p 1407; Timberland Lumber Co v Bank of America (1976), ILR, 66, p 270; Butcf Van Bokhelen and Rabh 5A v Grammont Aerospace Corp (1977), ILM, 66, p 311; International Association of Machinists and Aerospace Workers v OPEC (1981), ILR, 66, p 413. Criminal acts by a head of State (such as embezzlement) are not acts of the state but are private acts, with the result that the legality of those acts does not have to be accepted without question in extradition proceedings against him after he has ceased to be Head of State: Perez Jimenez v Aritagueza (1962), ILM, 33, p 153. In such cases the burden of proof is on the State (or former Head of State) to establish that his acts were performed in his public capacity. Republic of the Philippines v Marcos (No 1) (1978), ILM, 81, p 184, decided by the US Court of Appeals for the Second Circuit in the case of Arita (from a different (and divided) decision of the Ninth Circuit Court of Appeals: Republic of the Philippines v Marcos (No 2) (1987), ibid, p 609. On both cases see Meagher, Harv LJ 29 (1988), pp 127–34.

Thus foreign legislation may be questioned in so far as it is alleged to affect property or interests outside the foreign state's territory, and see eg United Bank Ltd v Ecuador (Northern Corp) (1978), ILR, 66, p 511; private international law cases. Hunt v Mobil Oil Corp (1977), ILR, 66, p 246; Allied Bank International v Banco Creditivo Agricola de Cartago, ILM, 24 (1985), p 762; Airline Pilots Association International v TACA International Airlines, AJ, 79 (1985), p 737; IIR v Republic of Chile, ILM, 19 (1980), pp 429, 414. As to the non-recognition of the effects of confiscatory laws on property outside the state's territory see eg Western National Bank v Republic of Peru (1985), ILR, 77, p 350; operation by foreign officials of their state's banking regulations (West v Multibanco Comercier, AJ, 81 (1987), p 660); grant of extradition by another state to the foreign state (see Den Branden v Hendrick, ILR, 69, p 223; Gisler v Procurator-General of the Canton of Bern (1964), ILR, 72, p 597; In the Trial of F E Stenter (1971), ILR, 74, p 478; Mitterrepublik v Draghi and Boos (1974), ILR, 77, p 394; Brasier-Meath v Group Terrorist Case (1977), ILR, 74, p 493). Failure to act may involve an act of state: D'Angelo v Petroles 6

6 168 US 250, 252. The language reflects that used earlier by the House of Lords in Duke of Brunswick v King of Hanover (1848) 2 HL Cas 1, 17.

7 See n 6.

8 Hunt v Mobil Oil Corp (1977), ILR, 66, p 288 (motives for nationalisation); Occidental of Umm al Quwayn v A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colosseria (1978), ILR, 66, p 329 (title to oil dependent on sovereignty over disputed areas); Claro Petroleum Corp v Occidental Petroleum Corp, AJ, 78 (1984), p 445 (clamns necessitating scrutiny of sovereign decisions allocating oil concessions); Salsany v Reagan (1985), ILR, 80, p 19 (foreign state's grant of permission for the use of its territory by armed forces). But if the proceedings are on foreign state's acts, do not necessitate direct judicial inquiry into acts of a foreign state, the proceedings are not barred: Reavis v Exxon Corp (1977), ILR, 66, p 317; Industrial Investment Corporation v Mitsui & Co Ltd (1979), ibid, p 386; Northrop Corp v McDonnell Douglas Corp, AJ, 77 (1983), p 882; Garcia v Chase Manhattan Bank (1985), ILM, 24 (1985), p 454; Associated Containers Transportation Corp v USA, ILM, 22 (1983), p 824; Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (1983) 2 Lloyd's Rep 171, ILR, 66, p 368. In WS Kirkpatrick & Co Inc v Environmental Tectonics Corp International, ILM, 29 (1979), p 182, the US Supreme Court emphasised that vested for the legality or validity of some foreign state's act within its own territory to be in issue before the act of state doctrine can be applied: the doctrine was not just a rule of judicial abstention applying to cases where the conduct of foreign policy may be affected, but a rule of decision requiring that the acts of foreign sovereigns within their own jurisdiction be deemed valid. Since the acts in question must be those of a foreign state, the doctrine has been held inapplicable in relation to acts of an international organisation: International Tin Council v Amsaligam Inc, AJ, 82 (1988), p 837.

never from any point of view subject to examination. This often happens, for example, in order to determine whether a law is constitutional, or a penal or revenue law, and thus to be denied extra-territorial operation. In the state of the forum in those cases where the law may purport to have such an effect. Similarly, the consistency of a foreign law with international law may be examined. Nevertheless, generally, and subject to limits which may vary from one state to another, the lawfulness of legislation is not questioned in the courts of another state; instead courts will treat it as properly made and having the effect which it purports to have on matters arising within the jurisdiction of the foreign state concerned. Accordingly, the effects of such governmental acts may be beyond challenge in the courts of other states, and private claims based on such effects may be rejected, if they involve judicial inquiry into the validity or legality of those acts. This restraint upon the questioning of foreign state acts, known especially in the United States of America as the act of state doctrine, may be.

In particular, English law uses that term in a somewhat different sense; nevertheless, substantively the same general rule of


Issuance of a patent (Mannington Mills Inc v Congoleum Corp) (1979), ILR, 66, p 487 and enforcement of a court order sought by a private party (Timberlane Lumber Co v Bank of America (1976), ILR, 66, p 270; Dominicus Americano Bohio v Gulf and Western Industries Inc (1979), ILR, 66, p 378) have been held not to be an act of state for these purposes. Similarly as regards acts of a bankruptcy trustee: Remington Rand Corp v Business Systems Inc, AJ, 82 (1938), p 587.

Foreign legislation has also sometimes been examined by reference to the question of its formal validity and the constitutional competence of the organ responsible for it (see McNair and Watts, LEGAL POLICY (1937), p 491; Sedley, AJ, 56 (4th ed, 1966), pp 438-40; Lipstein, BY, 43 (1964), pp 269-270; Shaghoof v Mier (1957) 299 US 468; AD, 8 (1935-37), No 14 and note thereto); Prentis Palyce Olga v West (1929) 1 KB 781; Re Amand (No 2) (1942) 1 All ER 236, 1942] 1 KB 345 (on which see McNair and Watts, op cit, p 436); but note Butk v Attorney-General (1965) Ch 745, 438 for a refusal by the Court of Appeal in the UK to impugn the validity of the constitution of a foreign or independent state, and Dubai Bank Ltd v Galadari and Others (No 5), The Times, 26 June 1990 declining to question the constitutionality of a foreign law in proceedings which had that as their object, but allowing the question to be considered where it needed to be resolved in the course of proceedings (in the same way as in the case of the Court of Appeal in the UK in the same proceedings). In Timbrell v Peru-India v finding that a foreign official's acts were in violation of its state's constitution and laws was dependent in rejecting the relevance of the act of state doctrine to those acts: AJ, 75 (1981), p 149.

As to the extra-territorial application of such laws see below, § 144.

See § 113.

Inquiry into the interpretation, scope and meaning of a foreign law is often necessary and is not precluded even if it is the state's constitution (eg Breen v Breen (1961) 3 All ER 225), unless perhaps the foreign state concerned has officially and formally pronounced upon such matters in which case that pronouncement would itself be an 'act of state': see D'Angelo v Petroleum Mercantile Corp v Government of the Libyan Arab Republic (1977), ILR, 62, pp 140, 199.

In English law 'act of state' usually refers to a particular defence to an action in tort, by which in proceedings brought by an alien the defendant may plead that he acted under the orders of or with the subsequent approval of the British Government (or, it is usually assumed, of a foreign government). For its application in this sense, see eg Baron v Dennan (1848) 2 Ex 167; Walker v Bird (1982) AC 491; Salaman v Secretary of State for India (1961) 1 KB 613; Johnston v Walker (1921) 2 AC 262; Commercial and Estates Co v Egypt v Board of Trade (1925) 1 KB, at pp 290, 291.

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judicial restraint is applied by English courts although perhaps more restrictively than in the United States.

It is not clear how far this doctrine may properly be regarded as a rule of public international law or whether it belongs essentially to the province of private international law. Considerations of public policy have often prevented a full recognition of the validity of foreign legislation. There is probably no international judicial authority in support of the proposition that recognition of foreign official acts is affirmatively prescribed by international law. The United States
Supreme Court has regarded the act of state doctrine in United States law as having its roots in the notion of comity between independent sovereigns, buttressed by judicial deference to the exclusive power of the executive branch of government over the conduct of foreign relations because judicial review of acts of state of a foreign state could embarrass the conduct of foreign relations by the political branches of government. The relationship between the doctrine and considerations of judicial policy and discretion in the face of possible conflict with the Executive’s responsibilities is strong. The Supreme Court has accordingly held that where the Executive states that application of the act of state doctrine would not advance the interests of American policy, that doctrine should not be applied by the courts, with the result that in such circumstances the court is free to examine the foreign act of state on its merits in the light of those legal principles which would otherwise be unapplicable because of the act of state doctrine. The Italian Court of Cassation has, however, held the non-justiciability of acts of foreign states to be a principle of international law, forming part of the Italian legal system.

§ 113 Foreign legislation contrary to international law Whatever may be the rule of international law as to the duty of states (and their courts) to recognise the effects of foreign legislation within the foreign country concerned, it would appear that there is no such obligation with respect to foreign legislation, whatever the place of its purported effect, which is in itself contrary to international law. The matter most frequently arises in connection with the seizure of property without compensation, and courts have varied in their approach and their conclusions. Sometimes the foreign expropriation law is denied effect on grounds which may have little, if anything, to do directly with its violation of international law. Thus irrespective of its compatibility with international law, it may be held that the law does not have extra-territorial effect.


See also the summary of the position adopted in a number of states in IIA, Reports of the 63rd Conference (1988), pp 722-747. Note also § 54, as to circumstances in which a duty of non-recognition might arise. See also n 9, in connection with the Sabattino case; § 112, n 3, as to foreign acts of state; and n 6, as to confiscatory legislation.

not to the extent to which expropriation without compensation constitutes a violation of international law; § 144 (as to the extra-territorial recognition of confiscatory laws); and § 386 (as to the effect of nationality laws which conflict with international law). Courts generally are willing to inquire whether the acts of a belligerent occupant are within the occupant’s powers under international law, and to refuse them effect if they are not. See also Morgenstern, ILQ, 5 (1949), pp 42-57; 155-71, and ibid, 70 (1954), pp 181-202; and BY, 48 (1976-77), pp 1-28, 65; Worley, Hag R, 94 (1958), ii, pp 195-204; Zander, AJ, 53 (1959), pp 826-52; see also pp 389f.; Reeves, AJ, 54 (1960), pp 141-56; Domke, ibid, pp 305-23; Basted, ibid, pp 801-35; Worley, AJ, 55 (1961), pp 680-3 (these last three in connection with legal proceedings in Dutch and German courts arising out of certain Indonesian measures of nationalisation in 1957-59); Jennings in Cambridge Essays in International Law (1965), at pp 78-81; Akhurst, BY, 46 (1972-73), pp 145-251, 7; Weil, AFDI, 23 (1977), pp 9-52; Hofmann, ZOG, 49 (1989), pp 41-58. See also the summary of the decision adopted in a number of states in IIA, Reports of the 63rd Conference (1988), pp 722-747. Note also § 54, as to circumstances in which a duty of non-recognition might arise. See also n 9, in connection with the Sabattino case; §§ 112, 113, as to foreign acts of state; and n 6, as to confiscatory legislation.

See also the summary of the decision adopted in a number of states in IIA, Reports of the 63rd Conference (1988), pp 722-747. Note also § 54, as to circumstances in which a duty of non-recognition might arise.
Effect to it would be contrary to the public policy of the forum. Similarly, where effect is given to the law, the court may not have expressly considered its possible incompatibility with international law, or may have inquired into the matter.

Courts of some countries have on occasions refused to give effect, as being contrary to their conceptions of public policy, to foreign confiscatory legislation even when not contrary to international law and even when affecting solely the nationals of the legislating country within its territory. Thus, in particular, is the consistent attitude of French courts. See eg. Union des Republiques Socialisatissimes v. Intendant General, Sirey (1929), pt 1, p 217; AD, 4 (1927–28), No 43 (and the comment thereon and other similar cases by Domke, Aj, 36 (1942), pp 26–29); Societe Potassie Artesienne v. Nathan Bloch, Dalloz (1939), p 257; AD, 9 (1938–40), No 54 (with regard to passing of property in the legislating country); Volatron v. Moulin, Dalloz (1939), p 329; AD, 9 (1938–40), No 10. See Lipstein, Grotsius Society, 35 (1949), pp 174–7, for a survey of these cases. But note Cassan v. Koninklijke Nederlandsche Petroleum Maatschappij (1966), ILR, 47, p 58, holding that legislation intended to remedy a prior illegal act (by a belligerent occupant) by invalidating a title to property apparently acquired under it was inadmissible from confiscatory legislation and could be given effect. For a more recent assertion that it is a rule of French public order that no legal effect is recognized in France of a disposition by a foreign state without an adequate indemnity, see Braden Copper Co v. Le Groupeement d'Importations des Metaux, ILM, 13 (1973), pp 186, 189; Carl Zeiss Jena v. VE Bati (1973), ILR, 66, p 126; Malitsz Corp v. Coney Bottling Co (1972), ILR, 66, p 92; Zervoi and Sons Ltd v. Grundlays Bank (Uganda) Ltd (1975), ILR, 66, p 168. In the Federal Republic of Germany, Art 30 of the Introductory Law to the Civil Code permits the effects of a foreign law to be refused recognition if it were in derogation of the basic principles of German public policy. A foreign confiscatory legislation discriminating against foreigners could be contrary to German public policy; in order to be refused recognition the violation of public policy must still substantially affect the German legal system: see, eg. oberamtliche Kredit Forderungssparkasse v. Deutsche Bank (1975), ILR, 66, p 16. As to Italy, see Vaghi v. Reichenbach, AD, 9 (1938–40), No 56; Koh-I-Noor Tuzkarna Ltd v. C Hammert (1938–40), No 10; Pergalet v. Fabriqnr Soc in Camera di Commerzio in Firenze (1940) 16 Ll, f. 84; Rechtsanwalt Vaghi v. Reischbank, AD, 9 (1938–40), No 49, p 44, and (1960), ILR, 40, p 17. As to Belgium, see the Utruria Case, AD, 9 (1935–37), No 94, and Wilkmnn v. Belgian State, AD, 15 (1948), No 66 (as to naturalization); Sarl Koh-I-Noor-Lt. & C Hammert v. A Aegbel and Soc de Droit Tokelouisqoise Entreprise Nationale Koh-I-Noor (1959), ILR, 47, p 31. See to the Netherlands, The Bardos, AD, 7 (1933–34), No 33; see the note thereto; the case of Trust-Maatschappij Helvetica, 7 (1933–34), No 33; Indonesian Corp PT Ecomptbank v NV Amsuntra Maatschappij de Nederlanden van 1845 (1964), ILR, 40, p 7; Czechoslovak National Corp Bata v. Bata-Best BV (1975), ILR, 74, p 102.

There would appear to be a de facto reason why foreign legislation should be treated in this respect differently from judgments of foreign courts. These may be refused enforcement on a number of grounds, including the fact that the foreign judgment violates principles of public policy of the lex fori. See Huntington v. Attrill (1893) AC 150; Atrill v. Attrill (1947) P 127. It is possible, from this point of view, an English court might refuse recognition, as being contrary to English conceptions of public policy, to foreign legislation which is clearly contrary to international law. See also Rev Helbert Wagg & Co (1966) Ch 326, 346–9, suggesting that the cases were not limited to laws affecting 'national' matters of the extraterritorial legislation of the expropriating state.

Anglo-Iranian Oil Co v. Idemitsu Kosan Kabushiki Kaisha, ILR, 20 (1953), p 305; and Anglo-Iranian Oil Co v. SUPOR Co, ILR, 22 (1955), pp 19 and 23 (these two cases arose out of the same facts as give rise, with a different result, to The Rose Mary case, n 16); F Palicio Companhia Sr v. Bram Hall, ILR, 62, p 41; Attorney-General of the United States v. VEB Koh-I-Noor-Lt. & C Hammert et al (1959), ILR, 74, p 100; Reciprocity of Laws Case, (1959), ILR, 71, p 37.


In this context the Court was referring in particular to principles of international law; by 'other unambiguous agreement' the Court would not appear to have been clearly referring to that general consent which is needed to establish rules of customary international law, but such a rule could perhaps be regarded as a matter of 'unambiguous agreement'. By implication the Court appears to accept that the act of state doctrine would be inapplicable if the foreign act of state did involve a violation of a treaty or of an unambiguously agreed rule of customary international law. In the Sabbatino case the property seized under Cuban laws was at the time of the seizure in Cuba, was owned by a Cuban company the majority of whose shareholders were US nationals, and was seized because of the US interest in the company.
foreign sovereign government, extant and recognised by the United States at the time of suit, even though the complaint alleged that the taking violated customary international law. Congress subsequently introduced an amendment to the Foreign Assistance Act (the so-called Hickenlooper or Sabbatino amendment) to counteract this decision, by providing that the act of state doctrine was not to preclude determinations on the merits giving effect to the principles of international law where a claim of title or other right to property is asserted which is based upon or traced through a confiscation or other taking after 1 January 1959 in violation of international law, unless inter alia, the President files with the Court a suggestion that the application of the act of state doctrine in a particular case is required by the foreign policy interests of the United States.12 On this basis (or as the result of the Bernstein exception)13 United States courts have often been able to examine whether a foreign law affecting ownership of property involves a violation of international law, and, if so, to deny effect to it in the United States.14

Other courts have not held themselves inhibited from inquiring into the extent to which a foreign expropriation law is contrary to international law,15 and their conclusions justify the assertion that foreign legislation which is contrary to international law may properly be treated as a nullity and, with regard to rights of property, as incapable of transferring title to the state concerned either within its territory or outside it. Where courts have expressly reached the conclusion that the law (or the action taken under it) was contrary to international law, they have in most cases declined to give effect to it.16 However, some courts,17 while not expressly deciding that the foreign legislation in question violated international law (and thus not actually giving effect to it despite such a violation) have suggested that even if it were contrary to international law effect should nevertheless be given to it; or, having found the law contrary to international law, have said that on that ground alone it should not be denied effect, although going on to deny it effect on some other ground. In such cases the court has tended to regard questions of the violation of international law, and suitable redress therefor, as an inter-governmental rather than a judicial matter, particularly since the international remedy for a taking of property pursuant to legislation in breach of international law is not necessarily invalidity of that law or non-recognition of a private title to property, but more often the payment of damages to the injured state.

Courts may be under a constitutional compulsion to give effect to the law of their own sovereign legislature even if violative of international law — although they will not lightly impute to it the intention to violate international law18 and although in some countries courts have in fact the power to refuse to give effect to national legislation contrary to international law19 but there is no compelling reason why they should assist in giving effect to violations of international law by a foreign legislature. In the absence of compulsory jurisdiction of internation-

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12 22 USC § 2370(c)(2), on which see Levine, AJ, 59 (1965), pp 366–70; Lowenfeld, ibid, pp 889–908; Liihli, The Protection of Foreign Investment (1965), pp 117–46. The limits to the exclusion of the act of state doctrine as a result of the amendment have been considered in a number of cases, eg French v Banco Nacional de Cuba (1968), IILR, 66, p 6; Present v United States Life Insurance Co, AJ, 62 (1968), pp 494; Mendez v Seki & Co (1973), IILR, 46, p 126; Hunt v Coastal States Gas Producing Co (1978), IILR, 66, pp 338, 361; Libyan American Oil Co v Socialist People’s Libyan Arab Jamahiriya (1980), IILR, 62, p 220. The record of the Hearings before the House Committee on Foreign Relations and the Senate Committee on Foreign Relations on this legislation contains much valuable commentary on the rule enunciated in the Sabbatino case: for references see Weissberg, ICLQ, 16 (1967), pp 704–6, nn 5, 9–17. Note also that in the US the plea of sovereign immunity is of no avail to a foreign state in proceedings in which rights in property taken in violation of international law are in issue and that property or any property exchanged for that property is present in the US in connection with a commercial activity carried on in the US by the foreign state: Foreign Sovereign Immunities Act 1976, § 1605(a)(3).

13 See § 112, n 22.

14 The US Court of Appeals (upholding the decision of the court below) had held in earlier stages of the proceedings in the Sabbatino case that the seizure under the Cuban law was contrary to international law, and should therefore not be given effect in the US by acknowledging the plaintiff’s title to property which was derived from that law: Banco Nacional de Cuba v Sabbatino, AJ, 56 (1962), p 1085. The Supreme Court’s decision had not affected that conclusion, and in later proceedings, after the enactment of the Hickenlooper amendment the Court of Appeals reaffirmed its finding that the taking was contrary to international law and rejected the plaintiff’s claim to title based on that law: Banco Nacional de Cuba v Farr Whittlock & Co (1967), IILR, 43, p 12, certiorari denied, AJ, 62 (1963), p 783.

15 See eg cases cited at nn 8, 11 and 17 below. See also § 112, n 10, as to inquiries into the constitutional validity of legislation. In Attorney-General of the United States v NV Bank voor Handel en Scheepvaart (1969), IILR, 74, p 150, the Netherlands Supreme Court rejected the existence of any rule of international law prohibiting the court from considering the question whether or not a seizure of property by another state is in violation of international law, even in respect of a seizure of property situated in the territory of that other state and even if the property does not belong to Dutch nationals. The Italian Court of Cassation has, however, held the acts of foreign states not to be cognisable in Italian courts even to consider their conformity with international law: Spa Imprese Marittime Frascati v Repubblica Araba di Libia, AJ, 77 (1983), p 163.

16 See eg Wolff v Ochholm (1817) 6 Maule and Selwyn 92; Re Krupp (1917) 2 Ch 188; Confiscation of Property of Sudeten Germans Case, AD, 1948, No 12; Niziyos Mines Case, IILR, 19 (1952), No 27; Anglo-Iranian Oil Co v Jaffari (The Rose Mary) (1953) 1 WLR 246 (on which see the comments in Re Helbert Waggy & Co Ltd (1956) 1 Ch 323, 346, and by Lauterpacht, CLJ, 12 (1954), pp 20–22, and O’Connell, ICLQ, 4 (1955), pp 267–93; Banco Nacional de Cuba v Sabbatino, AJ, 56 (1962), p 1085 (the decision of the Court of Appeals before the decision of the Supreme Court); and Banco Nacional de Cuba v Farr Whitlock & Co (1967), IILR, 43, p 12 (the decision of the Court of Appeals after the decision of the Supreme Court — the Supreme Court did not decide the question whether the foreign law in question was contrary to international law); Banco v Pan American Life Insurance Co, AJ, 58 (1964), p 511, affirmed, but not expressly on this point, AJ, 61 (1967), p 211; Bank Indonesia v Senemab Maatschappij and Twentsche Bank (1959), IILR, 30, p 28; Oppenheimer v Cattermole (1976) AC 249. See also the statement issued in May 1974 by the US Department of State as to its policy regarding oil nationalised by Libya in circumstances contrary to international law: ILM, 13 (1974), pp 767–82. See n 3, as to acts of a belligerent occupant in violation of international law; and §§ 386 and 391, nn 13–15, as to acquisition or loss of nationality in violation of international law.


18 See § 20.

19 See § 19.
al tribunals and having regard to the prohibition, under the Charter of the United Nations and elsewhere, of compulsive means of enforcement of international law by national action, municipal courts may on occasions provide the only means for securing respect for international law in this and other spheres. Principle does not countenance a rule which, by reference to international law, obliges courts to endow with legal effect legislative and other acts of foreign states which are in violation of international law and in practice no such international obligation is regarded as existing. However, in view of the practice of states as revealed by the actions of their courts, some of which have been prepared to acknowledge legal effects of foreign acts in violation of international law, it probably cannot be said that international law forbids courts to give effect to such a foreign act when to do so is in accordance with their own national laws. It is in any case consistent with principle that such violations of international law on the part of foreign states ought not to be assumed in the absence of evidence of a cogent character. Any complaint, on account of a judgment based on any such allegation, of the foreign state concerned is a suitable subject, at the request of that state, for international judicial determination.

§ 114 State equality and non-discrimination Although states are equal as legal persons in international law, this equality does not require that in all matters a state must treat all other states in the same way. There is in customary international law no clearly established general obligation on a state not to differentiate between other states in the treatment it accords to them. The freedom of a state to grant preferential treatment to certain states, or to impose disadvantageous arrangements on others, has long been a valued instrument of policy in the conduct of international relations.

Nevertheless, discrimination is widely regarded as undesirable, and in some particular respects a rule of non-discrimination may exist, within limits which are not clear. Thus a state party to a multilateral treaty may, as a reflection of its duty to perform treaties in good faith as well as of the equality of states parties to the treaty, be required to apply its terms equally to all other parties. In some circumstances, particularly if there is a strong element of arbitrariness in the different levels of treatment accorded by one state to others, discrimination might constitute an abuse of rights. States also have a duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to promote international co-operation free from discrimination based on such differences.

Furthermore, a state may be under an obligation not to discriminate in the treatment it accords to other parties to the treaty in respect of the subject matter of the treaty. Such a provision has appeared in some major multilateral treaties prepared by the International Law Commission, such as the Vienna Convention on Diplomatic Relations 1961. Several provisions of the General Agreement on Tariffs and Trade (GATT) are based on non-discrimination. A particular kind of non-discrimination obligation is to be found in those treaties...
containing a 'most-favoured nation' clause,7 whereby the grantor state is obliged to accord the state benefiting from such a clause whatever enhanced level of treatment the grantor provides to third states. Treaty obligations not to discriminate are sometimes in general terms, and sometimes related to specific grounds of possible discrimination (most usually in this context, nationality or national origin).

Treaties may not only create obligations not to discriminate, but may also impose on the parties obligations to discriminate positively in favour of another state or group of states. Such a situation arises, for example, where a state is obliged by treaty to give preferential treatment exclusively to another state or states,8 for example as between the members of a customs union. More generally, discrimination by way of granting specially favourable treatment to developing countries has come to be seen as a means whereby developed countries can assist developing countries in their efforts to make economic progress. Such positive discrimination in favour of developing countries is reflected in the Charter of Economic Rights and Duties of States,9 and the grant of special preferences to such states underlies the successive Lomé Conventions concluded between the EEC and certain other states.

The meaning of ‘discrimination’ in this context may need clarification. Mere differences of treatment do not necessarily constitute discrimination: to impose on a state with a notoriously bad economic and financial record harsher terms for an inter-governmental loan than are imposed on a state with an excellent record in those respects is not discriminatory. While everything depends on the particular circumstances of each case, discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way.10 While treaties usually refer to ‘discrimination’ or ‘non-discrimination’ without definition, they do sometimes go some way to explaining the meaning of those terms, as by specifying at least some particular circumstances which do, or do not, involve discrimination. Thus some of the major multilateral treaties prepared by the International Law Commission provide that discrimination is not regarded as taking place where the state applies any of the provisions of the treaty restrictively because of a restrictive application of that provision by the other state concerned, or where by agreement states extend to each other treatment different from that which is required by the treaty.11

Although not directly related to the equality of states, it is convenient to note here that a state may also be under a duty of non-discrimination in respect of the treatment it accords to individuals within its jurisdiction. Such a duty arises particularly in respect of human rights, for example under the UN Covenants of 1966 on Civil and Political Rights, and on Economic and Social Rights, and under the Convention on the Elimination of All Forms of Discrimination against Women 1979. Such non-discrimination is considered more fully elsewhere.12 Similarly, questions may arise as to the treatment a state accords to aliens compared with the treatment it accords its own nationals; this also raises issues considered more fully elsewhere.13

§ 115 Consequences of the dignity of states

Traditional international law has ascribed certain legal consequences to the dignity of states as inherent in their international personality. These are chiefly the right to demand that their Heads of State shall not be libelled and slandered; that their Heads of State and likewise their diplomatic envoys shall be granted special treatment when abroad, and that at home and abroad in the official intercourse with representatives of foreign states they shall be granted certain titles; that their warships shall be granted certain privileges when in foreign waters; that their symbols of authority, such as flags and coats of arms, shall not be used improperly and shall not be treated with disrespect on the part of other states.1 But while a government of a state, its organs, and its servants are bound in this matter by duties of respect and restraint, it is doubtful whether, apart from obligations in such matters as the protection of diplomatic and consular property, a state is bound to prevent its subjects from committing acts which violate the dignity of foreign states, and to punish them for acts of that kind which it was unable to prevent. There is, of course, nothing to prevent a state from enacting legislation calculated to ensure respect for the dignity of other states, and many have done so.2
Mere criticism of policy, judgment concerning the past attitude of states and their rulers, or utterances of moral indignation condemning immoral acts of foreign governments and their Heads of State, need not be suppressed nor punished. The position is different when the persons in question are in governmental service or otherwise associated with the government of the country. It was formerly often considered that it would be contrary to the dignity of a state for it to be subject to the jurisdiction of the courts of another state, but this is no longer the case at least as regards acts performed by states iure gestionis.

In 1949 the General Assembly of the United Nations approved, but did not open for signature, a Convention of the International Transmission of News and the Right of Correction. The Convention provides for some, not altogether

of these cases are exceptional. For some older Reports by the Law Officers of the Crown, see McNair, Opinions (1966), 1, pp 10–14; and see also Parry, BDII, 6, pp 69–70, and 7, pp 84–90.

As to the US, see Hackworth, ii, § 129; Whiteman, Digest, 5, § 9; Zaim v United States (1973), ILR, 61, p 601. For legislative provisions of a number of countries, see Preuss, AJ, 28 (1934), p 650; see also Dickinson, AJ, 22 (1928), pp 840–44; Swiss Federal Code, Arts 296–7.

Art 8(2) of the Lateran Treaty 1929 provides for the punishment of offences in Italy against the Pope, by speech, act or in writing: for some cases arising under that provision, see RG, 63 (1959), pp 102–4. For a distinction between insulting Adolf Hitler as Head of the German State and insulting him as Leader of the National Socialist Party, see Public Prosecutor v G (AD, 8 (1935–37), No 11); Public Prosecutor v B (ibid, p 25); the decision of the Spanish Supreme Court referred to in the Note at AD, 9 (1938–40), p 9; and Public Prosecutor v O, AD, 11 (1919–42), No 5. See also Public Prosecutor v T, ILR, 21 (1954), p 10. In Monaco v Monaco the court rejected the submission that it would be contrary to the dignity of the Head of a State to award him costs in an action in which he has been successful: (1937) 157 TLR 231; ibid, No 9. See also Defamation (Spain) Case, AD, 9 (1939–40); No 3; Re Rivera Calmet, ILR, 18 (1951), No 10; JAM v Public Prosecutor (1969), ILR, 73, p 387; Kolinge v Delpey (1985), AFDI, 32 (1986), p 951 (dismissing a complaint against a libel on a Head of State). See also RG, 72 (1968), p 204, as to slogans insulting a foreign Head of State; ibid, pp 1086–7, as to a film critical of a foreign Head of State; and RG, 92 (1988), pp 730–1, for action taken by Switzerland to prevent the publication of offensive criticism of President Mobutu of Zaire. See also § 451, n. 4.

The use of a foreign state’ s, or foreign Head of State’ s, coat of arms or flag as part of a commercial trade mark by private traders has sometimes been the subject of protest or legal proceedings to prevent such use. See eg Trade Mark (Heads of Foreign States) Case, AD, 8 (1935–37), No 10 (holding there to be ’a rule of international law according to which images of heads of foreign States may not be used for commercial purposes’); Manufactura de Tabacos Picardo v Amministrazione Autonima dei Monopoli Stato, AD, 10 (1941–42), No 3; Piccardo v Gia, Ltda, SA v Tabacchi Italiani SA, AD, 12 (1943–45), No 1.


Thus, when in January 1931 General Butler, of the US Army, made at a banquet disparaging statements concerning the Italian Prime Minister, Italy complained. The US Government thereupon expressed their regret at this unauthorised action on the part of an officer on active duty and reprimanded General Butler. See on this incident Stowell, AJ, 25 (1931), pp 321–24.

For a number of similar incidents, as well as incidents involving mere criticism of foreign states and their policies, see Whiteman, Digest, 5, pp 154–70. See also RG, 82 (1978), p 893, for a protest by Finland to Sweden regarding the circulation in Sweden of pamphlets criticising the President of Finland.

See eg the observations of the Italian Court of Cassation (United Chambers) in Borga v Russian Trade Delegation, ILR, 22 (1955), pp 235, 238; and the observations of Denning LJ in Rabintoala v Nizam of Hyderabad (1958) AC 379, 418. See generally § 110.


Effective, remedy with regard to publication abroad of news despatches which, in the view of the complaining state, are either false and distorted or are ‘capable of injuring its relations with other States or its national prestige or dignity’. In such cases the complaining state may submit to the state where the despatch is published its own version of the facts. The obligation of the latter is limited to the transmission of the corrected version to the news agency responsible for the original publication. If the correction is not published, the Secretary-General of the United Nations is under an obligation to give publicity, through the information channels at his disposal, both to the corrected version and to the original despatch and any comment of the government where the despatch was published. In 1952 the General Assembly separated from this Convention the provisions relating to the right of correction, and constituted them as a separate Convention on the International Right of Correction.

§ 116 Maritime ceremonials
Connected with the dignity of states are the maritime ceremonials1 between vessels, and between vessels and shore installations which belong to different states. In former times discord and jealousy existed between states regarding such ceremonials, since they were looked upon as means of maintaining the superiority of one state over another. Nowadays so far as the open sea is concerned, they are considered as mere acts of courtesy recognising the dignity of states. Maritime ceremonials are carried out by dipping flags or striking sails or firing guns. International law prescribes no right to such ceremonials between vessels meeting on the high seas. They are rather a matter of courtesy and international usage, in honour of the national flag; or they may result from special conventions or national laws of those states under whose flags the vessels sail. In particular no state has a right to require a salute from foreign merchant vessels for its warships on the high seas.2 But so far as concerns the territorial sea, littoral states can make laws concerning maritime ceremonials to be observed by foreign vessels.3


2 GA Res 630 (VII). The Convention entered into force on 24 August 1962. The remaining provisions have not yet been reconstituted into a convention dealing with the gathering and international transmission of news.

3 See generally § 122, n 6ff, on the use of broadcasting for propaganda purposes subversive of the interests of other states. See also Art 14(1) of the American Convention on Human Rights 1969 (§ 443), which provides that anyone injured by inaccurate or offensive statements or ideas disseminated by a legally regulated medium of communication has the right to reply or make a correction; on this provision, see the Advisory Opinion of the Inter-American Court of Human Rights on Enforceability of the Right to Reply or Correction (1986), ILR, 79, p 336.


5 That warships can open the sea ask suspicious foreign merchant vessels to show their flags has nothing to do with ceremonials, but with the supervision of the open sea in the interest of its safety. See § 293.

6 See § 200.
IND pendence and territorial and personal authority


§ 117 Independence and territorial and personal authority, as aspects of sovereignty

Sovereignty has different aspects. Inasmuch as it excludes subjection to any other authority, and in particular the authority of another state, sovereignty is independence. It is external independence with regard to the liberty of action outside its borders. It is internal independence with regard to the liberty of action of a state inside its borders. As comprising the power of a state to exercise supreme authority over all persons and things within its territory, sovereignty involves territorial authority (dominium, territorial sovereignty). As comprising the power of a state to exercise supreme authority over its citizens at home and abroad, it involves personal authority (imperium, personal sovereignty).

Independence, territorial and personal authority, are the three main aspects of the sovereignty of a state.

§ 118 Consequences of independence and territorial and personal authority

All states are under an international legal obligation not to commit any violation of the independence, or territorial or personal authority, of any other state. In consequence of its external independence a state can, unless restricted by customary law or by treaty, manage its international affairs according to discretion; thus, for example, it can enter into alliances and conclude other treaties, and send and receive diplomatic envoys. While independence is a reality of statehood in the nature of a right it may, in certain circumstances, become a duty, since a state may by treaty bind itself not to part with or impair its independence. Thus in Article 88 of the Treaty of St Germain 1919, Austria’s independence was declared to be inalienable and the subject undertook to abstain from any act which might directly or indirectly compromise her independence, in particular by participating in the affairs of another state; that undertaking was repeated and to some extent amplified in the Geneva Protocol of 1922. When a customs union between Austria and Germany was proposed the Permanent Court of International Justice was asked for an Advisory Opinion, and it held that the proposed customs union would not be compatible with Austria’s obligations to maintain its independence. Cyprus has similarly undertaken, in the Treaty of Guarantee concluded with Greece, Turkey and the United Kingdom in 1960, to maintain its independence and not to participate, in whole or in part, in any political or economic union with any state whatsoever.

In consequence of its internal independence and territorial authority, a state can adopt any constitution it likes, arrange its administration in any way it

1 For a judicial discussion of these aspects see R v Jacob’s Christian, BY (1925), p 211–19, and in JCL 3rd series, 6 (1924), pp 245–254. See also § 34. The Island of Palmas case (1928), Huber (sole arbitrator) said: ‘Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State . . .’ RIAA, 2, pp 829, 838.

2 But see Westlake, 1, pp 86–7.

3 See § 120.

4 Austro-German Customs Union Case (1931), PCIJ, Series A/B, No 41. Eight judges held that the proposed union would not be compatible with the Geneva Protocol; seven others held that it would also not be compatible with the Treaty of St Germain. The Court said that, for purposes of Art 88 of the Treaty, the independence of Austria ‘must be understood to mean the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible’ (at p 45).

The individual Opinion of Judge Anzilotti contains, in addition to weighty reasons in support of part of the Court’s Opinion, some interesting observations on the effect of restrictions of state sovereignty on its independence (pp 57–9). For the literature, to a large extent critical, on this case, see vol II of this work (7th ed), § 254. As to Austria’s present status, see § 98. In the context of the impact of the powers of the European Communities upon the sovereignty of member states it was noted by the Irish Supreme Court that ‘the freedom to formulate foreign policy is just as much a mark of sovereignty as the freedom to form economic policy and the freedom to legislate’ (p 723), and that ‘sovereignty in this context is the unfettered right to decide: to say yes or no’ (at p. 73). Crotty v An Taoiseach [1987] 2 CMLR 666, and see § 19, n 85.

See also the various treaties of the US with some of the republics of the Caribbean which gave the US the right of intervention to preserve the independence of these republics and obliged the latter not to conclude any treaty endangering their independence or providing for a cession of their territory to a foreign power (see eg the Treaty of 16 September 1915, with Haiti, AJ, 10 (1916), Suppl, p 234, and AJ, 16 (1922), pp 607–10).

5 See following note.

6 ‘A State’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems: Military and Paramilitary Activities Case, ICJ Rep (1986), p 131; see also pp 108, 133. See also the third principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, which stipulates that ‘Every State has an inalienable right to choose its own political, economic, social and cultural systems, without interference in any form by another State’: GA Res 2625 (XXV) (1970).

But internal political and social arrangements might nevertheless be a matter of legitimate concern to the international community, as for example where they infringe some overriding principle or rule of international law. Thus the Security Council declared null and void a proposed new Constitution adopted by South Africa (Res 554/1984, repeated by the General Assembly Res 39/45 of 20 November 1984; see UNYB (1984), pp 137–143), and similarly declared null and void the establishment by South Africa in Namibia of an interim government and Legislative Assembly (§ 88, n 47). Note also, for example, the restrained imposed upon Cyprus in this respect by virtue of the tripartite guarantee of the state of affairs established by the Basic Articles of its Constitution: TS No 5 (1961); and see §§ 40, 4, and § 131, 4, n 4. See BPL (1964), p 126, for representations made by the UK and Turkey when Cyprus introduced compulsory military service inconsistently with the relevant constitutional provisions. Membership of an organisation may also impose certain restraints upon a state’s freedom to adopt whatever form of government it chooses: thus the exclusion of Cuba from the Inter-American system by the Punta del Este meeting in 1962 was on the basis that ‘adherence by any member of the Organisation of American States to Marxism–Leninism is incompatible with the principles and objectives of the Inter-American system’ (see AJ, 56 (1962), at p 611; see also Fenwick, ibid., pp 469–74).
ty, particularly as to the state’s entitlement, agreement, in the exploitation of those sovereignty over the state’s natural resources, such as mineral deposits? There ing to discretion subject always to the requirements of international law and basis for attempts against a foreign state.’ And a state can through naturalisation state, provided the individuals themselves give their international received at all. On the other hand, hospitality -or ‘territorial individuals and property fall at once under the territorial authority of a state when they cross its frontier. Aliens residing in a state can therefore be compelled to pay rates and taxes, and to serve in the police under the same conditions as citizens for the purpose of maintaining order and safety, and even in certain circumstances to serve in its military forces. But aliens may be expelled, or not received at all. On the other hand, hospitality —or ‘tutelle administratif’— may be granted to them, provided they abstain from making the hospitable territory the basis for attempts against a foreign state.7 And a state can through naturalisation adopt foreign nationals residing on its territory without the consent of the home state, provided the individuals themselves give their consent.8

The territorial authority of a state over everything within its territory includes sovereignty over the state’s natural resources, such as mineral deposits.9 There has been much controversy over the consequences flowing from that sovereignty, particularly as to the state’s entitlement, by virtue of that sovereignty, to expropriate the assets in its territory of foreign undertakings engaged, with its agreement, in the exploitation of those resources.10 In consequence of its personal authority, a state can treat its nationals according to discretion subject always to the requirements of international law and especially of human rights,11 and it retains its power even over such nationals as

It was held by the PCIJ in 1932, in the Case concerning the Interpretation of the Statute of the Memel Territory, that the grant of autonomy to a territorial unit does not result in a division of sovereignty in a way disturbing the unity of the state: PCIJ, Series A/B, No 49, p 313. The fact that the final appellate tribunal of a state is a body with its seat in another state is not necessarily inconsistent with the first state’s independence: see § 78, n 15. Nor is the fact that a state’s constitution is a law of another state and can only be amended by another state’s legislative process (as was the case until 1982 with Canada, whose constitution was established in the British North America Act 1867–1964, being Acts of the British Parliament: see § 34, n 9).

See § 404, n 12.

See § 402.

See § 122.

See §§ 386–7.

Special problems arise where a fluid resource, such as natural gas or hydrocarbon deposits, extends beyond the land frontier of the state, particularly where it extends beneath the land frontier of one or more other states. See the 1978 Report of the UNEP Inter-governmental Working Group, ILM, 17 (1978), pp 1091, 1094–9; Lagonié, AJ, 73 (1979), pp 215–43; Upton and Teclaff (eds), Trans-boundary Resources Law (1987); Brit Inst of Int and Comp Law, Joint Development of Offshore Oil and Gas (vol 1, 1989; vol 2 (ed Fok), 1990). For examples of agreements between the two states concerned in such a situation see the UK–Norway Agreements relating to the Frigg Field Reservoir 1976 (TS No 113 (1977)) (for which see Mann, AFDI, 24 (1978), pp 792–809), the Murchison Field Reservoir 1979 (TS No 39 (1981)) and the Statford Field Reservoirs 1979 (TS No 44 (1981)), concerning the exploitation of oil and gas reservoirs extending beneath their adjacent areas of continental shelf in the North Sea; and Art 3 of the UK–Republic of Ireland Agreement concerning the Delimitation of Areas of Continental Shelf between the Two Countries 1988 (TS No 20 (1990)).

See generally § 407; and also § 106, on the ‘New International Economic Order’.

Including in particular treaties for the protection of minorities, the general obligations of the

emigrate without thereby losing their citizenship. A state may therefore require its citizens abroad to return home and fulfil their military service,12 may require them to pay rates and taxes, and can punish them on their return for crimes they have committed abroad.13

§ 119 Violations of independence and territorial and personal authority The duty of every state itself to abstain, and to prevent its agents and, in certain cases, nationals, from committing any violation1 of another state’s independence or territorial integrity or personal authority is correlative to the corresponding right possessed by other states. In the Lotus case the Permanent Court of International Justice stated that ‘the first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State’;2 and in the Corfu Channel case the International Court of Justice observed that ‘between independent States, respect for territorial sovereignty is an essential foundation of international relations’.3

However, not all acts performed by one state in the territory of another involve a violation of sovereignty. Thus no violation of the territorial state’s sovereignty is involved if another state buys a house there, or concludes a commercial transaction there. Such acts are unlikely to involve the exercise of a state’s sovereign authority or derogate from the sovereign authority of the territorial state. Similarly, even if a state does exercise its sovereign authority in another state, if that other state consents there will be no derogation from its sovereign authority and thus no violation of its territorial authority.4

It is not feasible to enumerate all such actions as might constitute a breach of a state’s duty not to violate another state’s independence or territorial personal authority. But it is useful to give some illustrative examples.5 Thus, in the absence

Charter of the United Nations relating to human rights and fundamental freedoms, and the more specific obligations in the various treaties which now exist for the protection of such rights and freedoms: see §§ 425–44. See also § 131(2) on humanitarian intervention.

12 But see § 123, n 2.

13 See § 136. The exercise of the various rights enumerated in this section is subject to the existence of restrictions created by treaty, of which many examples exist: see § 121.

1 See § 140.

2 PCIJ, Series A, No 10, p 18.

3 ICJ Rep (1949), p 35. See also the Military and Paramilitary Activities Case, ICJ Rep (1986), p 3, where the USA was held to have acted in breach of its obligations under international law by engaging in various forms of violations of Nicaragua’s territorial sovereignty, including the laying of mines in Nicaragua’s internal and territorial waters, overflying Nicaraguan territory and attacking targets in Nicaraguan territory (see especially pp 127–9).

4 See n 11.

5 As to various aspects of state action to enforce abroad compliance with its laws, see Mann, Hag R, 111 (1964), i, at pp 127–58, with particular reference to the use of physical force in another state; the peaceable performance of acts of state authority (service of documents, taking evidence, notarial functions); the conduct of investigations to enforce its criminal, administrative or fiscal jurisdiction; and resort by a state to the courts of another state to enforce its public or sovereign rights. See also Akehurst, BY, 46 (1972–73), at pp 145–51; and see Public Prosecutor v Van H, ILR, 19 (1952), No 49; Service of Summons in Criminal Proceedings (Austria) Case (1961), ILR, 38, p 133.
of treaty provisions to the contrary, a state is not allowed to intervene in the management of the internal or international affairs of other states, or to prevent them from doing or to compel them to do certain acts in their domestic relations or international intercourse. A state is not allowed to send its troops, its warships, or its police forces into or through foreign territory, or its aircraft over it, or to carry out official investigations on foreign territory or to let its agents conduct clandestine operations there, or to exercise an act of administration or jurisdiction on foreign territory, without permission. Thus it will

6 Even an accidental crossing of the frontier is a violation of territorial sovereignty. For an incident in 1963 when the UK apologised to the Yemen for, and paid compensation for damages occurring as a result of, an accidental crossing of the frontier by a British military aircraft (see BPL, 57 (1963), p 103. For an incident involving a protest by Austria against the shooting by a Czechoslovakia border guards of a refugee who had already escaped to Austria, see RG, 89, (1985), p 403.

The Security Council, in condemning a state for violating the territory of another state, has sometimes called for the payment of compensation or other appropriate redress by the transgressor. See eg Res 189 (1964) (incursions into Cambodia by South Vietnamese forces); Res 262 (1968) (Israeli raid on Beirut airport); Res 290 (1970) (incursion of Portuguese forces into Guinea); Res 387 (1976) (incursion of South African forces into Angola); Res 455 (1979) (incursion of Southern Rhodesian forces into Zambia); Res 487 (1981) (Israeli attack into Iraq).

7 As to a warship's right of innocent passage through territorial waters of another state, see § 201.


9 See § 218ff. On the incident in 1960 concerning the shooting down of an American military aircraft from above, see the trial of the US aviators, see § 54 (1960), pp 836–54. In 1973 the action of Israeli military aircraft in intercepting a Lebanese airliner in Lebanese airspace and forcing it to land in Israel was condemned by the Security Council: see SC Res 337 (1973); UNYTB, (1973), pp 299–52; and, for action in ICAO, ibid, pp 947, 948.

10 See eg RG 88 (1984), pp 711–725 (protest against activities of French customs officials in Switzerland), and pp 725 (protest against various activities of Italian officials in Switzerland). As to the illegal abodement of a person from the territory of one state by the authorities of another state, see n 13.

11 See eg RG 71 (1982), pp 237–243 as to the occupation of France in Spain in respect of the territory of Argentine officials, RG, 88 (1984), pp 454, and 90 (1985), p 974; and as to operations by Italian agents in Switzerland, RG, 89 (1985), p 460. See also § 165, n 5, para 3, as to the operations of French agents in New Zealand leading to the sinking of the 'Rainbow Warrior'. See generally Glenon, Hav, IJL, 25 (1984), pp 1–42; and § 569, n 10, as to Spain. It is sometimes the case that such activities are carried out by people with diplomatic or consular status: such activities are incompatible with that status: see § 487.

12 See § 123. Neighbouring states often give one another permission to act in each other's territory; for instance, one state may permit the customs officers of another state to be stationed at a railway station in the former's territory for the purpose of examining the luggage of travellers. See German Railway Stations at Basle Case, decided by a German Court in June 1928; AD (1927–28), No 90; and see Vali, Servitudes de International Law (2nd ed 1958), pp 125–34; as to the functions of South African railway police in respect of the railway in the Bechuanaland, see Parliamentary Debates (Commons), vol 686, col 43 (written answers, 9 December 1963); as to Canadian and US drug investigation officials in each other's territories, see ILM, 27 (1988), p 403; as to an agreement for the operation of certain French and Italian officials in each other's territories see RG, 87 (1983), p 417; and as to French customs officials on certain trains in Switzerland, see RG, 90 (1986), p 450. When in 1988 the USA and USSR concluded an agreement including provision for the inspection by their officials of the other's nuclear missiles, some of the bases being held at bases in third states, the consent of the third states was envisaged to allow for inspections on their territories: see ILM, 27 (1988), p 58, 67. See also Hackworth, ii §§ 150, 151 and 153; and Mann, Hag, R, 111 (1964), i, p 127ff.

As to the exercise in foreign territories by a state for the purposes of judicial authority, which is an aspect of sovereignty, see normally be a violation of the territorial sovereignty of a state for the police or military forces of another state to pursue criminals or rebel forces who flee over the frontier of a neighbouring state; and it is nonetheless a violation if the police or military forces are acting on the basis of 'hot pursuit' analogous to that accepted in maritime matters, for in that context the right of 'hot pursuit' involves no violation of territorial sovereignty since it ceases at the outer limit of another state's territorial sea. The violation of the territorial sovereignty of the neighbouring state into which the pursuers enter may occasionally be justified on grounds of self-defence or by the failure or inability of the invaded state to fulfill the duties of control over its territory which are the corollary of its rights of territorial sovereignty. Such pursuit on land is, however, a form of self-help which is now mostly unlawful. It is also a breach of international law for a state
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without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime. Where this has happened, the offending state should - and often does - hand over the person in question to the state in whose territory he was apprehended. But states do not always do this, and the fugitive may be brought to trial in the courts of the state whose agents have seized him. The question then arises whether those courts should decline jurisdiction because of the violation of international law involved in his seizure. National courts have generally not declined to exercise jurisdiction over an accused who has been brought within their power by means of a seizure in violation of international law.

1989 when four Spanish customs officials in pursuit of suspected smugglers entered Gibraltar; although the persons were issued against them, there was no further action.

'Hot pursuit' on land may occur with the consent of the territorial state, in which case no violation of territorial sovereignty will have occurred. See eg Santa Isabel Claims (1926), RIAA, iv, at pp 787-8; and the agreement of Iraq allowing Turkey to pursue Kurdish rebels up to 15 km into Iraq's territory (RG, 89 (1955), pp 453-6). See also on Benelux–France–Federal Republic of Germany Convention on the Gradual Suppression of Common Frontier Controls 1990 (the 'Schengen Agreement'), Art 41 of which allows for 'hot pursuit' across land frontiers on certain conditions.

The abduction of a person from a foreign state's territory may involve the responsibility of the abduction state under human rights treaties binding on it even though the acts complained of on the part of its agents occurred in the territory of another state: see decisions of the UN Human Rights Committee in Calleberti de Casariego v Uruguay (1981), ILR, 68, p 41, and López v Uruguay (1981), ILR, 68, p 29. As to the possibility of a person seized in violation of international law being entitled to petition the European Commission of Human Rights, see O'Higgins, BY, 36 (1960), pp 279, 291-3.

Thus Germany restored to Switzerland, in 1935, a certain Herr Jacob-Salomon, an ex-German political refugee who had been abducted from Switzerland with the connivance of German officials and was submitted to arbitration, but soon after the termination of the written proceedings Germany submitted to arbitration in September 1935 that a state official 'acted in an inadmissible manner' in this case and surrendered Jacob to the Swiss authorities. For an account of this case see Coughlan, AJ, 36 (1935), pp 502-7, and ibid, 30 (1936), pp 123.

In 1961 South African police crossed the border into Basutoland and arrested Mr Ganyile, a South African national: the British Government protested, the South African Government apologised, and released Mr Ganyile, who sought compensation from the South African Government: Parliamentary Debates (Commons), vol 652, cols 702-5 (29 January 1962). As to the apparent abduction of Mr Higgs from Northern Rhodesia to South Africa in 1964, and his subsequent release, see BPIL (1964), pp 185-6. Similarly in 1972 South Africa returned to Lesotho Mr Mbole who had been seized there and taken to South Africa by four South African policemen who, according to a spokesman of the South African Department of Foreign Affairs, had been 'acting in a spirit of excessive zeal' (The Times, 29 November 1972). As to the request by the US Government to the authorities of the state of Florida for the release of a person seized in Canada and forcibly carried across the frontier a person wanted by the US police was found guilty of kidnapping. The court pointed out that an unlawful carrying of a person beyond the boundaries of a state to be dealt with by the laws of another state is a violation of the sovereignty of the former: S F (24) 17: AD (1929-30), No 180. And see Villareal v Hammond (1934), 4 FL (2nd) 503; AD (1933-34), No 143, where the court in granting extradition of the prisoners accused of kidnapping certain persons in Mexico with the view to handing them over to the US authorities, pointed out that that act in any case constituted a violation of Mexican territorial sovereignty.

The abduction of Adolf Eichmann from Argentina to Israel in 1960 so that he could stand trial in Israel for crimes committed during the Second World War, was generally acknowledged to have constituted a violation of Argentina's territorial sovereignty. Argentina raised the matter in the Security Council which by Res 138 of 23 June 1960 'requested Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law.' On 3 August 1960 Israel and Argentina issued a joint communiqué stating that they resolved to regard as closed the incident which arose out of the action taken by citizens of Israel which infringed the fundamental rights of the State of Argentina' (see ILR, 36, at p 59).


In August 1973 an Israeli court sentenced a man to a term of imprisonment for the breach of the Eichmann case law.

For a British protest to the Soviet Union in 1958 about the landing in the UK of seamen from a Russian vessel to search for one of their colleagues who had fled the vessel, see UK Contemporary Practice, VII, p 166 (ICLQ, 8 (1959)); see also Parliamentary Debates (Lords), vol 253, cols 126-7 (14 November 1963) as to British protests to Cuba regarding the seizure by Cuban forces of 19 Cuban refugees from British territory in the Bahamas. For protests by Japan at the seizure on Japanese territory by South Korean agents of Kim Dae Jung, a leading South Korean opposition politician, see RG, 78 (1974), pp 1112-16, and 85 (1981), p 171.

Separate from the question whether the incursion of one state's agents into another state without its consent to arrest, seize and abduct wanted persons is a violation of international law (which it is) is the question whether such operations are lawful in terms of the seizing state's own law. The argument which seems to be primarily applicable is that, subject to the public order in 1989 in testimony before a sub-committee of the House of Representatives Committee on 8 November 1989 the Deputy Director of the FBI emphasised that the concurrence of the state in which the seizures took place was a prerequisite of such operations. See, for the views of the State Department's Legal Adviser, AJ, 84 (1990), pp 725-9; and see Lowenfeld, ibid, pp 444-93, 712-16, and the US Supreme Court's decision in United States v Verdugo-Urquidez, ILR, 29 (1990), p 441 (and Lowe, CJ, 50 (1991), pp 16-19).

US courts have declined jurisdiction where its exercise would involve a violation of a treaty, since treaties are part of the supreme law of the land (eg US v Rauscher, 370 US 355 (1962); Donnelly v Mulligan, AD, 7 (1933-34), No 144; US v Toscanino (1974), ILR, 61, p 190), at least where the treaty is self-executing or has been implemented by legislation (US v Postal, AJ, 73 (1979), p 698; and see Reifenfeld, AJ, 74 (1980), pp 892-904). The improper seizure of a person from the US to another state with which the US has an extradition treaty has been held not to constitute a breach of that treaty so as to bring the rule into operation; in such a case, as in others where it is a violation of international law which is involved, US courts have not on that account declined jurisdiction over the person who was wrongfully seized. See Ker v Illinois (1986) 119 US 436; Friede v Collins (1982) 342 US 519. In the latter case a unanimous Supreme Court observed (per Black J): this court has never departed from the rule announced in Ker v Illinois . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction": at P 522.

See also United States v Insull et al where the court rejected the plea of the accused that he had been unlawfully seized by the Turkish police while on a Greek vessel in Turkish waters the court had no jurisdiction: 8 F Suppl 310; AD, 7 (1933-34), No 75. Similarly, in Ex parte Lopez the court interpreted the law of the land (the laws applicable for which the accused was charged) as having been forcibly seized in Mexico by some persons (whose subsequent extradition to Mexico was granted in the Villareal Case, n 15 of this section) and brought to the US: 6 F Suppl 342; AD, 7 (1933-34), No 76. See also, to the same effect, Jackson v Olson, AD, 13 (1946), No 27; US v United States Postal, AD, 11 (1942-43), No 53; US v Sodell, ILR, 24 (1957), p 256; US v Cotten (1973), ILR, 61, p 216; US ex rel Lujan v Gengler (1975), ILR, 61, p 206; US v Caldera, AJ, 73 (1979), pp 302; US v Peltier, AJ, 73 (1979), p 299; US v Cordero, AJ, 76 (1982), p 618. Although the
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Having regard to the personal authority of other states, a state is not allowed to naturalise aliens residing on its territory without their consent, nor to prevent them from returning home for the purpose of fulfilling military service.

§ 120 Restrictions upon independence

Independence is not unlimited liberty for a state to do what it likes. The fact that a state is a member of the international community restricts its liberty of action, because of many rules of customary international law binding upon it and because of the many treaty obligations which affect it in the management of its international affairs. Nevertheless, international law governs relations between states which are sovereign, and decisions are not unambiguous this has also been the attitude of English courts: Ex parte Scott (1829) 9 BC 446; Sinclair v HM Advocate (1890) 17 R (JC) 38; R v Barrett (1917) 86 JKB 894; Ex parte Elliott (1949) 1 All ER 376; and see also observations in R v Plymouth Magistrates' Court, ex parte Driver (1985) 2 All ER 681; R v Bow Street Magistrates, ex parte Mackeson (1982) 75 Cr App R 24; R v Guildford Magistrates' Court, ex parte Healy (1983) 1 WLR 108. See also Afonneke v A-G, AD, 10 (1941–42), No 97; A-G of Israel v Eichmann (1962), ILR, 36, p 5; the Kim Dar eng affair, RG, 78 (1974), pp 112–16, and 85 (1981), p 371; R v Hartley (1977), ILR, 77, p 330; and Fédération Nationale des Déportés et Internés Ré sistants et Patriotes v Barbie (1985), ILR, 78, p 125; Re Extradition of David (1975), ILR, 61, p 482 (allowing extradition to a third state of a fugitive unlawfully seized from another state). Similarly in 1976 South African courts upheld their jurisdiction to try persons abducted from Swaziland by South African police, despite defence pleas that their arrest was in violation of international law: Nkholo v Minister of Justice (1976), ILR, 68, p 7; Nduli v Minister of Justice (1977), ILR, 69, p 145. For a contrary decision of a French court, see Re Jolus, AD, 1973–34, No 77. But in the case of Colonel Argoud, who alleged that he had been abducted from the Federal Republic of Germany by French officials, he was tried and convicted in France for his illegal political activities: the Cour de Cassation in 1964 upheld the conviction notwithstanding any possible breach of international law which it held to be a matter for inter-state representations and not to affect the jurisdiction of the court: Re Argoud (1964), ILR, 45, p 90. See also Cocart-Zeligén, L'Affaire Argoud: considérations sur les arrestations internationalement irrégulières (1965); de Schutter, Rev Belge, 1 (1965), pp 8–124, and ZGW, 25 (1965), p 298ff, and 27 (1967), p 188–9.


Some countries make it a criminal offence to perform in their territorial government activities on behalf of a foreign state. See eg Kämpfer v Public Prosecutor of Zürich, decided in 1939 by the Swiss Federal Tribunal: AD, 10 (1941–42), No 2. While a government cannot exercise jurisdictional rights in foreign territory, it has been held repeatedly that, in pursuance of requisition decrees or similar measures, it may take peaceful possession of a vessel in foreign waters: see generally on the requisitioning of merchant ships abroad § 144, n 34, para 3.


1 See § 121, n 10.

2 See also § 633(3), as to the application of the principle in dubio mitius in the interpretation of treaties.

3 See Judge Anzioé's Opinion, referred to at § 118, n 2. Thus through Art 6 of the Convention of London 1884, between Great Britain and the former South African Republic, stipulating that the latter should not conclude any treaty with any foreign state other than the Orange Free State, without approval on the part of Great Britain, the Republic was so much restricted that Great Britain considered herself justified in defending the opinion that the Republic was not an independent state, although the Republic itself and many writers were of different opinion. See Rivier, i, p 89; Westlake, Papers, pp 419–60. As to the extent to which various treaties concluded at the beginning of the century between the USA and certain other states in Central America and the Caribbean impaired the independence of those states, see § 118, n 2, and the 8th ed of this volume, p 289, n 3, and pp 307–8. See also § 83, n 3, and § 131, n 37.

4 See §§ 81–3.

5 See § 96.

6 As to state servitudes, see §§ 236–40.

7 See § 198ff.

8 See §§ 117, and §§ 400–44; and see also § 409, on the plea of non-discrimination, and §§ 425–44 as to the numerous obligations resting on states in the field of human rights.

9 See §§ 175–81.


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tion of the environment, states are increasingly subject to constraints upon their freedom of action in their own territory to engage in or permit activities, not in themselves unlawful, which pollute the environment, particularly if damage beyond their frontiers may thereby be caused to other states or their nationals, or to areas (such as the high seas) which are available for use by all states. The matter is now frequently regulated by treaty, either bilaterally between neighbouring states experiencing problems of this kind, or multilaterally.

Finally, a state is not allowed to permit on its territory the preparation of a hostile expedition against another country. In the Corfu Channel case the International Court of Justice held that in view of 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States', the Albanian authorities were under an obligation to notify or give warning of the presence of a minefield in Albanian waters. As the Court found that in the circumstances of the case the Albanian authorities must be presumed to have had knowledge of the minefield, Albania was bound to pay compensation for the damage caused by the explosion of the mines. Where the act injurious to one state has been committed on the territory of another by an organ of a third state present there with the consent of the territorial state, the state committing the act will be responsible for the act itself, while the territorial state, if not a participant in the act itself, may be held responsible for allowing its territory to be used for the commission of the act.

Apart from these restrictions, which have their origin in customary international law, there are many obligations which a state can assume through treaties, without thereby losing its internal independence and territorial supremacy.

There is probably no state which is not in one point or another restricted in its territorial supremacy by treaties with other states.

§ 122 Subversive activities against other states. The duty of a state to prevent the commission within its territory of acts injurious to foreign states does not imply an obligation to suppress all such conduct on the part of private persons as is inimical to or critical of the regime or policy of a foreign state. Thus a state has in general no duty to suppress criticism of, or propaganda directed against, other states or governments on the part of private persons.

The direction is different where the conduct of private persons goes beyond the limits of criticism or propaganda and involves subversive activities directed towards the violent overthrow of the regime of another state. A state's obligations not itself to engage in such activities extend also to the encouragement and toleration of them on the part of others within its territory. Accordingly a state must take special care when it allows political refugees from another state to take up residence in its territory, particularly in the case of a political figure who has
been removed from power in that other state, or been expelled or fled from it before attaining power. Although ostensibly a private person, there is always a possibility that he may use his exile as a base from which to engage in political activities in his home country, perhaps involving plans for the overthrow of the regime there so as to facilitate his return. Many states, when allowing such persons to take up residence, accordingly make it a condition that they refrain from political activity affecting their country of origin.  

While the dividing line between criticism and subversion may not always be easy to draw, there is little room for doubt where the subversive activities of private persons in a state take the form of organising on its territory armed hostile expeditions against another state. A state is bound not to allow its territory to be used for such hostile expeditions, and must suppress and prevent them. Some states have legislation which is wide enough to apply to some aspects of the preparation of hostile expeditions and the recruitment of persons to serve in armed expeditions abroad. These matters assumed some prominence in the 1960s and 1970s as a result of the recruitment by containing elements in certain African states of foreign individuals (often nationals of European states or the United States of America) to assist their armed forces in their internal struggle for power in the state. Many states regarded such mercenaries, particularly where their recruitment was thought to be with the connivance or encouragement of some other states, as representing external interference, if not intervention, in the affairs of the state in which they were operating, to the prejudice of the principle of self-determination. As a result of these events the treatment of mercenaries, in certain limited circumstances, as criminals received a measure of international justification. Thus in General Assembly Resolution 3103 (XXVIII) (1973) it was declared that 'the use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals'. By Article 47 of the 1977 Additional Protocol I to the

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5 In 1973 a dispute arose between Tanzania and Uganda regarding alleged attempts by Dr Obote, the former President of Uganda but then living in Tanzania, to overthrow his successor, President Amin. The matter was settled through the good offices of Ethiopia, and on 28 May 1973 the Presidents of Tanzania and Uganda signed an agreement in Addis Ababa in which 'each party undertakes to see to it that its territory is not used as a base of subversion against the other. The Government of Tanzania will assume responsibility that former President Milton Obote will not interfere in the internal affairs of Uganda. The Government of Uganda will not demand the eviction from Tanzania of Dr Milton Obote'. However, after some years Dr Obote again from Tanzania urged the overthrow of President Amin, eg in his statement of 11 January 1979. Note also the toleration by the French Government of the mercenaries were being used primarily by military units from Cuba. As to the use of mercenaries in the civil war in the Congo in 1961, see McNemar in International Law of Civil Strife (ed Falk, 1971), pp 279–80, 288–90. A state’s armed forces may, however, in certain circumstances consist of or include organised units recruited from another country but forming an integral part of the state’s regular forces, as in the case of the Papal Guard (of Swiss origin; members of that Guard are an exception to the general rule by which it is a criminal offence for a Swiss national to serve in a foreign army) and the Gurkha Regiment (of Nepalese origin, but serving with the British army, pursuant to an agreement concluded in 1947 between the UK, India and Nepal; see the statement by the Minister of Defence in the House of Commons on 1 December 1947). In 1974 four mercenaries, three British and one American, were tried and executed in Angola by the Government of that country, against which they had been fighting; several others were sentenced to terms of imprisonment. See Parliamentary Debates (Commons), vol 915, cols 44–9 (12 July 1976); see also ibid, vol 906, cols 234–44 (10 February 1976); RG, 80 (1976), pp 570–4. As to the use of mercenaries in an unsuccessful attempt to stage a coup in the Seychelles in 1981, see RG, 87 (1983), pp 145–7, and 88 (1984), p 283; UNYB (1981), pp 226–8, and UNYB (1982), pp 321–8.

6 See generally on armed bands, Brownlie, ICLQ, 7 (1958), pp 712–35; Laugher, RG, 70 (1966), pp 75–116. In its judgment of 20 December 1988 the ICJ held that it had jurisdiction in respect of an application filed by Nicaragua against Honduras in respect of the alleged activities of armed bands said to be operating from Honduras on the border between the two states and in Nicaragua: Border and Trans-border Armed Actions Case, ICJ Rep (1988), p 69.

7 The legislation may have been primarily intended to ensure observance by the state of its obligations of neutrality in time of war. For the UK see the Foreign Enlistment Act 1870, under which it is an offence for a British subject to enlist in the military or naval service of a foreign state at war with another foreign state with which the UK is at peace, or for anyone to induce such conduct (ss 1 and 2); and it is also an offence to serve in or sell, supply, or offer to sell or supply, military equipment to proceed against a friendly foreign state (s 1). By virtue of the definition in the Act of a ‘State’, the Act can apply to some civil wars. See generally on the Act, McNair and Watts, Legal Effects of War (4th ed, 1966), pp 448–53; Lynch, Crim Law Rev (1978), pp 257–68; Jaconelli, Public Law (1990), pp 337–41; and for proposals to amend the Act, the Report of the Committee on the Recruitment of Mercenaries (Cmd 6569, 1976). See also the legislation enacted in Australia, the Crimes (Foreign Incursions and Recruitment) Act 1978 (ILM, 17 (1978), p 948); and on the Belgian law of 1 August 1979 see David, Rev Belge, 16 (1981), pp 3–32.

Apart from action under such legislation it may be open to a state to prevent the departure of persons intending to enlist in foreign forces engaged in hostilities abroad by withholding passport facilities. The UK took such action in relation to British mercenaries engaged in the hostilities in the Congo in 1961 (Parliamentary Debates (Commons), vol 638, cols 27–8 (written answers, 12 April 1961); ibid, cols 105–6 (written answers, 19 April 1961)); and in relation to those engaged in hostilities in Angola in 1976 (Parliamentary Debates (Lords), vol 368, cols 1201–7 (9 March 1976)).

It has been held that contracts made with a view to promoting a hostile expedition against a foreign State are unenforceable. See Forsyth v Delgado, Stirey (1934), p 75 (with a note by Niboyet); AD, 6 (1931–2), No 9; and see ZOV, 4 (1934), p 937, for references to similar cases.

It may be noted that in Angola the Government of the mercenaries were being used primarily by military units from Cuba. As to the use of mercenaries in the civil war in the Congo in 1961, see McNemar in International Law of Civil Strife (ed Falk, 1971), pp 279–80, 288–90. A state’s armed forces may, however, in certain circumstances consist of or include organised units recruited from another country but forming an integral part of the state’s regular forces, as in the case of the Papal Guard (of Swiss origin; members of that Guard are an exception to the general rule by which it is a criminal offence for a Swiss national to serve in a foreign army) and the Gurkha Regiment (of Nepalese origin, but serving with the British army, pursuant to an agreement concluded in 1947 between the UK, India and Nepal; see the statement by the Minister of Defence in the House of Commons on 1 December 1947).

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Note also that the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in which it is the duty of states not to organise or encourage the organisation of irregular forces or armed bands, 'including mercenaries', for incursion into the territory of another state. In GA Res 35/48 (1980), establishing an ad hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the General Assembly recognised 'that the activities of mercenaries are contrary to fundamental principles of international law, such as non-interference in the internal affairs of States, territorial integrity and independence'. See also Art 3(g) of the Definition of Aggression, GA Res 3314 (XXIX) (1974).
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1949 Geneva Conventions relating to the Victims of International Armed Conflicts, a mercenary (as strictly defined in the Article) does not have the right to be a combatant or a prisoner of war. In 1989 the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, based on the work of an ad hoc committee established in 1980. Articles 2, 3 and 4 lay down that any person who recruits, uses, finances or trains mercenaries, or who, being a mercenary, participates directly in hostilities or in a concerted act of violence, commits an offence for the purposes of the Convention, as does a person attempting to commit such an offence and an accomplice. States parties must not recruit, use, finance or train mercenaries, and must prohibit and make punishable such activities (Article 5). The Convention also imposes various obligations of cooperation upon the states parties, and requires them to take the necessary steps to assess jurisdiction over offenders (Articles 9 and 12) and provide for their extradition (Article 15).

A state's obligation to prevent hostile expeditions from its territory, and itself to refrain, directly or indirectly through organisations receiving from it financial or other assistance or closely associated with it by virtue of the state's constitution, from engaging in or actively supporting subversive activities against another state have often been stated. Article 2 of the International Law Commission's draft Code of Offences against the Peace and Security of Mankind included the following offence:

"The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions."

In its Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States the General Assembly asserted that 'Every State has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State'. As to subversive activities by the state itself against another state, Article 4 of the International Law Commission's 1949 draft
Declaration of the Rights and Duties of States, 20 stated that ‘Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization in its territory of activities calculated to foment such civil strife’ (Article 4); and in Article 2 of its draft Code of Offences against the Peace and Security of Mankind21 it included as an offence ‘The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State’. In GA Res 2131 (XX) (1965) the UN General Assembly declared that ‘no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State or interfere in civil strife in another State’. This was repeated verbatim in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States,22 which also stated that ‘Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force’. The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state may in certain circumstances constitute aggression as defined by the General Assembly.23 For that reason the International Law Commission, in its renewed consideration of the draft Code of Crimes against the Peace and Security of Mankind, agreed to regard these acts as forming part of the crime of aggression rather than as a separate crime.24

One of the central issues before the International Court of Justice in the Military and Paramilitary Activities case was the legality or otherwise of action by the United States of America in rendering logistic, financial and other assistance to the so-called Contra forces which were trying to overthrow the Government of Nicaragua. The Court found that some, although not all, of this assistance involved acts in breach of the United States’ obligations under customary international law in respect of the prohibition against the threat or use of force, and of the principle of non-intervention.25 Neighbouring states have sometimes concluded treaties containing provisions aimed at prohibiting use of the territory of a state’s neighbour by a third state as a base for armed hostile or terrorist incursions into the territory of the other.26 Such provisions reinforce the prevailing rules of customary international law in this matter.

Despite this relative clarity of the law, there have been numerous incidents in which hostile expeditions have been organised in one state against another,27 or in which a state has been more directly involved in or assisted subversive activities against another.28 Thus during the Arab–Israeli fighting since 1948 anti-Israeli groups operating from bases in neighbouring Arab states have often from there organised and launched hostile expeditions into Israel;29 also in 1948, the General Assembly of the United Nations considered the grant by Yugoslavia, Albania and Bulgaria of assistance and facilities for armed rebel groups operating against Greece;30 in 1952 China was condemned by the General Assembly for giving assistance to hostile forces in Burma;31 in 1954 insurgent forces crossed the frontier into Guatemala from Honduras;32 in 1955 an expeditionary force organised in Nicaragua attacked Costa Rica;33 in 1958 Lebanon alleged that the United Arab Republic was organising and assisting subversive activities against Lebanon;34 in 1961 Cuban exiles in the United States of America

20 YBILC (1949), p 286.
21 YBILC (1954), ii, p 149.
23 GA Res 3314 (XXVII) (1974), Art 3(g). Such sending of armed bands into another state is not only an unlawful use of force and unlawful intervention but will also constitute an indirect armed attack, which gives rise to a right of self-defence on the part of the attacked state: see § 127. See also, on indirect military aggression, Zanardi in The Current Legal Regulation of the Use of Force (ed Cassese, 1986), pp 111–19. But a state’s responsibility is not engaged by the transport of armed forces which were trying to overthrow the regime of another State or interfere in civil strife in another State: see Akehurst, Indian JIL, 27 (1987), pp 366–7.
24 Report of the ILC (40th Session, 1988), para 228(5), and draft Art 12.4(g) of the draft Code of Crimes provisionally adopted by the ILC (at para 279). But preventing or aiding subversive or terrorist activities in another state if it was in no position to put a stop to it: Military and Paramilitary Activities Case, ICJ Rep (1986), pp 82–6. See Akehurst, Indian JIL, 27 (1987), pp 366–7.
28 As to armed expeditions sent by one state into another’s territory at the latter’s invitation, see § 130.
29 Where there is a civil war between contending factions in a state, questions of recognition arise and can complicate consideration of the lawfulness of assistance given by other states to the rebels: see § 49, and § 130, n 16.
30 See eg as to America’s attack on such bases in Sinai in 1956, § 127, n 25; and as to Israel’s retaliatory raid on Beirut airport in 1968, see Falk, AJ, 63 (1969), pp 415–43, especially p 423ff, and Blum, AJ, 64 (1970), pp 73–103, especially p 791ff. Insofar as a state of war may be regarded as having existed for the purpose of providing a matter of considerations apply.
31 See GA Res 109 (II) (1947), 193 (III) (1948), 288 (IV) (1949) and 382 (V) (1950), and the Report of the Special Committee set up under the first of these Resolutions (UN Doc A/644) and the Report of the Committee Established by the Security Council (UN Doc S/460/Rev 1).
32 GA Res 707 (VII) (1952): the matter was regarded as involving ‘a violation of the territory and territorial sovereignty’ of Burma. See also GA Res 815 (IX) (1954).
35 See references cited at § 130, n 4.
ica organised an armed expedition which landed at the Bay of Pigs in Cuba, some years later United States agencies engaged in covert operations in Chile against the regime of President Allende; during the Vietnam conflict United States bases in Laos were used as a starting point for bombing and reconnaissance missions against North Vietnam, while Cambodian and Laotian territory was used by North Vietnamese forces as bases for attacks on the Republic of Vietnam; throughout the 1970s many African states have allowed their territories to be used by armed rebel or insurgent groups engaged in 'wars of liberation' against colonial regimes in neighbouring countries; in 1978-79 Ugandan exiles in Tanzania launched attacks (with the support of Tanzanian forces) into Uganda to bring down the regime of President Amin; and for several years from 1981 onwards the United States gave assistance in various forms to rebel forces in Nicaragua.

In addition to a state's obligations in the matter of subversive activities against other states, a state also has a duty to do all it can to prevent and suppress attempts to commit common crimes against life or property, where such crimes are directed against other states; 'a fortiori a state must not itself engage in or support international terrorist acts. The undertaking or encouragement by the authorities of a state of terrorist activities in another state, or the toleration by the authorities of a state of organised activities calculated to carry out terrorist acts in another state was included by the International Law Commission in its draft Code of Offences against the Peace and Security of Mankind. In the Declaration on the Strengthening of International Security and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States the General Assembly reaffirmed the duty of states to refrain from organising, assisting, instigating or participating in terrorist acts in another state. Progress towards the elimination of this abhorrent anti-terrorism measures has however been hindered by difficulties over, in particular, the definition of 'terrorism', which must, in the eyes of some but not all states, take account of the purposes for which a prima facie terrorist act is committed. This has proved controversial where, although terrorist acts may be privately undertaken and motivated, they are more often undertaken by organised groups (and often by or with the support of states themselves) acting in pursuit of international political goals, such as the attainment of a territory's independence or protest against a particular state's actions.

Nevertheless, after an increase in acts of terrorism since the 1960s, involving in particular the kidnapping and sometimes killing of diplomats and others, and the hijacking and sabotage of aircraft, specific international action was taken in an attempt to put a stop to such terrorist activities. A Convention on Offences and Certain Other Acts Committed on Board Aircraft was concluded in Tokyo in

35 UNYB (1961), pp 120-23; and see Whiteman, Digest, 5, pp 275-6.
37 See Diem, B. For the rejection by the UK of a Chinese protest against the use of Hong Kong by US forces as a leave centre in between periods of operational duty in the Vietnam conflict, see BPIL (1965), pp 136-7.
38 See § 127, n 31.
39 Thus eg Tunisia and Morocco allowed the Algerian rebel movement, the FLN, to establish bases in their territories during the Algerian civil war in the years after 1954; Zambia and Mozambique allowed rebel movements in Rhodesia to establish bases in their territories; and Zambia allowed SWAPO guerrilla operations in Namibia to establish bases in its territory. Similarly, in the Middle East, several states bordering Israel have, since 1948, allowed their territories to be used by Palestinian and other guerrilla forces operating against Israel (and see n 29).
41 See also §§ 421-4, as to non-extradition for political offences, and attempts to exclude terrorist acts from the scope of such offences for extradition purposes.
42 YBILC (1954), ii, p 149. For further consideration of the matter by the ILC, in its renewed consideration of the draft Code, see Report of the ILC (40th Session, 1988), paras 246-55. As to earlier action relating to terrorism during the time of the League of Nations see 8th ed of this vol, p 292, n 5. The Convention for the Prevention and Punishment of Terrorism 1937, which was concluded within the framework of the League of Nations following the assassination in 1934 of the King of Yugoslavia and the President of the Council of France, was ratified by only one state and has not entered into force. For the final drafts of the Convention for the International Prevention and Punishment of Terrorism, see Nanda, J, The Convention and the Convention of the Council of the International Criminal Court, see the Report of the Committee of Jurists of 26 April 1937, Doc C 222, M 162 1937 V; Hudson, Legislation, vi, pp 802, 878. For the replies of governments see Doc A 24 1936, V. See also, for the discussion in the First Committee of the Seventeenth Assembly in 1936, OffJ, Special Suppl, No 156. For an analysis of the Convention see By 19 (1938), pp 214-17. As to the special protection which must be afforded to Heads of States, diplomats and others, see §§ 451 and 492.
43 For an attempt to invoke municipal law remedies in respect of terrorist acts as a violation of international law — unsuccessfully, but for differing reasons on the part of the three-member Court of Appeals — see Tel-Oren v Libyan Arab Republic (1984), ILR, 77, p 192 (especially at pp 224-5, 235-7, pointing to uncertainty whether terrorism violates established customary international law).
46 See § 141.
1963, followed by the Convention for the Suppression of Unlawful Seizure of Aircraft signed at the Hague in 1970, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal in 1971. Also in that year the Organisation of American States concluded a Convention to Prevent and Punish Acts of Terrorism, and within the framework of the United Nations a Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, was opened for signature in 1973. A European Convention on the Suppression of Terrorism was opened for signature in 1977; it provides principally for certain terrorist acts to be extraditable as between contracting parties without being regarded as political offences, and for parties, if they do not extradite a person suspected of committing a terrorist offence, to submit the case to their competent authorities for the purpose of prosecution. The prevention of international terrorism has been considered at successive sessions of the General Assembly of the United Nations which set up an ad hoc Committee on International Terrorism in 1972. In 1979 the Assembly adopted a Convention against the Taking of Hostages. Two further multilateral agreements were concluded in 1988: the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, and the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (together with a Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf). In addition to such international measures some states have enacted legislation to provide specific measures to counter terrorism, such as the Prevention of Terrorism (Temporary Provisions) Act 1974 and the Suppression of Terrorism Act 1978 enacted by the United Kingdom, and the Act to Combat International Terrorism 1984 enacted in the United States of America.

The principles of independence and non-intervention enjoin upon governments and state officials the duty to refrain not only from active interference but from propaganda directed against another state, as by inciting the overthrow of the government, or more generally, propaganda encouraging threats to breaches of international peace or acts of aggression. Such propaganda involves the state concerned in a breach of its international obligations. Numerous...
attempts have been made to prohibit such propaganda, but while states generally have been willing to subscribe to treaties and other international instruments on the subject, many have been reluctant to refrain from hostile propaganda altogether. In the Convention concerning the Use of Broadcasting in the Cause of Peace 1936 the parties undertook to prohibit the broadcasting within their territories of any transmission calculated by reason of its inaccuracy or otherwise to disturb international understanding or to incite the population of any territory to acts incompatible with the internal order or the security of a territory of another party. In 1948 a United Nations Conference on Freedom of Information and the Movement Against International Propaganda was held, as a result of which a Convention on the Right of Correction was adopted in 1952. From its

subversive activities generally), and § 69 (as to freedom of information). On the possibility of protecting international peace by municipal legislation against war propaganda as well as against acts injurious to foreign states, see Pella, La Protection de la paix par le droit interne (1933), and RG, 40 (1933), pp 401–505; Mirkine-Guetzivitch, Droit constitutionnel international (1933), pp 244–90; Rappaport, Grotius Society, 18 (1932), pp 41–64. In 1950 and 1951 Soviet Russia and a number of other Eastern European states passed legislation penalising incitement to war. See AJ, 46 (1952), Suppl, pp 34–42, 99–104, and Grzybowski and Pundez, ibid, pp 537–42.

On the National-Socialist propaganda, wireless and otherwise, directed against Austria in 1933, see Documents (1933), pp 385–98; Sennent, La Radiophonie et le droit international public (1932), pp 37 et seq; Press, AJ, 28 (1934), pp 649–68; Raestad, Dossiers de la cooperation internationale (1953).

In 1949 Haiti accused Santo Domingo of moral aggression in that a Haitian exile in Santo Domingo had been allowed to make "vulgar and provocative broadcasts" directed at the over-

control by the British Government has frequently been invoked by that government in


Particular problems have arisen in the context of direct transmission of television programmes across national frontiers, even if they do not contain overtly subversive material: see Freeman, AS Proceedings (1980), pp 351–11, Bond, ibid, pp 311–17; Taishoff, State Responsibility and the Direct Broadcast Satellite (1987). And see the European Convention on Transfrontier Television 1989 (Misc No 12 (1990); Cm 1068), on which see Boissin de Chazournes, AFDL, 34 (1988), pp 795–805. The European Court of Human Rights, in Autronic AG o Switzerland, The Times, 30 May 1990, has enforced a company's freedom under Art 10 of the European Convention on Human Rights to receive information and ideas, in the form of television broadcasts from a Soviet television satellite. See also, as to differences between Cuba and the USA over transmissions by 'TV Marti' from the USA to Cuba, UN Docs S/21249 and S/21365 of 16 April 1990 and 21 June 1990 respectively. See generally as to satellites, § 372.

See § 115, n. 8.

Resolution 756 (XXIX).

A Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, the Promotion of Human Rights and to Countering Apartheid and Incitement to War was adopted in the 26th UNESCO General Conference in November 1978: ILM, 18 (1979), p 276. See also the Resolution on an International Programme for the Development of Communication adopted at the 21st UNESCO General Conference in 1980: ILM, 20 (1981), p 451. This resolution has been so early days the General Assembly of the United Nations has passed resolutions condemning hostile propaganda as well as, more generally, propaganda against peace or for wars of aggression. The condemnation of such propaganda has tended to be accompanied by measures to encourage the freedom to provide and receive information, this being regarded as necessary for the proper development of international understanding and as an important factor contributing to the maintenance of international peace. It has also been regarded as involving a fundamental human right. A Draft Convention on Freedom of Information was prepared at the 1948 United Nations Conference but, although given further study subsequently, it has not yet been adopted. A Draft Declaration on Freedom of Information was approved by the Economic and Social Council in 1960, but it too has not yet been adopted by the General Assembly. Freer access to and dissemination of in
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formation was also provided for in the Final Act of the Helsinki Conference on Security and Cooperation in Europe 1975. It is in the context of the freedom to provide and receive information that states have sometimes felt it necessary to protest at actions by another state designed to prevent the reception in its territory of broadcasts originating from the territory of the protesting state.

§ 123 Restrictions upon personal authority Personal authority does not give unlimited liberty of action. Although the citizens of a state remain to a considerable extent under its power when abroad, the exercise of this power is restricted by the state's duty to respect the territorial supremacy of the foreign state on whose territory those citizens reside. A state must refrain from performing acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign state. A state must not perform acts of sovereignty in the territory of another state. Thus, for instance, a state may not use force upon its nationals abroad to compel them to fulfill their military service obligations in their home state (even though it is within its rights in imposing such obligations upon them); and a state is prevented from requiring such acts from its citizens abroad as are forbidden to them by the municipal law of the land in which they reside, and from ordering them not to commit such acts as they are bound to commit according to the municipal law of the land in which they reside.

But a state may also by treaty obligation be in some respects restricted in its liberty of action with regard to its citizens. Thus insofar as the principle of marking the establishment of a so-called 'new international information and communication order', on which see Condorelli, Ital YBIL, 5 (1980-81), pp 123-38; Sur, AFDI, 27 (1981), pp 45-64. On the UNESCO Committee for the Intergovernmental Information Programme, established in 1985, see Beer-Gabel, AFDI, 32 (1986), pp 684-96. Cmnd 6198, at pp 36-9; ILM, 14 (1975), pp 1292, 1315-17. See also the Concluding Document of the Madrid Follow-up Conference 1980-83 (Cmnd 9066, pp 19-21; ILM, 22 (1983), pp 1398, 1403).

§ 124 Abuse of rights A further restraint on the freedom of action which a state in general enjoys by virtue of its independence, and territorial and personal supremacy, is to be found in the prohibition of the abuse by a state of a right enjoyed by it by virtue of international law. Such an abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage. Thus international tribunals have held that a state may become responsible for an arbitrary expulsion of aliens. The Permanent Court of International Justice expressed the view that, in certain circumstances, a state, while technically acting within the law, may nevertheless incur liability by abusing its rights — although, as the Court said, such an abuse cannot be presumed. Individual judges of the International Court of Justice have some-
times referred to it; possibly it is implied in the frequent judicial affirmation of the obligation of states to act in good faith. The conferment and deprivation of nationality is a right which international law recognises as being within the exclusive competence of states; but it is a right the abuse of which may be a ground for an international claim. The duty of the state not to interfere with the flow of a river to the detriment of other riparian states has its source in the same principle. The maxim, sic utere tuo ut alienum non laedas, is applicable to relations of states no less than to those of individuals; it underlies a substantial part of the law of torts in several systems of law; it is one of those general principles of law recognised by civilised states which the International Court is bound to apply by virtue of Article 38 of its Statute. However, the extent of the application of the still controversial doctrine of the prohibition of abuse of rights is not at all certain.

Much of the purpose of a doctrine of abuse of rights is directed to securing a balance between the right of the state to do freely all those things it is entitled to do, and the right of other states to enjoy a similar freedom of action without harmful interference originating outside their borders. The need for such a balance has been underlined by the rapid growth of activities which could cause harm far outside the area where they take place, and by the urgency of contemporary concern for the protection of the human environment. In the Trail Smelter Arbitration, which raised questions of state responsibility for acts of private persons on its territory, the tribunal supported the proposition that 'a

that the prohibition of abuse of rights was supported by judicial and other authority (Report of the Commission (Fifth Session, 1953)).


See the Joint Dissenting Opinion in the Admission Case, ICJ Rep (1949), pp 91, 92; and see the Opinion of the Court itself in that case for the statement that with regard to the conditions of admission of new members of the Charter did not forbid the taking into consideration of any factor it was possible 'reasonably and in good faith' to connect with the conditions laid down in the Charter.


See §§ 175–81 and also §§ 173–225.

See Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA, Neth YBIL, 11 (1980), p 326, concerning pollution of the Rhine by a company in France, causing damage in the Netherlands. The court concluded that it had to apply international law and that, there being no applicable rule of customary international law, it had to apply general principles of law, which included the principle sic utere tuo ut alienum non laedas, by virtue of which the person making the discharging was causing the pollution was acting in breach of a legal duty.


See eg Balladore Pallieri, p 287; Cavagneri, Nuovi Studi sull'intervento (1928), pp 42–92. 'Abuse of rights' may have some affinities with, although it is distinct from, the doctrine of déroute ment de pouvoir. The Court of Justice of the European Communities has jurisdiction to hold invalid acts of the Council and Commission of the Communities on grounds, inter alia, of misuse of powers: see Art 173 of the Treaty establishing the EEC, and equivalent Articles of the Treaties establishing the ECSC and Euratom.
permit activities in their territories, that freedom must, if such activities involve risk, be compatible with the protection of the rights flowing from the sovereignty of other states, which calls for cooperation between the states concerned to prevent or minimise the risk of transboundary injury, or its effects if injury has already occurred, and for reparation to be made for any appreciable injury suffered.

§ 125 Protection of the environment  Concern for the effects which a state's acts may have outside its territory has increasingly extended beyond their specific effects on nearby states, to cover also acts which may affect all states through their impact on the world's environment generally.

18 Concerning accidents capable of causing transfrontier damage: ILM, 28 (1989), p 247. And see § 125, n 15, for other OECD decisions.

See draft Arts 1–10 submitted by the Special Rapporteur and referred to the Drafting Committee by the ILC at the end of its debate on this topic at its 1988 session: Report of the ILC (40th Session, 1988), paras 21–101. See also Arts 10–17 (the previous Arts 1–10 having been revised to become Arts 1–9) discussed by the ILC at its 1989 session, and focusing on procedures (warnings, notifications, etc) for preventing transboundary harm: Report of the ILC (41st Session, 1989), paras 377–97, these articles were expanded into Arts 10–20 at the Commission's session in 1990, and draft Arts 21–27 (on international liability) and 28–33 (on civil liability in the event of a transboundary injury) were also discussed; Report of the ILC (43rd Session, 1990), 410.


While international concern has grown rapidly in the last decade, the matter began to attract growing attention among lawyers and scientists much earlier. See eg Air Pollution (1961), World Health Organization Monograph Series No 46.

2 See n 11 of this section.

3 Some states formally reserved their rights as against the USSR; these included the UK (see UKMIL, BY, 57 (1986), p 600). See generally on this incident, RG, 90 (1986), pp 1016–20, and 91 (1987), pp 653; Kiss, AFDI, 32 (1986), pp 139–52; Handl, RG, 92 (1988), pp 5–62; the statement by the IAEA Board of Governors, at ILM, 25 (1986), p 1029; Sands, Chernobyl: Law and Communication (1988); and Woodliffe, ICLQ, 39 (1990), pp 461–71. For an attempt (unsuccessful, mainly on procedural grounds) to institute proceedings against the USSR for damage allegedly caused by the Chernobyl accident, see Garden Contamination (1) and (2) (1987), ILM, 25, pp 367–88.

4 See also the report of the court, referred to in note 3, that relevant international obligations which might have been breached by the USSR would give rise to claims by other states rather than by affected individuals (at p 382).

As a result of the Chernobyl accident two conventions were concluded within the framework of the IAEA: the Convention on Early Notification of a Nuclear Accident 1986, and the Convention on Assistance in the Event of a Nuclear Accident or Radiological Emergency (1986), ILM, 25 (1986), pp 1370, 1377. The former entered into force on 27 October 1986. It is open to accession by all states and to international organisations and regional integration organisations constituted by sovereign states which have competence in the relevant matter. The depositary is the IAEA. See Article 8. The IAEA Notification and Assistance Convention (1986), Note also several bilateral agreements providing for prompt exchange of information in the event of a nuclear accident, such as that concluded in 1990 between the UK and the Soviet Union (TS No 54 (1990)) and in 1987 between the UK and Denmark (TS No 11 (1989)), which has in turn concluded similar agreements with Sweden, Norway, Finland, Poland and the USSR: RG, 92 (1988), p 379. For other similar agreements, see OECD Council decision of 8 July 1988 (ILM, 28 (1989), p 247; RG, 94 (1990), pp 140–6), and Boyle, BY, 60 (1989), pp 257, 278–85.


In 1973 Australia and New Zealand instituted proceedings before the ICJ against France in respect of the conduct by France of nuclear tests in the Pacific which it was claimed by the applicants would lead to radiological fallout on their territories; and their territorial government had granted interim measures of protection to the applicant states (Nuclear Tests Case, ICJ Rep 1973, pp 99, 135: see Cot, AFDI, 19 (1973), pp 252–71) but did not in the event need to reach any decision on the substantive issues which arose (ibid, 1974), p 253, 457. Note also Art I.1 of the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water 1963 (TS No 3 (1964)) providing for the prohibition of nuclear weapon
pollution of the land in several other countries as a result of increases in atmospheric radioactivity and consequential polluted precipitation over a wide area.

Multilateral treaties dealing with specific forms of pollution have been concluded covering such matters as pollution at sea\(^4\) (as by the spillage of oil,\(^5\) and dangerous substances,\(^6\) pollution of maritime areas resulting from land-based sources,\(^7\) pollution of rivers flowing through more than one state,\(^8\) transboundary airborne pollution,\(^9\) and damage-limiting action to be taken in the event of a nuclear accident.\(^10\) Where problems arise particularly between neighbouring states, they may regulate matters by bilateral arrangements.\(^11\) Increasing problems have been associated with the dumping, in a safe manner, of dangerous waste materials which are an inevitable by-product of many industrial processes; nuclear waste material has posed particularly serious problems. Apart from steps taken to control dumping at sea,\(^2\) treaties have sometimes totally excluded the dumping of certain wastes in areas covered by them,\(^3\) or, like the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989,\(^4\) have prescribed procedures designed to minimise the associated risks.

Worldwide concern over environmental matters found expression in the convening, in Stockholm in 1972, of the United Nations Conference on the Human Environment. This Conference adopted a Declaration of Principles,\(^5\) and an Action Plan,\(^6\) which have provided the framework for subsequent international action. Following a recommendation of the Stockholm Conference, the United Nations General Assembly in 1972 established a United Nations Environment Programme in order to promote the further development of international environmental law, taking into account the Declaration of the United Nations Conference on Human Environment, as well as the special needs and concerns of the developing countries, and to examine, in this context, the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of the environment, also taking into account relevant existing international legal instruments (pt 1, para 15(d)).


See n 6 of this section.\(^8\)

See eg Article V of the Antarctic Treaty 1959 (see p 257).

ILM, 28 (1989), p 657. See also the Memorandum concerning Transboundary Air Pollution between the USA and Canada in 1980 (ILM, 20 (1981), p 690). Participation in this Stockholm Conference was convened on the recommendation of the United Nations Economic and Social Council in 1968 (Res 1346 (XLV)). Principle 21 states that states have, in accordance with the UN Charter and the principles of international law, the sovereign right to exploit their own resources pursuant to their own policies, in the interests of their peoples, and to promote the development of their national activities, in the movements of resources being undertaken on an international scale.

See also GA Res 44/228 (1989), convening a Conference on Environment and Development in Brazil in June 1992, to promote the further development of international environmental law, taking into account the Declaration of the United Nations Conference on Human Environment, as well as the special needs and concerns of the developing countries, and to examine, in this context, the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of the environment, also taking into account relevant existing international legal instruments (pt 1, para 15(d)).


As to pollution of water and air, see § 124, and as to pollution at sea, see § 335 ff.

ILM, 11 (1972), p 1421.
Is 

dioxide emissions caused primarily by increases in the use of fossil fuels and by 
chlorofluorocarbons (damaging the ozone layer) and an increase in carbon 
about by two related, though distinct, scientific discoveries. The first was the 
discovery in 1985 of a hole in the protective layer of ozone in the earth’s upper 
modification techniques having widespread, long-lasting or severe effects as the 
massive pollution of the atmosphere or of the seas, has been proposed by the 
International Law Commission as an international crime. A convention was 
adopted by the United Nations General Assembly in 1976 by which parties 
undertake ‘not to engage in military or any other hostile use of environmental 
modification techniques having widespread, long-lasting or severe effects as the 
means of destruction, damage or injury to any other State Party’. An 
broader concept of environmental pollution and damage was brought 
about by two related, though distinct, scientific discoveries. The first was the 
discovery in 1985 of a hole in the protective layer of ozone in the earth’s upper 
modification techniques having widespread, long-lasting or severe effects as the 
means of destruction, damage or injury to any other State Party’. An 

An even wider concept of environmental pollution and damage was brought 
about by two related, though distinct, scientific discoveries. The first was the 
discovery in 1985 of a hole in the protective layer of ozone in the earth’s upper 


Conventions of 1949 (ILM, 16

Draft Articles on State Responsibility, Art 19.3(d); YBILC (1976), ii, pt 2, pp 95, 108–10 (pars 30–33), 121 (para 71); and Report of the ILC (1989), pars 199–204.


large portions of the earth). After the discovery of the damage to the ozone layer 
the international community responded quickly by concluding the Vienna 
Convention for the Protection of the Ozone Layer 1985, and the associated 
Montreal Protocol on Substances that Deplete the Ozone Layer 1987, concerned particularly with limiting the use of chlorofluorocarbons. The ‘greenhouse’ problem does not yet have sufficiently widely agreed specific causes to enable an effective international agreement to be concluded, but studies leading to that end are being undertaken as a matter of urgency. The attempt to ensure protection of the environment, as a matter of common interest to all, gives rise to some difficult and novel legal problems. These include the question whether a claim lies for damage to the environment itself, distinct from any economic loss which such damage may cause to the interests of a particular state (as by loss to its fisheries industry, or to tourism, or the costs of making good the damage), and the question who, in the case of damage to the environment itself, may present such a claim. Failing the establishment of a special international institution with powers in this respect, it may prove necessary to develop the possibilities inherent in obligations to protect the environment being owed erga omnes, or in the right of a party to a multilateral treaty to take action against another party which is in breach. In any event the whole matter raises a serious legal question whether the international community can afford to go on attempting to deal with those problems by adapting, and supplementing by treaty, a legal system based essentially on establishing the delictual liability of certain respondents and assessing appropriate compensation. This, by itself at least, seems an inadequate way of tackling what is basically a question of public order, and accidents are likely to have results not compensatible by damages. A delictual system is hardly designed to deal with things that ought not to be allowed to happen at all.

23 ILM, 26 (1987), p 1529. The Convention was based upon a draft prepared by UNEP. It entered into force on 22 September 1988.

24 ILM, 26 (1987), p 1550. It entered into force on 1 January 1989. There are special provisions for developing countries. See also the Adjustments to that Protocol adopted in 1990 (TS No 32 (1991)), on which see Mintz, Yale JIL, 16 (1991), pp 571–82.

25 See eg the work of the Intergovernmental Panel on Climate Change, established in 1988 by UNEP. The panel established several committees to study various aspects of the matter, and they presented their reports in 1990.


27 On the need to develop international law so as adequately to ensure such protection see Bruneé, ZStV, 49 (1989), pp 791–808; and Report of the ILC (42nd Session, 1990), paras 526–30, as to the protection of the environment in areas beyond national jurisdiction (‘global commons’).

28 Note that Art 8(10) of the Convention on the Regulation of Antarctic Mineral Resource Activities 1988 (see § 257, n 5) provides for the Commission established by that Convention to be able to pursue, in the national courts of parties, liability claims for damages to the Antarctic environment or dependent or associated ecosystems.

29 See § 1, n 6; and note also § 1, n 9, as to the possibility of instituting an actio popularis.

30 See § 649.
SELF-PRESERVATION AND SELF-DEFENCE


§ 126 Self-preservation

As a rule, all states are under a mutual duty to respect one another’s sovereignty, and are bound not to violate one another’s independence. Exceptionally, however, a state may in certain circumstances violate another state’s territory. One such exception occurs in those few cases in which intervention is permitted. The other principal exception was formerly regarded as covering violations for the purpose of self-preservation, it being widely maintained that every state had a fundamental right of self-preservation. But this alleged right, if it ever existed, was often a barely colourable excuse for violations of another state’s sovereignty. If every state really had a right of self-preservation, all the states would have the duty to admit, suffer, and endure every violation done to one another in self-preservation. The inviolability of a state’s territory is now so firmly and peremptorily established by Article 2(4) of the Charter of the United Nations, and the prohibition of aggression and other unlawful uses of armed force is so fundamental a rule of international law, that self-preservation can no longer be invoked to justify such violations.

More generally, however, and not only in connection with violations of territory, the necessity of safeguarding the integrity and inviolability of the territory of the state may in strict limited circumstances justify acts which would otherwise be internationally wrongful.

§ 127 The right of self-defence

No state is obliged by customary international law to remain passive when another state takes action inimical to its legally protected interests. Where this happens, the state affected may be entitled to take counter-measures. These may take a form not involving the use of force; counter-measures involving the use of force are now normally unlawful, because of Article 2(4) of the United Nations Charter.

Nevertheless, if a state is attacked it is entitled, in circumstances of necessity, to use armed force in order to defend itself against an attack, to repel the

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1 See §§ 128–33.

2 See Draft Articles on State Responsibility, Arts 33 and Commentary, YBILC (1980), pp 34–52, concerning violations of territorial sovereignty. The ILC acknowledged that there were still divergent views about the acceptability of the defence of necessity. The circumstances in which, in the view of the ILC, would enable a state to invoke the wrongfulness of action taken include (a) that the action is the only means of safeguarding an essential interest of the state against a grave and imminent peril, (b) that the action does not seriously impair an essential interest of the other state, and (c) that the international obligation with which the action taken is in conformity does not arise out of a rule of jus cogens.

Some older precedents may still be instructive for considering the kind of situations in which those questions may arise in practice. The necessity of taking action to avoid damage to essential interests of the state was acknowledged as justifying conduct otherwise wrongful in the Russian Indemnity Case (1912), RIAA, xi, pp 421, 443 (although on the facts of the case the Permanent Court of Arbitration concluded that the financial difficulties which had arisen did not constitute a state of necessity sufficient to justify the conduct in question); see also French Company of Venezuelan Railroad Case, ibid, p 285, 353 (concerning grave financial difficulties); Company General of the Orinoco Case, ibid, pp 184, 280 (need to avoid armed conflict); and the individual opinion of Judge Anzilotti in the Oscar Chin Case (1934), PJCE, Series A/B, No. 63, pp 112–14. As to the Torrey Canyon incident (1967), see Comm 3246; See also comments by Fitzmaurice, as Legal Adviser to the British Foreign Office, in the context of British military action against Egypt in 1956, quoted by Marston, ICLQ, 37 (1988), pp 773, 785–6.


3 See Art 30 of the ILC’s draft Articles on State Responsibility, YBILC (1979), pp 115–22; Leben, AFID, 28 (1982), pp 9–77; Zoller, Peacetime Unilateral Remedies: An Analysis of Counter-Measures (1984); Simon and Sicilians, AFID, 32 (1986), pp 53–78; de Graaf, YBIL, 7 (1986–87), pp 169–89; Elagab, The Legality of Non-Forcible Counter-Measures in International Law (1988); Thirlaway, BY, 60 (1989), pp 107–113. In the Case Concerning the Airplane Case (1998), ILR, 54, p 303, the Arbitral Tribunal said: "If a situation arises which, in one state’s view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of force, to enforce its rights through "counter-measures" (art 337); see also § 625, n 22. See also §§ 129, 13–16, on various forms of economic coercion. See n 12, as to reprisals; and vol II of this work (7th ed), §§ 29–32, as to retorsion.

4 See § 128. It may be noted that Art 2 (4) does not prevent a state from using force on its own territory, eg if it has been invaded by another state: in such a case the use of force would be justified as self-defence.

Note also the somewhat wider sense of self-defence as meaning the wounding off of a disaster caused or threatened by the work of nature. For instance, if a river flowing successively through
attacking forces, and expel them from its territory. Article 51 of the Charter, moreover, expressly preserves the right of individual or collective self-defence against armed attack – a right which the Charter recognises as ‘inherent’ and which is based on customary international law continuing to exist alongside the law established by the Charter. The requirement that there be an armed attack is clear, but not without difficulty. It includes direct attacks across an international frontier by a state’s regular armed forces (if amounting to more than a mere frontier incident), and indirect attacks consisting of the sending by or on behalf of a state of armed groups or mercenaries into another state where they carry out acts of armed force of such gravity as would constitute an armed attack if conducted by regular forces; but does not include such acts as assistance to opposition groups taking the form of the provision of weapons or logistic, financial or other support (although such acts may amount to an unlawful use of threat of force or to intervention in the internal or external affairs of a state).

The territories of two states is provided with a lock in the lower state, and if, through a sudden rise of the upper part of the river, the territory of the upper state be dangerously flooded, and if there be not sufficient time to approach the local authorities, it would be an excusable act on the part of the upper state to send some of its own officials into the lower state to open the lock.

As to defensive action against foreign radio broadcasts taking effect upon the territory of the state and injurious to it, see Hyde, p 606; see also § 122, nn 62, 63.

As to alliances, see §§ 666–6; and as to collective action in the general interest, see § 122. It may be particularly be noted that treaties of alliance may stipulate that an armed attack on one member is to be considered an armed attack on all, so enabling all other members of the alliance to respond to the attack in self-defence. See eg Arts 5 and 6 of the North Atlantic Treaty 1949.


As a result of an armed attack by one state on another the latter’s territory is occupied, and fighting temporarily ceases while the latter seeks means of repelling the attacking state. Military occupation can be regarded as a continuing armed attack justifying continued recourse to the right of self-defence. See in this sense the actions of the UK in response to Argentina’s invasion of the Falkland Islands in 1982 (see nn 25 and 30 of Kuwait and its allies in 1990 after the seizure of Kuwait by Iraq and before SC Res 678 (1990) authorised the use of force to repel Iraq’s aggression (see § 127, n 44).

Although states have frequently invoked the right of self-defence in relation to their response to the activities of irregular forces fighting wars of insurgency, it is not always easy to characterise those activities as ‘armed attacks’ justifying resort to the use of armed force in self-defence. To the extent that the irregular forces possess no international status and are operating alone within the territory of the state against which they are fighting, the international law of self-defence may not be relevant. See also n 10, as to resort to self-defence by the people of a territory in their struggle against the state having sovereignty over it.

The terminology was used by the ICJ in the Military and Paramilitary Activities Case, ICJ Rep (1986), p 103, but the dividing line between an armed attack and a ‘mere frontier incident’ may not always be clear.

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CF para 3 (g) of the Definition of Aggression, GA Res 3314 (XXIX) (1974).


This has the consequence that the illegal use of such forms of force cannot be met by counter-measures involving the use of armed force: see Military and Paramilitary Activities Case, ICJ Rep (1986), pp 104, 110–11, 127.

In many cases self-defence involves no action by the defending state in violation of another state’s territorial sovereignty, since its action in self-defence will be confined to expelling intruders from its own territory. But there may be circumstances where defensive action involves the violation of another state’s territory. Thus a state may be under attack from within another state’s territory, as where guns are fired across the frontier; or attackers, while carrying out hostile operations within the territory of the state, may operate from and be supplied from bases in a neighbouring state; or, even if the attackers do not have bases in a neighbouring state, they may take refuge there from the defending state’s forces; or, before any attack has occurred, the intending attackers may be organised on neighbouring territory for the purpose of a raid. In all such cases, the state under attack, or threat of attack, may be entitled to take action in self-defence even though it may involve violation of the other state’s territory and the use of armed force.

It is sometimes argued that the peoples of a territory are, in exercising their right of self-determination, justified in using force in self-defence against the state having sovereignty over the territory, whose control and domination of the territory constitute a violation of the peoples’ rights. See Dugard, ICLQ, 16 (1967), pp 157–90; Frenkel in International Law of Civil War (ed Falk, 1971), pp 190–91, 228; Wilson, International Law and the Use of Force by National Liberation Movements (1988), pp 130–35; and generally §§ 85, at nn 25–28. In the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (GA Res 2625 (XXV) (1970)) no such right of self-defence is directly recognised, although it does state a duty on the part of all states to refrain from any forcible action which deprives peoples of their right to self-determination, and states that they ‘should as far as possible seek and receive in accordance with the purpose and principles of the Charter: see para 7 of the elaboration of the first principle, and para 5 of the elaboration of the fifth principle. However, the effect of the Declaration and of the principles of the Charter embodied in it is not that the state in question is deprived of its sovereignty over the territory, but that their right to respond to such a request (ibid); (3) the right of the parent state to seek assistance from third states (see § 130, n 20); and (4) their right to respond positively to such requests (ibid); and the international status of liberation movements, and the question of recognition (see § 49).

See § 119, n 13, as to ‘hot pursuit’ on land.

Although in practice the dividing line is not always clear, it is necessary to distinguish self-defence from reprisals. The former is defensive in nature, and is not derived from the fact that a state has incurred an actual or threatened attack; the latter is essentially retributive or punitive action in response to a past unlawful incident and as a sanction to secure a return to lawful forms of behaviour, usually during hostilities. See vol II of this work (7th ed), §§ 33–43, as to reprisals generally, and Brownlie, International Law and the Use of Force by States (1963), pp 219–33; Kallioinen, Belligerent Reprisals (1971); Bowett, AJ, 66 (1972), pp 1–36; Barsotti in The Current Legal Regulation of the Use of Force (ed Cassese, 1966), pp 79–110; Zemanek, ZOV, 47 (1987), pp 32–43; Doehring, ibid, pp 44–54; Hampson, ICLQ, 37 (1988), pp 818–43, especially 819–24; The first principle in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States stipulates that ‘States have a duty to refrain from acts of reprisal involving the use of force’; GA Res 2625 (XXV) (1970). On the distinction, in general, between self-defence and reprisals see Tucker, AJ, 66 (1972), pp 586–95, and Bowett, loc cit. As to legitimate counter-measures, see n 1. As to reprisals by third states, see Akehurst, BY, 44 (1970), pp 1–18.
While the subject of self-defence is more appropriately treated in detail elsewhere, it may be noted here that the basic elements of the right of self-defence were aptly set out in connection with the Caroline incident in 1837 by the American Secretary of State, Daniel Webster, who considered that there had to be a 'necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation' and also that the act should involve 'nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it'.

The law relating to self-defence was much discussed in the context of various measures taken by the United States of America against Nicaragua. The matter was referred to the International Court of Justice, which delivered judgment in the Military and Paramilitary Activities Case in 1986. Although directly concerned with the right of collective self-defence rather than with the right of individual self-defence, much of the Court's conclusions apply to the latter as much as to the former. The Court found that 'observance of the criteria of the necessity and the proportionality of the measures taken in self-defence' was necessary if action in self-defence was to be lawful, and that the state claiming to act in self-defence must have been the victim of armed attack; the Court went on to hold that where, in exercise of the right of collective self-defence, a state responds to an attack on another state, the attacked state must have declared itself the victim of an armed attack, and have requested assistance.

The justification of self-defence for action which involves the violation of another state's territory is an exception to the general duty of all states to respect the territorial sovereignty of other states. Like all exceptions, it is to be strictly applied. In particular, the necessity for such action must be clear. If an imminent violation, or the continuation of an already commenced violation, can be prevented and redressed otherwise than by a violation of another state on the part of the endangered state, this latter violation is not necessary, and therefore not excused and justified. When, to give an example, a state is informed that a body of armed men is being organised on neighbouring territory for the purpose of a raid into its territory, and then the danger can be removed through an appeal to the authorities of the neighbouring country or to an appropriate international organisation, no case of necessity has arisen. But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises, and the threatened state is justified in invading the neighbouring country for the purpose of disarming the intending raiders.

There are divided views whether it is permissible for a state to use force in self-defence against an armed attack which has not yet actually begun but is reasonably believed to be imminent. The better view is probably that while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even

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13 See vol II of this work (7th ed), §§ 52aa, 52y. See also works cited in the bibliography preceding § 126.

14 As to the notion of self-defence in the major legal systems, see Jenks, Common Law of Mankind (1956), pp 139–43.

15 This form of words was endorsed by the Nuremberg International Military Tribunal in 1946: Re Goering and others, AD, 13 (1946), No 92. See also Grotius, II, i, v.

16 See Wharton, i, § 50c; Moore, ii, § 217; Hyde, i, §§ 66, 248 (n); and Hall, § 84. With the case of the Caroline is connected the case of McLeod, which will be discussed at §§ 55, 112. As to both cases, see Jennings, AJ, 32 (1936), pp 82–99. In addition to the Caroline incident, cases of self-preservation discussed in the 9th ed of this vol, §§ 56–123 concerned the shelling of Copenhagen and the destruction of the Danish Fleet (1807). Amelia Islands (1812), American expeditions to Mexico (1916–19), the German invasion of Luxembourg and Belgium (1914), the Japanese invasion of Manchuria (1931), the sinking of the French Fleet at Oran (1940), and the modification of neutrality obligations by the US during the Second World War. Hall, § 86; Martens, i, § 73; Hyde, i, § 68, and others quote also the case of the Virginis (1873) as an example of necessity of self-preservation, but it seems that the Spanish Government did not plead self-preservation but piracy as justification for the capture of the vessel (see Moore, ii, § 309, pp 893–903). That a vessel sailing under another state's flag can nevertheless be seized on the high seas in case she is sailing a port of the capturing state for the purpose of an invasion or bringing masts of a hostile insurgents, there is no doubt. No better case of necessity of self-preservation could be given, since the danger is imminent and can be frustrated only by the capture of the vessel.

more pressing in relation to anticipatory self-defence than they are in other circumstances. In conditions of modern hostilities it is unreasonable for a state always to have to wait until an armed attack has begun before taking defensive action. States have in practice invoked the plea of self-defence to justify action begun to forestall what they regard as an imminent threatened attack.19

The development of the law, particularly in the light of more recent state practice, in the 150 years since the Caroline incident, suggests that action, even if it involves the use of armed force and the violation of another state’s territory or forces (and probably its nationals); (b) there is an urgent necessity for defensive action against that attack; (c) there is a practicable alternative to stop or prevent the infringement, ie to the needs of defence; and (e) in the case of collective self-defence, the victim of an armed attack has requested assistance.

In practice it is for every state to judge for itself, in the first instance, whether a case of necessity in self-defence has arisen. But, unless the notion of self-defence is to be eliminated as a legal concept, or unless it is used as a cloak for concealing deliberate breaches of the law, the question of the legality of action taken in self-defence is suitable for determination and must ultimately be determined by a judicial authority or by an independent political body, like the Security Council of the United Nations.20 The refusal on the part of the state concerned to submit to or abide by the impartial determination of that question may be prima facie evidence of a violation of international law under the guise of action in self-defence. Thus the Charter of the United Nations leaves intact the inherent right of individual or collective self-defence in case of armed attack against a member of the United Nations unless the Security Council takes action. But the Charter lays down expressly that measures taken in the exercise of the right of self-defence must be immediately reported to the Security Council and that they do not affect the general responsibility of the Council for the maintenance of and the restoration of international peace.21 This is a most important safeguard for, with self-defence possibly now substantially the only legitimate occasion for the use of armed force otherwise than under the authority of the United Nations, the proper scrutiny and control of circumstances when self-defence is invoked is essential to the maintenance of peace. The appointment of committees to inquire into the facts of a situation goes some way to countering the inadequacies of a unilateral assessment of a situation by the interested parties.22

The right of self-defence, either individual or collective, has been asserted on many occasions when a state has resorted to armed force involving the violation of another state’s rights, amongst which the following examples23 may be mentioned:

(1) In 1956 Israel invoked the right of self-defence when launching the attack against Egypt which led to British and French intervention in the vicinity of the Suez Canal.24 Israel asserted that it needed to destroy fedayeen bases in Sinai from which repeated raids against Israel had been launched, with the consent and approval of Egypt.25 Israel also claimed

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19. Eg the Israeli attack on Egyptian forces in Sinai in 1956 and again in 1967 at the beginning of the so-called ‘six day war’ (see n 27), the US quarantine of Cuba in 1962 (n 29), the Iraqi attack on Iran in 1980 (see UN Doc S/2250, pp 23–5), the Israeli attack in 1981 on nuclear installations in Iran (n 35), and the US attacks on terrorist-related targets in Libya in 1986 (n 38).

20. The invasion of Goa in 1961 was allegedly in self-defence against an imminent attack: see Wright, AJ, 56 (1962), pp 617, 620–26; Flory, AFDI, 8 (1962), pp 476–91; Rubino in The Current Legal Regulation of the Use of Force (ed Cassese, 1986), pp 134–8; and § 55, n 62. The element of self-defence was invoked also in that India claimed that Goa was an integral part of Indian territory, wrongfully occupied by Portugal, and against which occupation India was defending itself. This, however, raises serious questions as regards the temporal relationship between an attack and the action taken in self-defence; and probably takes the notion of self-defence into the realm of self-help.


22. In its judgment the Nuremberg International Military Tribunal said that ‘whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be submitted to impartial investigation and adjudication, if international law is ever to be enforced’: Re Goering and others, AD, 13 (1946), No 92, at p 210; see also Re Hirota and others, AD, 15 (1948), No 118, at p 364. And see Bowett, Self-Defence in International Law (1958), pp 263–8. In the Military and Paramilitary Activities Case the ICJ rejected arguments that the issues raised were not justiciable by the Court, and specifically affirmed its competence to determine the issues of collective self-defence which arise: ICJ Rep (1986), pp 26–8; see also the jurisdictional phase of the same case, ICJ Rep (1984), pp 431–6. For an instance of express rejection by the Security Council of a claim to have acted in self-defence, see the Resolution of 1 September 1951 regarding the invasion of Hungary by Austria.
to be acting in self-defence at the time of its invasion of neighbouring Arab territories in June 1967,27 and again when taking extensive military action against Lebanon in June 1982.28

(2) In 1962 the United States of America imposed a naval ‘quarantine’ of Cuba, and defended its action on the grounds of self-defence since Soviet vessels were bringing to Cuba offensive missiles which the United States regarded as an immediate threat to its own security.29

(3) During the years immediately preceding the attainment of independence by the British territories of Aden and the Federation of South Arabia, armed attacks into those territories were repeatedly launched by armed forces from the neighbouring Yemen Arab Republic. British forces, in defending themselves against these attacks, occasionally attacked areas in the Yemen Arab Republic which were used in support of attacks on British territory. The United Kingdom asserted that in taking such action it was acting in self-defence, as, for example, in the attack on Harib Fort in 1964.30

(4) In 1970 United States and South Vietnamese forces entered Cambodian territory in order to attack and destroy there North Vietnamese forces which were using Cambodian territory as a base for warfare against South Vietnam.31 Similar action (but this time not involving United States ground forces, although United States aircraft were used) was taken, for similar reasons, in 1971 against North Vietnamese forces using Laotian territory.32 Apart from particular incidents33 arising during the fighting in Vietnam, the unlawfulness of that fighting as a whole and of the involvement of the United States of America in it has been argued in part in terms of the exercise of the right of self-defence, collective or individual, against aggression.34

(5) In June 1981 Israel attacked nuclear installations in Iraq (which was hostile to Israel), justifying that action as legitimate self-defence against the imminent threat to Israel’s security posed by the possibility of Iraq developing a nuclear weapons capability.35

(6) In 1982 the United Kingdom used armed force in self-defence in response to the seizure by Argentinia of the Falkland Islands and South Georgia, eventually securing the removal of all Argentine forces from those British territories.36
(7) The United States of America sought to justify various of its actions against Nicaragua in the early 1980s on grounds of collective self-defence. The lawfulness of these American actions was the subject of proceedings instituted by Nicaragua before the International Court of Justice which, in its judgment in the Military and Paramilitary Activities Case, rejected American claims to have acted in exercise of the lawful right of collective self-defence.37

(8) In 1986 United States aircraft attacked terrorist-related installations in Libya, in exercise of the right of self-defence against further terrorist attacks on American targets which available evidence showed were likely to be imminent.38

(9) In 1987 United States warships and aircraft on several occasions took action in self-defence against Iranian vessels and installations engaged in, or used in support of, unlawful minelaying operations in the Persian Gulf, during the conflict between Iran and Iraq.39 These minelaying operations had already resulted in damage to neutral American (and other) shipping legitimately navigating in the Gulf, and were calculated, as well as being inherently likely, to result in further such damage.

(10) The practical difficulties in the way of correctly assessing, in the light of modern weapons technology, whether action in self-defence is called for are well illustrated by four incidents in which military commanders have had to take decisions in the face of apparently threatening developments and in the knowledge that any delay in taking response action could allow a dangerous attack on themselves to take place: (a) In September 1983 Soviet fighters shot down an aircraft intruding in Soviet airspace, and that aircraft proved to be a Korean civilian airliner;40 the Soviet Union claimed to have acted in self-defence; (b) In May 1987, during the hostilities between Iran and Iraq, the commander of the USS Stark, a neutral warship on patrol in the Persian Gulf, refrained from taking action against approaching aircraft, which then fired missiles which severely damaged his ship, with considerable loss of life;41 (c) during the same hostilities, the USS Vincennes in July 1988 shot down a rapidly approaching aircraft, which turned out to be an Iranian civilian airliner; the US claimed to have acted in self-defence;42 (d) in January 1989 US aircraft over the high seas in the Mediterranean shot down, in self-defence, two Libyan military aircraft which were approaching in what appeared to be a hostile manner.

(11) Kuwait, together with a number of other states acting in collective self-defence, took a number of actions by way of self-defence in response to Iraq's armed aggression against, and seizure and occupation of, Kuwait in August 1990. After the adoption by the Security Council of Resolution 678 in November 1990 authorising the use of force, Iraq was expelled by force from Kuwait in 1991.44

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**Intervention**


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38 Since US aircraft participating in the attack flew from US bases in the UK, the British Government was directly involved in the questions as to the lawfulness of the action taken. See generally RG, 90 (1986), pp 981-4; Al, 80 (1986), pp 632-6; AFDI, 32 (1986), pp 1026-7; Greenwood, West Vir Law Rev, 89 (1987), pp 933-60; D'Amato, Al, 84 (1990), pp 705-11. See also Saltany v Reagan (1988), ILR, 80, p 19. And as to the views of the British Government, see particularly UKML, BY, 57 (1966), pp 637-42.


40 See § 220, n 1.
§ 128 Prohibition of intervention

That intervention is, as a rule, forbidden by international law there is no doubt. Its prohibition is the corollary of every state’s right to sovereignty, territorial integrity and political independence.1

Where intervention involves the use of armed force it is likely additionally,2 to violate Article 2(4) of the Charter of the United Nations,3 which prohibits the


A question of particular controversy is whether the prohibition of ‘force’ in Art 2(4) of the UN Charter is limited to armed force. This is essentially a matter of treaty interpretation; the better view is probably that provision is limited to armed force. The matter was much discussed in the preparatory work for the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States, in the context of the first principle. For statements of the view of the UK (to the effect that Art 2(4) is concerned only with armed force), see BPI(p (1966), p 191, and ibid (1967), p 186. The Declaration as finally adopted (GA Res 2625 (XXV) (1970)) did not, in the first principle, offer any definition of the ‘force’ referred to in Art 2(4), in contrast to the third principle, which, in the context of intervention, expressly covered forms of coercion other than armed force. See generally on the Declaration, §105. In the Military and Paramilitary Activities case the ICJ suggested that at least as regards the customary principle

of prohibiting the use of force, ‘force’ was not limited to armed attacks or aggression (ICJ Rep (1986), p 101); but this could still leave grave uses of force as having to involve armed force if they are to come within the scope of the principle. The Court held the arming and training by the USA of opposition forces in Nicaragua, but not the supply of funds, as involving a threat or use of force: ibid., pp 118–19.


The abuse of economic power in international relations has been much discussed in connection with the attempts to define aggression (see §30, n 37), but without clear conclusions being reached. The definition of aggression finally adopted by the General Assembly in 1974 was limited to various acts involving the use of armed force: GA Res 3314 (XXIX). See also §129, n 13–16, as to economic coercion.

Military and Paramilitary Activities Case, ICJ Rep (1986), pp 99–101. See also ibid, p 100 and §2, n 3, as to the status of this obligation as jus cogens.

GA Res 3314 (XXIX), (1974); see also §30, n 37.

Thus the principle of non-intervention is embodied in Art 8 of the Montrevideo Convention on the Rights and Duties of States 1933 (LNTS, 165, p 19) and Art 15 of the Charter of the Organisation of American States 1948 (UNTS, 119, p 49), on which see also §132, n 2; Art 8 of the Charter of the League of Arab States 1945 (UNTS, 70, p 237); and Art 3 of the Charter of the Organisation of African Unity 1963 (Peaslee, International Governmental Organisations (3rd ed revised, 1974), p 1165), on which see Akinyemiu, BY, 46 (1972–73), pp 393–400; Art 32 of the Charter of Economic Rights and Duties of States 1974 declares that no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights: GA Res 3281 (XXIX) (1974), and see §106. See also Art 1(1) of the Inter-American Convention on the Rights and Duties of States in the Event of Civil Strife 1928 (BSF, 128 (1928), p 514). A non-intervention obligation may also be provided in a bilateral treaty: see eg Art 4 of the Libya–Chad Agreement of 31 August 1989, ILM, 29 (1990), p 15. See also agreements cited in §122, n 26.

YBILC (1949), p 286.

In its Draft Code of Offences against the Peace and Security of Mankind (YBILC (1954), pt 2, pp 151–2) the ILC regarded the employment by the authorities of the state of armed force against another state for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the UN as an act of aggression, and as, consequently, not merely contrary to international law but constituting a crime under international law (Art 2(1)); also regarded as such a crime was 'intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind' (Art 2(9)); and note the ILC's commentary (at p 150) that the provision does not cover every kind of political or economic pressure, but only those 'where the coercive measures constitute a real
Declaration on the Inadmissibility of Intervention,\(^8\) in which it declared that no state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state and that, consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state are condemned; that no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind; and that the strict observance of these obligations was essential to international peace, since any form of intervention not only violates the spirit and letter of the Charter but leads to threatening situations. Similar provisions are repeated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, particularly the first and third principles;\(^9\) and in Principle VI of the Declaration on Principles Guiding Relations between Participating States, forming part of the Final Act of the Conference on Security and Cooperation in Europe 1975.\(^10\) For the United Nations and its member states acting through its organs, non-intervention in essentially domestic matters is a principle set out in Article 2(7) of the Charter.\(^11\)

§ 129 Concept and character of intervention Although states often use the term 'intervention' loosely to cover such matters as criticism of another state's conduct, in international law it has a stricter meaning, according to which intervention is forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state.

Intervention is thus a form of interference by one state in the affairs, internal or external, of another; and intervention may affect those affairs either directly or indirectly. Since every state has the right, as an attribute of its sovereignty and as an exercise of its international personality, to intervene in the internal or external affairs of another state, that does not mean that this right is not qualified by treaty obligations,\(^1\) to decide for itself such matters as criticism of another state's policies, economic or cultural systems, and its foreign policy, interference in those matters can infringe its sovereignty. Thus, however much one state may dislike the particular ideology or political system adopted by another, that does not legally permit it to intervene so as to bring about changes; support for an opposition within another state is perhaps one of the clearest examples of unlawful intervention in the affairs of that state\(^1\) (provided that support has the other characteristics necessary to constitute intervention). This was the central issue in the Military and Paramilitary Activities Case,\(^2\) in which the International Court of Justice held that support given by the United States of America to opposition forces in Nicaragua was unlawful. In the light of the Court's judgment in that case it seems that action in support of opposition forces within another state may constitute intervention, even if the support itself is of a non-military kind;\(^3\) if it has a military character but is limited to such indirect support as the supply of weapons or logistic support, it may constitute not only intervention but also an unlawful threat or use of force, but would not amount to an armed attack;\(^4\) and if it involves direct military action by the supporting state (whether on the part of its regular forces or through the desparch of armed bands

intervention in the internal or external affairs of another state.\(^5\) For further consideration of intervention by the ILC, in the course of its resumed consideration of the Draft Code following GA Res 36/106 (1981), see ILC Report (60th Session, 1988), paras 232–45, and draft Art 14 (with commentary) provisionally adopted at its 41st Session, 1989 (Report, para 217): that draft Article is limited to fomenting or aiding subversive or terrorist activities in another state, but must be read with draft Art 12(4)(a) which treats the invasion or attack by the armed forces of a state of the territory of another state as aggression. As to the concept of international crime, see \(\text{§}\) 157, \(\text{Res}\) 2311 (XX), adopted by 199 votes in favour, none against, and one abstention. See also eg \(\text{Res}\) 380 (V) (1950).

In 1980 the Assembly adopted a further declaration, the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States: \(\text{Res}\) 36/103. This resolution, unlike \(\text{Res}\) 2311 (XX), met with opposition from a significant body of states, and although 120 states voted in favour, 22 voted against and 4 abstained.

\(\text{GA}\) Res 2625 (XXV) (1970). See generally on the Declaration \(\text{§}\) 105. On the first principle in particular, see Tanca in The Current Legal Regulation of the Use of Force (ed Cassese, \(\text{1986}\)), pp 397–412. See also paras 7 and 8 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations: \(\text{GA}\) Res 42/22 (1987).

\(\text{Cmnd}\) 9066: \(\text{ILM}\), 14 (1975), pp 1292, 1294. See generally \(\text{§}\) 105, n 3.

\(\text{\hspace{0.5cm}See} \text{§}\) 132.

\(\text{\hspace{0.5cm}See} \text{§}\) 118. In the Military and Paramilitary Activities Case, the ICJ stated the applicable principle as its political, economic, social and cultural systems, and its foreign policy, interference in those matters can infringe its sovereignty. Thus, however much one state may dislike the particular ideology or political system adopted by another, that does not legally permit it to intervene so as to bring about changes; support for an opposition within another state is perhaps one of the clearest examples of unlawful intervention in the affairs of that state\(^1\) (provided that support has the other characteristics necessary to constitute intervention). This was the central issue in the Military and Paramilitary Activities Case,\(^2\) in which the International Court of Justice held that support given by the United States of America to opposition forces in Nicaragua was unlawful. In the light of the Court's judgment in that case it seems that action in support of opposition forces within another state may constitute intervention, even if the support itself is of a non-military kind;\(^3\) if it has a military character but is limited to such indirect support as the supply of weapons or logistic support, it may constitute not only intervention but also an unlawful threat or use of force, but would not amount to an armed attack;\(^4\) and if it involves direct military action by the supporting state (whether on the part of its regular forces or through the desparch of armed bands

in the following terms: 'A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely' (ICJ Rep (1986), p 108). Note also intervention which takes the form of dictatorial insistence by State A, acquired in the course of war, that certain treaties between states B and C shall be abrogated by State B; see Art 292 of the Treaty of Peace with Germany of 1919.

\(\text{ICJ}\) Rep (1986), p 133.

\(\text{ICJ}\) Rep (1986), p 14. See generally on the judgment, Eismann, \(\text{AFDI}\), 32 (1986), pp 153–91; Akhurst, \(\text{Indist\ JIL}\), 27 (1987), pp 357–84; Hightet, AJ, 81 (1987), pp 1–56; Briggs, ibid, pp 78–86; Boyle, ibid, pp 86–93; Christensen, ibid, pp 93–101; D'Amato, ibid, pp 101–5; Falk, ibid, pp 106–12; Farer, ibid, pp 112–16; Franck, ibid, pp 116–21; Glennon, ibid, pp 121–9; Gordon, ibid, pp 129–35; Hargrove, ibid, pp 135–43; Janis, ibid, pp 144–6; Kirgis, ibid, pp 146–51; Moore, ibid, pp 151–9; Morrison, ibid, pp 160–66; Reisman, ibid, pp 166–73; Tsen, ibid, pp 173–83. See also \(\text{§}\) 127, n 32, as to the justification of self-defence advanced by the USA (but rejected by the Court). See also \(\text{§}\) 130, as to civil wars.

For the Order of the Court indicating provisional measures see ICJ Rep (1984), p 169, on which see Rceu, RG, 89 (1985), pp 38–111; Deatherage, Harv ILJ, 26 (1985), pp 280–86. For the judgment of the Court on its jurisdiction to hear the case, see ICJ Rep (1984), p 392, on which see Martinez, Harv ILJ, 26 (1985), pp 622–9. For the consequential withdrawal by the USA from further participation in the proceedings, see ILM, 24 (1985), p 246. Subsequently the USA withdrew its declaration under Art 36 (2) of the Court's Statute accepting the Court's compulsory jurisdiction: see ILM, 24 (1985), p 1742; for comment see Chimni, ICLQ, 35 (1986), pp 960–70. The failure of the USA to comply with the Court's judgment was the subject of debate in the Security Council (which adopted no resolution: see ILM, 25 (1986), pp 1337–65) and in the General Assembly (which adopted Res 41/31).

US actions in support of the so-called 'contra' forces in Nicaragua had been the subject of much comment separately from the ICJ's judgment in the Military and Paramilitary Activities Case: see eg D'Amato, AJ, 79 (1985), pp 657–64; Moore, AJ, 82 (1986), pp 43–127; Rowles, ibid, pp 658–86.

\(\text{\hspace{0.5cm}See}\) eg financial support: ICJ Rep (1986), p 124. See generally n 19.

\(\text{\hspace{0.5cm}ICJ}\) Rep (1986), pp 103–4, 124.
on a significant scale) it is in addition likely to constitute an armed attack (so giving rise to the right of self-defence on the part of the attacked state) and may well also constitute aggression. 9

It must be emphasised that to constitute intervention the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention, because they are not forcible or dictatorial. There are many acts which a state performs which touch the affairs of another state, for example granting or withholding recognition of its government, good offices, various forms of cooperation, making representations, or lodging a protest against an allegedly wrongful act: but these do not constitute intervention, because they are not forcible or dictatorial. Similarly, a state may, without thereby committing an act of intervention (although it might be in breach of some other international obligation, for example under treaties such as the General Agreement on Tariffs and Trade which promote freedom of trade), sever diplomatic relations with another state, discontinue exports 10 to it or a programme of aid, or organise a boycott 14 of

8 See § 127.
9 See § 30, n 37.
10 It may be noted that the elaboration of the third principle in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (§ 105) appears to prescribe a less rigorous standard, in referring, as a consequence of the impermissibility of intervention, to the illegality of ‘armed intervention and all other forms of interference or attempted threats’ (italics added).

11 It also seems desirable to exclude from the category of intervention the toleration by a state upon its territory of the acts of private persons which endanger the safety of other states, though some writers do not make this distinction and it is often not observed in state practice; see Redlob, op cit. in bibliography preceding § 128, at p 511, and Hettlage, op cit. in bibliography preceding § 128, at p 25. See also Gemma, Hagar (1924), iii, p 365, and Fauchille, § 300 (3). See § 122 as to subversive action in fomenting civil strife in another state.

12 But as to premature recognition, see § 41. Excessive delay in according recognition may in certain circumstances amount to overt encouragement to the former regime to reassert its control, but is unlikely in itself to constitute intervention. Mexico never recognised the government established by the Allende Party and the success of the Nationalists in the Spanish Civil War; see Thomas and Thomas in *International Law of Civil War* (ed Falk, 1971), pp 161–3, and also p 157.

13 But note that Art XXI of the GATT permits unilateral trade restraints if a state believes its national security threatened.

14 Relations between the USA and Cuba have involved, on both sides, extensive measures involving the restriction of trade between the two states, and the seizure or freezing of assets. Many of the cases cited below in relation to the recognition of foreign confiscations (§ 142), and above in relation to acts of state (§ 112), and the literature in relation to both, have concerned the consequences of these measures. See also Mathy, *Rev Belge*, 18 (1984–85), pp 183–94.


One of the most important recent boycotts has been that organised by certain Arab states against Israel: see generally Chil, *The Arab Boycott of Israel* (1976); Friedmann, *Harv ILJ*, 19 (1978), pp 443–53. In 1966 the Council of the Arab League established a boycott committee to implement its decision to boycott ‘Zionist’ goods and products. In 1951 the scope of the boycott was broadened to include a secondary boycott by Arab states of goods from non-Israeli industrial enterprises who were regarded as having given assistance to Israel; those firms were blacklisted by the Central Boycott Office, and their products were excluded from the Arab countries participating in the boycott. Either by law or by contract foreign firms trading with those countries were required to observe the boycott, not only in their activities in those countries but sometimes also in their dealings with blacklisted firms in third countries, including even their own. Such effects of the boycott within the territory of other states has been regarded by some as infringing their sovereignty (a reaction similar to that of many states to the extra-territorial effects of anti-trust laws, as to which see § 139). Some states have accordingly
its products. Such measures are often in response to actions or policies of which the state taking the measures disapproves or regards as unlawful, and may be presented by it as a form of 'sanctions'. Although such measures may, at least indirectly and in part, be intended not only as a mark of displeasure but also to persuade the other state to pursue, or discontinue, a particular course of conduct, such pressure falls short of being dictatorial and does not amount to intervention.

Interference which is sufficiently coercive to constitute intervention may take a variety of forms. It may involve the use of armed force in the direct form of military action, or in a more indirect form as where support is given to subversive or terrorist armed activities in another state. Other forms of coercion, involving economic or political measures rather than resort to military action, may also constitute intervention, where they have the necessary coercive effect.


In the context of the Government's policy towards the Arab boycott of Israel (broadly to the effect that it is 'against the introduction in this country of documents and transactions, of clauses and undertakings which are intended to restrict the commercial freedom of British firms to trade with all countries in the Middle East'), see Parliamentary Debates (Lords), vol 398, cols 1685–6 (19 February 1979); see also ibid, cols 422–34 (1 February 1979). As to the decision of the House of Lords not to proceed with a Foreign Boycotts Bill introduced in 1977, see Snyder, ICLQ, 29 (1980), pp 518–21. See also § 139, n 32.

Thus a number of states imposed various measures as a mark of disapproval of the Polish Government's treatment of a Polish workers' movement: see eg AJ, 76 (1982), pp 379–84 (as to US action); UKML, BY, 53 (1982), p 508 (as to UK action).

Similarly, various economic measures were taken by a number of countries against Argentina as a result of that state's invasion of the Falkland Islands in 1982: see §§ 111, n 10.

Widespread measures were also taken by various states in response to Libyan acts of, or support for, international terrorism. See eg measures taken by the USA, at ILM, 25 (1986), pp 173–221; AJ, 80 (1986), pp 629–31, 948–51; Caras, Harv ILJ, 27 (1986), pp 672–7; RG, 90 (1986), pp 102–5; or an unsuccessful attempt to uphold the operation in the UK of a US order freezing assets held abroad by US banks, see Libyan Arab Foreign Bank v Bankers Trust Co (1989) 3 All ER 252.

15 Eg various 'sanctions' imposed on Southern Rhodesia, South Africa and Iraq: see § 132, n 4.

But note that such action may be open to objection for other reasons. Thus in 1976 the Security Council, by resolution 330, unanimously condemned any action by South Africa (such as the closure of border posts) designed to coerce Lesotho into recognising the independence of the Transkei, an independence earlier declared by the General Assembly to be 'invalid' and not to be recognised (see §§ 55, n 21).

16 Military and Paramilitary Activities Case, ICR Rep (1986), p 108. In that case the ICR held that support given by the USA to forces in Nicaragua fighting against the established government constituted unlawful intervention, that support consisting of financial support, training, supply of weapons, intelligence and logistic support: ibid, p 124. Humanitarian assistance does not constitute unlawful intervention, nor is it in any other way contrary to international law, if given without discrimination to all in need in the state in question and not merely to one side in the conflict: ibid, p 124–5.

In the Military and Paramilitary Activities case the ICR held that the supply of funds to opposition forces in another state, while not amounting to a threat or use of force, was 'undoubtedly an act of intervention in the internal affairs of that state: ICR Rep (1986), p 119. On non-military intervention generally, see Wright in The Relevance of International Law (eds Deutsch and Hoffman, 1968). See also nn 13–16, as to various forms of economic and other pressure not amounting to intervention.

17 Note on Financial Intervention and Control: Intervention, or something very like it, has sometimes taken place for the purpose of rehabilitating the financial situation of a state which is insolvent or suffering from serious embarrassment. For some examples (and bibliography) from the period before 1939, see 8th ed of this vol, p 312, n 1.

The League of Nations, through its Financial Committee, did important work in assisting the financial reconstruction of states whose finances had been plunged into chaos as a result of the First World War, or who for other reasons would have been unable to raise loans upon satisfactory conditions without the support of a powerful external authority. For details and literature on the subject, see the 7th ed of this vol, p 279, n.

Since the Second World War much of the task of assisting the financial reconstruction of states facing severe economic and financial troubles has been carried out through the IBRD and IMF, and other inter-governmental financial institutions established on a regional basis. The give of assistance has often been made conditional on undertakings by the state assisted as to the future management of its economy, often severely limiting its freedom of action in that respect. On intervention in the form of conditions attached to the grant of aid, see Cardozo in Essays on Intervention (ed Stanger, 1964).

1 The Security Council has accepted that it is 'the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other state or group of states': SC Res 387 (1976). See § 16. The ICR has accepted that 'intervention ... is already allowed at the request of the government of a State': Military and Paramilitary Activities case, ICR Rep (1986), p 126. In that case the ICR assessed as unlawful BA'sBA's 'sanction' (see § 74, n 52) and its provision of 'financial support': ibid, pp 183–52, 155; Ranzotti in The Current Legal Use of Force (ed Cassee, 1986), p 147–66; Higgins, ibid, pp 446–7; Bokor-Szego, ibid, pp 469–70.

2 See § 131(5).

3 UK Contemporary Practice, V, pp 99–102 (ICLQ, 7 (1958)). The question of Oman was discussed in several subsequent years by the UN General Assembly, in the context of the principle of self-determination and the alleged unlawfulness of UK assistance to the Sultan. The UK consistently maintained that the Sultanate of Muscat and Oman was an independent state, entitled to request assistance from the UK which in turn was entitled in international law to provide it. See eg BPIL (1962), pp 146–50; UNBY (1962), p 146.


6 See ibid (1965), p 189.

7 See generally the literature cited at §§ 40, n 48, and § 127, on 31 and 33, much of which considers the Vietnam conflict from the point of view of intervention. See also BPIL (1964), pp 20–21, and ibid (1965), pp 9–11.

§ 130 Assistance on request The requirement that interference be dictatorial if it is to amount to intervention excludes from intervention assistance rendered by one state to another at the latter's request and with its consent, which may be given ad hoc or in advance by treaty. Requests for assistance, often in the form of detachments of armed forces or the supply of military equipment, are often made and acceded to. Accordingly, no unlawful intervention was involved when British forces went to the aid of Muscat and Oman in 1957 at the request of the Sultan; when British and American forces landed in (respectively) Jordan and Lebanon in 1958 at the request of those states; when British forces assisted Uganda, Kenya and Tanganyika in 1964, and Zambia in 1965, at their request; when, during the Vietnam conflict, American forces assisted the Republic of Vietnam at its request; when, in 1968 and 1969, and again in 1983, French
forces responded to requests for assistance from Chad, and also in 1978 in response to a request from Zaire;10 when, in 1977, military units from the Federal Republic of Germany took action at Mogadishu Airport with the consent of the Somali authorities in order to free a hijacked aircraft;11 when, in 1982, American, French and Italian forces landed in Beirut, following an agreement with Lebanon;12 when in 1987 Sri Lanka agreed to the presence of Indian forces in Sri Lanka in order to assist in the restoration of order there;13 or when in 1988 Indian troops assisted the Maldives to restore order after an attempted coup.14

The possibility of abuse, by the fabrication of requests for assistance or by a request being made by an alleged government having only limited, temporary and precarious authority, is real. Whether a request is to be regarded as genuine or can only be determined in the light of the particular circumstances.

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10 See RG, 83 (1979), pp 202–8, and § 131, n 13. As to the policy of France to intervene in a foreign state only at the request of its recognised government, see RG, 83 (1979), p 171.


13 See statement by the Indian Prime Minister in the Indian Parliament on 4 November 1988. See statement by the Indian Prime Minister in the Indian Parliament on 4 November 1988.


The landing of US forces in Panama in December 1989, aimed at securing the arrest of General Noriega, the military leader and effective ruler of Panama, was in part justified on the basis of US action having been taken with the consent of the constitutional authority in Panama (other grounds advanced in justification of the US action included self-defence, the need to restore democracy in Panama in the face of arbitrary refusal to honour election results, the need to defend the Panama Canal, and the need to protect US military and other personnel). General Noriega had set aside the results of elections in Panama which had resulted in the election of

Guillermo Endara as President; US forces acted with the tacit consent of Endara, whose swearing in as President was arranged within hours of the landing of US forces; See generally RG, 94 (1990), pp 493–6, 786–7; AJ, 84 (1990), pp 545–9, for official statements by the US Government; Nanda, ibid, pp 494–503; Farber, ibid, pp 503–15; D’Amato, ibid, pp 516–24; Quigly, Yale JIL, 15 (1990), pp 276–315. Although a Security Council resolution condemning the US action as a ‘flagrant violation of international law’ was not adopted because of the veto cast by three states (SC debates, 23–24 December 1989), an equivalent resolution was subsequently adopted by the General Assembly on 29 December by 75 votes to 20, with 40 abstentions (GA Res 44/240). For the background to these events, involving the taking of various economic measures against Panama, see § 129, n 13, para 6; and for other aspects of the matter, concerning failure to respect the status of diplomatic premises, see § 495, n 8.

16 See AJ, Suppl 22 (1928), pp 118–24, on the request, in May 1927, by the Government of Nicaragua to the US Government for assistance and good offices in order to ensure free and impartial elections in Nicaragua.


For a legal history of US involvement in civil wars in Latin America, much of which probably constituted intervention, see Kane, Civil Strife in Latin America (1972); and see RG, 88 (1984), pp 270–74. See generally on civil war, § 49, n 2.

18 On the regulation of exports of munitions, in particular in connection with foreign civil wars, see Atwater, American Regulation of Arms Exports (1941). See also AJ, 25 (1931), p 125, for the pronouncement by the US Secretary of State on 23 October 1930, in connection with the resolution of the Belgian parlement.

As to the so-called Non-Intervention Agreement of August 1936, between various European states in connection with the Civil War in Spain, see Lapradelle, New Commonwealth Quarterly, ii (1936), pp 295–308, and RI (Paris), 18 (1936), pp 153 et seq; Deen, Geneva Special Studies, vii, No 4, Foreign Affairs (USA), January 1937; Garner, AJ, 31 (1937), pp 66–73; Smith, BY, 18 (1937), pp 17–31; Scelle, Friedenswarte, 37 (1937), pp 65–70; McNair, LQR, 53 (1937), pp 471–500; Padelhord, AJ, 31 (1937), pp 226–43. That Agreement, and the subsequent arrangements and agreements, while of importance as instances of the possibilities and limitations of ad hoc international cooperation in political matters affecting the peace of the world, constituted not the then accepted principles of international law in the matter of intervention. Inasmuch as Italy and Germany undertook not to supply the rebellious forces with munitions of war, these agreements consisted in an undertaking on the part of certain powers to refrain from committing an international illegality in consideration of the other powers’ promise of a manner in which they were considered – and, according to some, legally bound – to act. See, on intervention in the Spanish Civil War generally, Toynbee, Survey (1937), ii; Vedovato, Il non intervenzio in Spagna (1938); Padelhord, International Law and Diplomacy in the Spanish Civil Strife (1939); Rousseau, RI, 3rd series, 19 (1939), pp 217–93, 451–5; 525–74, 69, and 20 (1940), pp 114–49; Scelle, RG, 45 (1948), pp 207, 407–8; Bloedel, AJ, 48 (1949), p 91; 574, 473–599, and 46 (1939), pp 197–228; Raedsted, ibid, pp 613–37, 809–26; and Thomas and Thomas in The International Law of Civil War (ed Falk, 1971), pp 113–20.

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state and internal disturbances are essentially limited to matters of local law and order or isolated guerrilla or terrorist activities, it may seek assistance from other states which are entitled to provide it. But when there exists a civil war and control of a state is divided between warring factions, any form of interference or assistance (except probably of a humanitarian character) to any party amounts to intervention contrary to international law. In such a case the authority of any party to the conflict to be the government entitled to speak (and to seek assistance) on behalf of the state will be doubtful, and assistance to any party will prejudice the right of the state to decide for itself its form of government and political system. It is, however, widely accepted that if there is outside interference in favour of one party to the struggle, other states may assist the other party.

A further limit upon the right of states to assist another state at the request of its government is sometimes said to arise where the requesting government is exercising authority over a colonial territory and seeks assistance in suppressing an armed struggle by the peoples of that territory in exercise of their right of self-determination. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States stipulates that 'every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle on equal rights and self-determination of their right to self-determination and freedom and independence'. However, the reference to 'every State' has not been taken by states with sovereignty or similar authority over dependent territories as requiring them to abdicate their responsibilities or as prohibiting them from resisting, by armed force if necessary, armed rebellion by those seeking self-determination for the territory. Nor have such states refrained from seeking, and sometimes receiving, aid from other states in resisting such rebellions, although the General Assembly has on occasion called for outside states to refrain from assisting the colonial authority in suppressing those seeking self-determination.

§ 131 Circumstances which may justify intervention

Exceptionally, a state may be justified in intervening in the affairs of another state. In such cases the intervention is nevertheless subject to certain limitations as to the manner and circumstances of its intervention: in particular, it must act consistently with the prohibition against the use or threat of force laid down in the United Nations Charter, its actions must be proportional to the circumstances occasioning the intervention, and other means of remedying the situation (such as diplomatic representations) must be shown to have failed or to be so unlikely to succeed as to make recourse to them unnecessary. Furthermore, any justification for intervention, being an exception to a fundamental rule of international law, has to be applied strictly. Notwithstanding the somewhat general language used by the International Court of Justice in the Corfu Channel case, and its decision in the Military and Paramilitary Activities case that the particular conduct there in issue constituted unlawful intervention, the practice of states does not yet permit the conclusion that intervention in strictly limited cases and in a manner not inconsistent with the Charter of the United Nations is necessarily excluded. It is a practice which is open to abuse, and it is important that the use of force by way of intervention raises issues which are justiciable before an international tribunal.

Reasons which have been said to give a state justification for intervening in the affairs of another state include the following.


1 The Court said: 'The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in International Law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice.' (ICJ Rep, 1949, p 35). It is not clear whether the 'alleged right of intervention' refers to intervention generally or to intervention 'in the particular form' adopted by the UK. The Court recognised that the attitude of Albania constituted an extenuating factor in the case. See also Brownlie, International Law and the Use of Force by States (1963), pp 288–9; and below, at nn 28, 29.


4 Formerly it was asserted that states had certain rights of intervention in order to secure the observance by other states of universally accepted rules of international law, or of their treaty obligations (see eg the 8th ed of this vol, pp 307–8). Such intervention was said to be in the
A state's right to protect its citizens abroad, where they are being wrongfully treated, may justifiably lead it to intervene in order to secure their proper treatment. Although intervention for that reason may be open to abuse and lead to unjustifiably extensive intervention in another state's affairs, there has been little disposition on the part of states to deny that intervention properly restricted to the protection of nationals is, in emergencies, justified. States have on many occasions invoked that reason as, at least in part, the justification for taking forcible action in another state. Such occasions have included the action by the United Kingdom (with France) in landing forces in Egypt in 1956 to protect British nationals endangered by the consequences of Israel's attack on Egypt; the landing of United States forces in Lebanon in 1958 at a time of internal conflict there; the landing of Belgian forces in the Congo in 1960 to protect mainly Belgian nationals when law and order had broken down at a time of civil disturbances; the landing of United States and Belgian forces at Stanleyville in the Congo in 1964, to rescue persons being held by rebels as hostages; the landing of United States forces in the Dominican Republic in 1965 at a time of internal upheavals in that country; the landing of Israeli commandos at Entebbe Airport, Uganda in 1976 to free the passengers (mostly Israeli nationals) of a hijacked aircraft; the landing of Egyptian forces at Lanark Airport, Cyprus in 1978 to rescue Egyptian and other hostages held by terrorists in a hijacked aircraft; the landing of French and Belgian forces, with medical support facilities provided by the United Kingdom and air transport provided by the United States, in Shaba Province of Zaire in 1978, to protect Belgian and other European nationals endangered by rebel activities in the Province; and the landing of United States forces in Grenada in 1983.

Although it was formerly said that intervention was justified in order to ensure the safety of the property of a state's citizens abroad, it is probably now only in situations where they are in immediate danger of losing their lives or suffering serious injury that intervention could be considered to be justified. For the protection of citizens abroad is restricted to cases where there is an armed attack on those citizens, where the forces being attacked are those organs which, within the framework of the UN, can be authorized to act in the collective interest (see § 132). As to whether, in the event of an unlawful intervention by State A in the affairs of State B, State C may take counter-measures against State A which would otherwise constitute an unlawful intervention in its affairs, see Military and Paramilitary Activities Case, ICJ Rep (1966), pp 110–11, 127.

As to the limits upon the use of force for the protection of nationals abroad, see Bowett, Self-Defence in International Law (1958), pp 87–105, and Grotius Society, 43 (1957), pp 111–26; Brownlie, International Law and the Use of Force by States (1963), pp 289–301; Hyde, 4, p 646–9; Akehurst, International Relations (May 1977), pp 3–23; Ronzini, Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanitarian (1985); Bowett in The Current Legal Regulation of the Use of Force (ed Cassese, 1986), pp 39–55. Note also the possibility that in certain circumstances the situation in which a state's nationals abroad may be placed may be such as to constitute an armed attack on that state, so giving rise to a right for it to take action in self-defence (see § 127, and note particularly n 16). There may also be justification for action to protect nationals abroad on the basis of humanitarian intervention (see n 17).

In November 1964 a British minister stated in Parliament that 'we take the view that under international law a State has the right to land troops in foreign territory to protect its nationals in an emergency if necessary': Parliamentary Debates (Commons), vol 702, col 911. For the landing of British troops in China in 1927 for the protection of British subjects, see LN Monthly Summary (7 March 1927), p 48. As to the possibility of extending the right to intervene for the protection of nationals so as to apply also to 'kith and kin', see Dugard, ICLQ, 16 (1967), pp 177–87, and (in connection with the Soviet invasion of Poland in 1939) Ginsburgs, AJ, 52 (1958), pp 76–8.

See ICLQ, 6 (1957), pp 325–30; and see generally § 132, n 2.

See § 130, n 4.


See UNYB (1964), pp 95–100; BPIL (1964), pp 130–33.

See § 133, n 9.

10 See § 133, n 9.
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Considered lawful. Even then it must also be shown that the territorial authorities are unable or unwilling to protect those at risk, and that other means of securing their proper protection have been tried and failed or would, certainly, be ineffective, as where there is a breakdown of local order. Where action has been taken by a state to protect its citizens in another country from such imminent dangers, it is not unusual for the state to include in its operations measures which may also benefit nationals of other foreign states who are subject to the same threat.

(2) There is general agreement that, by virtue of its personal and territorial authority, a state can treat its own nationals under the law as if different states were in the same situation in such a way as to deny their fundamental human rights and to shock the conscience of mankind, the matter ceases to be of sole concern to that state and even intervention in the interest of humanity might be legally permissible. However, the fact that, when resorted to by individual states, it may be—has been—abused for selfish purposes tended to weaken its standing as a lawful practice. That objection does not apply to collective intervention, and the growing involvement of the international community on both a global and a regional basis, with the protection of human rights diminishes any need for states to retain or exercise an individual right of humanitarian intervention. The cruelties of President Amin's regime: see Chatterjee, ICLQ, 30 (1981), pp 75-6. As to the possible right to overthrow a despotic regime in another country, see the opposing views of Reisman, and Schachter, in AJ, 78 (1984), pp 642-5, 645-50. To covert civil operations to airlift a large number of Jews from Ethiopia to Israel in 1984-85 see Aaron, Harv ILJ, 26 (1985), pp 585-93.

Element of humanitarian intervention can be seen in the action, beginning in April 1991, of certain states (primarily the USA, with units from several other states, including the UK) in certain border areas of northern Iraq in order to provide emergency aid to large numbers of Kurdish refugees, fleeing after a failed insurrection against the government of Iraq. The situation of the refugees, and the pressures on the borders of neighbouring states, prompted the Security Council to condemn the repression by Iraq of the Iraqi civilian population and to insist that Iraq allow immediate humanitarian access: SC Res 668 of 5 April 1991. Overflights by British and US military aircraft delivering supplies were followed by the entry of military units from a number of states into northern Iraq to establish (and if necessary defend) locations where refugees could be offered assistance. Iraq was at that time the outset told not to use its military forces against the refugees, or to use aircraft or helicopters in Iraq north of the 36th parallel, and was later told to withdraw forces whose deployment in particular areas was threatening to the refugees' security. The USA and other states emphasised that their actions were solely humanitarian, and were not directed against Iraq's sovereignty or security. Iraq's attitude was ambivalent, formally protesting at the infringement of its sovereignty (eg UN Doc S/22459 of 8 April, S/22513 of 22 April and S/22531 of 25 April 1991), but not resisting the action taken and in substance acquiescing. The US and military personnel later withdrew as their relief and protective roles were taken over by UN personnel. These various events need to be seen against the background of the international community's firm response to Iraq's aggression against Kuwait.

If humanitarian intervention is ever to be justified, it will only be in extreme and very particular circumstances. Crucial considerations are likely to include whether there is a compelling and urgent situation of extreme and large-scale humanitarian distress demanding immediate relief; whether the territorial state is itself incapable of meeting the needs of those in distress; whether there is likely to be any active resistance on the part of the territorial state; and whether the international community are unable to respond effectively or quickly enough to meet the demands of the situation; whether there is any practicable alternative to the action taken; whether there is likely to be any active resistance on the part of the territorial state, and whether the action taken is limited both in time and scope to the needs of the emergency. In short, it would have to be peaceful action (which need not exclude it being carried out by military personnel) in a compelling emergency, where the transgression upon a state's territory is demonstrably outweighed by overwhelming and immediate considerations of humanity and has the general support of the international community.

The declaration issued at the end of the London Economic Summit 1991 included the following passage: 'We note that the urgent and overwhelming nature of the humanitarian problem in Iraq caused by violent oppression by the Government required exceptional action by the international community, following UNSCR 688. We urge the UN and its affiliated agencies to be ready to consider similar action in the future if the circumstances require it. The international community cannot stand idly by in cases where widespread human suffering from famine, war, oppression, refugee flows, disease or flood reaches urgent and overwhelming proportions.'
intervention. The Charter of the United Nations in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organisation, marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society. This is so although the degree of enforceability of fundamental rights is still rudimentary and nothing in the Charter itself authorises intervention in matters which are essentially within the domestic jurisdiction of the state. Equally, the objection to humanitarian intervention does not apply to humanitarian assistance to those in need in another state; even in a situation of conflict within a state, humanitarian assistance will not constitute intervention, so long as it is given (or perhaps at least available) without discrimination between the parties to the conflict.

(3) If permissible action taken in exercise of the right of individual or collective self-defence involves also a degree of intervention, that intervention is itself justified on grounds of self-defence. Thus, the International Court of Justice accepted, in the *Military and Paramilitary Activities in International Waters* case, that the argument based on collective self-defence advanced by the United States of America could justify action which would otherwise constitute unlawful intervention, but found on the facts of the case that the argument of collective self-defence could not be upheld. The question whether an act amounts to action in self-defence is not to be confused with self-help, or even necessity. In the *Corfu Channel* case (1949), between the United Kingdom and Albania, the International Court of Justice held that the sending of British naval ships into Albanian waters (forming part of an international channel) to sweep a minefield, after efforts to secure Albanian cooperation in attempts to deal with it had failed, constituted a violation of Albanian sovereignty, in violation of international law. The minefield had previously caused damage to two British destroyers and loss of life of some of the crews and the Court held Albania responsible. However, the Court rejected the contention of the United Kingdom that its action was justified as necessary both in the interests of safety of navigation and in order to secure evidence which otherwise might be lost or destroyed, for the purpose of future proceedings before an international tribunal against Albania.

(4) States are sometimes said to have the right to intervene in the affairs of another state in order to assist the peoples of a territory of that state to exercise, by armed force if necessary, their right of self-determination. Numerous resolutions of the General Assembly of the United Nations have requested states to give assistance, including measures of a military character, to "national liberation movements" seeking to assert their right of self-determination.

The General Assembly's definition of aggression was expressly without prejudice to the right of peoples forcibly deprived of the right to self-determination, freedom and independence to struggle to achieve it, and to seek and receive support, in accordance with the principles of the Charter and in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

Nevertheless, the lawfulness of such intervention is open to considerable doubt. While the principle of self-determination of peoples is generally accepted, until independence has been attained the parent state retains

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21 However, other grounds justifying intervention (eg particularly the protection of nationals) may have a strong humanitarian element. Furthermore, the interest of all states in matters of human rights is accepted as justifying diplomatic representations sometimes made by a state on humanitarian grounds in respect of non-nationals, even though the state acknowledges that formally it may have no locus standi: see § 411, n 10.

22 See § 433.

23 See § 433.

24 See Art 2(7). But it must be noted that, possibly, to the extent to which 'human rights and fundamental freedoms' have become a persistent feature, purling the character of a legal obligation, of the Charter (see § 433) they may have ceased to be a matter which is essentially within the domestic jurisdiction of states.

25 See § 125, n 18.

26 See § 127 as to self-defence generally. See also Fawcett, HAG R, 103 (1961), ii, pp 359–69. Note in particular the question of 'hot pursuit' across the frontier of another state: see § 119, n 13.


29 On the right to seize evidence located within another state, see Nasim Hasan Shah, AJ, 53 (1959), pp 594–612; and on the admissibility of illegally obtained evidence, see § 119, n 16, final para. It may be noted that if independent tribunals do not normally have the power to insist upon the production of evidence or to subpoena a witness, a right for a state itself to take action necessary to collect vital evidence may persuasively be argued.

30 Associated aspects of the same issue include (1) the right of a liberation movement to use force to achieve its aims (see §§ 85, n 26 and 127, n 10), (2) its right to seek assistance from third states (see also §§ 83, n 27), and (3) the right of the parent state to use force to resist the liberation movement (see § 127, n 10 and § 130 at nn 20–2); (4) its right to seek assistance from third states (see §§ 130, nn 20–2), and (5) their right to respond positively to such requests (see ibid); and (6) the international status of the liberation movement, and the question of recognition (see § 49).

31 Apart from the assistance given to 'liberation movements' in colonial territories in Africa, mention should be made of India's representation of its military action in support of the emerging State of Bangladesh in 1971–72 as assistance to the people of the country in exercising their right of self-determination: see literature cited at § 85, n 31.

32 Considerations of self-determination did not, however, prevent the Soviet Union intervening in Hungary in 1956 (see §§ 53, n 14) and in Czechoslovakia in 1968 (see § 133, n 10) in order to reverse the wishes of the lawful government which had popular support for the policies it was adopting. The events in Czechoslovakia led to the formulation by the Soviet Union of the so-called 'Brezhnev Doctrine': see § 133, n 11.

33 Vietnam justified its intervention in Kampuchea in 1978–79 by (in part) relying on the duty to afford support to a national liberation movement (led by Heng Samrin, whose regime eventually established itself in power in Kampuchea) seeking to assert its rights against the Government of Kampuchea led by Pol Pot but under the power of an external state, namely China: see UN Doc A/34/559 of 12 October 1979, and UNYB (1979), pp 271–9; and Issott, RG, 87 (1983), pp 42–104. Vietnam also invoked the rights of self-defence and humanitarian intervention, and an agreement with the Heng Samrin 'Government'. See also §§ 45, n 6 and §§ 53, n 13.


35 GA Res 3314 (XXIV) (1974), para 7. If the right of national liberation movements to request assistance provides justification to third states to supply it, the ICJ's observation as to the inadequacy of requests for assistance from opposition factions within a state (see §§ 130, n 18) needs qualification. The ICJ, however, made clear generally that it was not concerned with a colonial situation: ICJ Rep (1986), p 108 (para 206).

36 See § 85.
its sovereignty over the territory in question. It thus also retains the rights and responsibilities which go with the possession of sovereignty, which include the right and duty to maintain law and order and to benefit from Article 2(4) of the Charter. It is the lawful authority in the territory, and at least so long as it is in good faith applying the principle of self-determination to the extent that circumstances permit, it is entitled to regard armed efforts by factions in the territory to assert an alternative authority there as an unlawful rebellion, and may regard such assistance by other states to the rebels as is calculated directly to assist the success of the rebellion as intervention in its internal affairs. Some degree of assistance by outside states to the rebels is probably permissible if it is humanitarian assistance and also perhaps if it is of an economic character not directly associated with the military effort of the rebels.

(5) A right of intervention may arise as a result of a treaty by which one state, expressly or by implication, consents to intervention for certain purposes by another state. In addition to a treaty by which one state expressly grants to another a right to intervene in certain circumstances, such a right of intervention may arise from a treaty of protection to the extent to which the treaty places responsibility for the affairs of the protected state in the hands of the protecting state, or from a treaty of guarantee, since a state that has formally undertaken to guarantee a certain state of affairs in another state, such as its independence, form of government or constitutional structure, may intervene if that state of affairs is jeopardised. Thus, Great Britain, France and Russia, the guarantors of the independence of Greece, intervened in Greece during the First World War in 1916 and 1917 for the purpose of re-establishing constitutional government in conformity with Article 3 of the Treaty of London of 1863, King Constantine had to abdicate, and his second son, Alexander, was installed as King of the Hellenes. Similarly, by the Treaty of Guarantee of 1960 relating to Cyprus the three guarantor states, Greece, Turkey and the United Kingdom, guarantee the state of affairs established by the Basic Articles of the Constitution of Cyprus (Article II), undertake in the event of a breach of the provisions of the Treaty to consult together as to what action to take, and 'insofar as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty' (Article IV).

§ 132 Collective intervention in the general interest As a matter both of history and of principle the prohibition of intervention must be regarded primarily as a restriction which international law imposes upon states for the protection of the independence of other members of the international community. For this reason the notion and the prohibition of intervention cannot accurately extend to collective action undertaken in the general interest of states or for the collective enforcement of international law. This means that while prohibition of intervention is a limitation upon states acting in their individual capacity, it does not properly apply to remedial or preventive action undertaken by or on behalf of the organs of international society.


In July 1974 a coup in Cyprus established for a short period a pro-Greek regime in the island. Turkey, claiming to be acting under the Treaty of Guarantee, thereupon invaded Cyprus and occupied part of the Island, which part subsequently purported to establish itself as the Turkish Federated State of Cyprus: see § 55, n 15. While the circumstances probably justified the guarantor states in taking some action by way of intervention in the affairs of Cyprus, it is doubtful whether the particular action taken by Turkey was in accordance with Art IV of the Treaty of Guarantee.

This point was perhaps not sufficiently appreciated by Loewenstein, Political Reconstruction (1946), pp 14–85 – a work otherwise notable for a valuable criticism of the traditional doctrine of non-intervention. See on collective intervention, Luard in Intervention in World Politics (ed Bull, 1984), pp 157–79.

Thus it would be wrong to treat as intervention the activities of UN forces in, for example, Korea, Egypt, the Congo and Cyprus, or those of British naval vessels on the Mediterranean patrol pursuant to Art Res 221 (1966) (see § 55, n 8). More controversial, however, was the lawfulness of the claim of the British and French Governments in 1956, at the time of landing forces along the Suez Canal, that they were doing so as a 'police action' to protect a canal of vital importance to the international community, for whose protection immediate action was necessary which only they were in a position to take. See generally on the Suez incident UINY (1964), pp 23–45; Wright, AJ, 51 (1957), pp 237–76; Fawcett, Hag R, 103 (1961), ii, pp 391–409; Henkin, Hag R, 114 (1965), i, pp 236–50.

It will be noted that the successive affirmations, on the part of American states, of the prohibition of intervention refers to intervention by states acting individually. The Convention of 1933 on Rights and Duties of States signed at the Seventh International Conference of
restrictions would constitute intervention, restrictions imposed pursuant to a mandatory United Nations resolution would not do so.

Indeed, apart from the principle of non-intervention with regard to matters of domestic jurisdiction, the system of the United Nations Charter is based on collective intervention, in matters affecting international peace and security, in relation not only to members of the United Nations, but also to non-members, in respect of whom the Charter imposes upon the Organisation the duty of ensuring that they act in accordance with its principles so far as may be necessary for the maintenance of international peace and security.

Although Article 2(7) of the Charter provides that it does not authorise the United Nations to intervene with regard to matters which are essentially within the domestic jurisdiction of states, that provision does not exclude action, short of

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American States laid down that "no State has the right to intervene in the internal and external affairs of another" (Art 8): LNTS, 165, p 19. In the Additional Protocol Relative to Non-Intervention, adopted in 1936 at the Inter-American Conference for the Maintenance of Peace, the Parties declared "inadmissible the intervention of any of them... in the internal or external affairs of any other of the Parties" (Art 1): International Conferences of American States, First Supp I 1933-40 (1940), p 191. In the Act of Chapultepec adopted on 3 March 1945, the American states reaffirmed their condemnation of intervention "by a State in the internal or external affairs of another" (AJ, 39 (1945), Suppl, p 108). At the same time the main purpose of the Act was to give expression to the principle and the obligations of collective security in a manner which, for its collective character, would be tantamount to intervention. See also the suggestive observations by Fenwick in AJ, 39 (1945), pp 643-49, on the decisive difference between individual intervention and collective action; see also Murdock, AJ, 56 (1962), pp 500-503. Article 15 of the Charter of the OAS 1948 prohibited intervention by any "State or group of States", but Art 19 went on to exclude from that prohibition measures adopted for the maintenance of peace and security in accordance with the Charter, thus still allowing certain measures of collective intervention: UNTS, 119, p 49. On intervention under the Charter of the OAS, see Thomas and Thomas, Non-Intervention: The Law and its Import in the Americas (1956), and Dihigo and Travers in AS Proceedings, 51 (1957), pp 91-100 and 100-110.

3 See § 129, n 13-19.


See § 55, n 8, as to trade sanctions imposed pursuant to UN resolutions at the time of Rhodesia's illegal declaration of independence in 1965. Upon Iraq's aggression against Kuwait on 2 August 1990 many other states immediately imposed a 'freeze' on Kuwaiti assets in their territories (to protect them from Iraqi control) and on Iraqi assets, without waiting for any authorisation from the Security Council. A few days later such authorisation was forthcoming in SC Res 661, imposing extensive trade sanctions, followed by SC Res 665, providing for the maritime enforcement of those sanctions. See generally above, § 127, n 44.

5 Article 2(6). See § 627.

6 See generally the 8th ed of this vol, §§ 168f, and vol II (7th ed), § 25gc; and Goodrich, Hambro and

dictatorial interference, undertaken with the view to implementing the purposes of the Charter. Thus with regard to the protection of human rights and freedoms — a prominent feature of the Charter — the prohibition of intervention does not preclude study, discussion, investigation and recommendation on the part of the various organs of the United Nations. The principle stated in Article 2(7) does not prejudice the application of enforcement measures under Chapter VII of the Charter.

Collective action which might otherwise have constituted intervention may also be taken by other organs of international society, acting within their areas of competence. Examples of action taken under the auspices of regional organisations include the military force established by the Organisation of African Unity which undertook certain peace-keeping functions in Chad in 1981, and the action taken primarily by military forces of the United States in Grenada in 1983, but also in conjunction with contingents from Barbados and Jamaica, as part of a collective action at the request of the Organisation of Eastern Caribbean States.

§ 133 Political aspects of intervention Much of the subject of intervention has a political character. This is clearly apparent in, for example, the so-called Monroe Doctrine of the United States of America, which originated in President Monroe's celebrated message to Congress on 2 December 1823. In it he declared, inter alia, that the United States, while disclaiming any intervention in wars in Europe, could not, on the other hand, in the interest of their own peace and happiness, allow European states to extend their political system to any part of America, and try to intervene in the independence of the South American republics. Accordingly, whenever a conflict occurs between such an American state and a European state, at any rate if it is likely to have territorial consequences on the American continent, the United States has been ready to intervene.

To some extent the Monroe Doctrine has been reflected in principles adopted by all the American republics. Thus the parties to the Declaration of the Principles of Solidarity of America adopted at the Pan-American Conference at Lima on 24 December 1938 affirmed their determination to maintain these principles 'against all foreign intervention or activity that may threaten them'. In a declara-
tion of the Ministers of Foreign Affairs of the American Republics adopted at Habana in July 1940 it was stated that any attempt on the part of a non-American state against the integrity or inviolability of the territory, the sovereignty, or the political independence of an American state shall be considered as an act of aggression against all the American states signatories to the declaration. At the same time, in the Convention on the Provisional Administration of European Colonies and Possessions in America, the various American states declared, in language both strikingly approximating to and going beyond the Monroe Doctrine, that any transfer or attempted transfer of the sovereignty, possession, or any interest in or control over colonies of non-American states located in the Western Hemisphere 'would be regarded by the American Republics as being against American sentiments and principles and the rights of American States to maintain their security and political independence'. This attitude was reaffirmed, in the form of a declaration on assistance and American solidarity, in the Act of Chapultepec of 3 March 1945, adopted by the Inter-American Conference on War and Peace.

The prohibition of intervention in the American continent by extracontinental states has developed to meet the growing significance of political, as opposed to military, intervention. In the Declaration of Solidarity adopted at Caracas in 1954 the Tenth Inter-American Conference declared that 'the domination or control of the political institutions of any American State by the international communist movement, extending to this hemisphere the political system of an extracontinental power, would constitute a threat to the sovereignty and political independence of the American States, endangering the peace of America, and would call for a Meeting of Consultation to consider the adoption of appropriate action in accordance with existing treaties'. The Declaration went on to state that it was designed to protect and not to impair the inalienable right of each American state freely to choose its own form of government and economic system and to live its own social and cultural life. There have been several occasions when action in conformity with the Declaration has been taken, notably the exclusion of the Government of Cuba from the Organisation of American States in 1962, and the action taken in 1965 to forestall the establishment in the Dominican Republic of a Communist regime.

A further example of the political character of much of the subject of intervention is afforded by the so-called 'Brezhnev Doctrine', named after the leader of the Soviet Union who propounded it in justification of intervention in Czechoslovakia in 1968. Czechoslovakia, one of the communist states of Eastern Europe closely associated with the Soviet Union, embarked in 1968 upon policies envisaging the democratisation of political life and greater guarantees of fundamental liberties. The Soviet Union saw this as posing a threat to the communist system in Czechoslovakia and as having serious implications for the communist regimes in other East European states. Accordingly, the Soviet Union and certain of its East European allies intervened with military force in Czechoslovakia in August 1968, in order to restore the former state of affairs. The Brezhnev Doctrine was to the effect that if the socialist and communist structure of a socialist country is threatened (even by a popular movement within it), other socialist countries are entitled to intervene to preserve the socialist and communist structure of the state.

INTERCOURSE

Kaufmann, Hag R, 55 (1935), iv, pp 586–8
Heilperin, Hag R, 68 (1939), ii, pp 331–447
Quincy Wright, AS Proceedings (1941), pp 30–39

§ 134 Intercourse between states Although it is no longer appropriate to speak of a vague general right of so-called intercourse, mutual dealings are essential for the members of the international community, and the promotion imposition of certain sanctions, as a result of Cuban intervention in Venezuela; see ILM, 3 (1964), p 977.


10 Similar fears of Communist penetration in Guatemala underlay the reaction of the OAS in 1954 to the invasion of Guatemala by insurgent forces from Honduras (see § 112, n 32).


13 For the views of the scholarly writers on liberty of commerce, see Catry, RG, 39 (1932), pp 193–218. For discussion of a proposal (which was not adopted) to include an article on the law communications in the ILC's draft Articles on the Rights and Duties of States, see YBILC (1949), p 179.
and facilitation of international intercourse consequently underlie many rules of international law, such as those relating to diplomatic2 and consular relations, the freedom of the high seas3 and the right of innocent passage through the territorial sea.4

§ 135 Rights of intercourse and economic cooperation States conclude treaties regarding such matters as posts, telegraphs, telephones, roads, railways and commerce, for which in practice they need to make provision. Article 23(c)1 of the Covenant of the League of Nations obliged members to make provision for securing and maintaining freedom of communications and of transit2 and equitable treatment of the commerce of all other members of the League of Nations, but notwithstanding the initiative of the League,3 various factors prevented the full development of the possibilities of that Article.

The Charter of the United Nations does not contain any similar provision, although it does have among its purposes4 the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and being a centre for harmonising the actions of nations in the attainment of the various purposes of the United Nations. This aspect of the purposes of the United Nations is developed in Chapter IX of the Charter which deals with international economic and social cooperation, and its implementation is in general the responsibility of the Economic and Social Council established by Chapter X. In particular, the Council is the organ with initial responsibility for the coordination of the activities of the various specialised agencies of the United Nations.

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, adopted by the General Assembly in 1970,5 proclaimed the duty of states to cooperate with one another in accordance with the Charter, and elaborated that principle in the following terms:

'States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:
(a) States shall co-operate with other States in the maintenance of international peace and security;
(b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;
(c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;
(d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.'

In practice states cooperate with one another extensively. To that end they have concluded a large number of treaties laying down detailed rules for matters arising in the course of the many essential dealings and transactions between states; and, particularly since the Second World War, they have established many international organisations to provide a continuing framework for their cooperation. In so doing states have in many fields substantially limited their individual freedom of action, in the interests of the international community as a whole and in recognition of their common interest in the facilitation of intercourse between the members of that community.

Numerous treaties now regulate many aspects of intercourse between states,6 including treaties in the following main areas of transport and communications:

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1 See §§ 461–533.
2 See §§ 534–55.
3 See §§ 284–6.
4 See §§ 198–201.
5 In pursuance of that article an Organisation for Communications and Transit was established by the League, to which the Transit Section of the Secretariat corresponded. The Conventions negotiated under the guidance of this organisation relate to such matters as freedom of transit, navigable waterways of international concern and the right of states having no sea-coast to a maritime flag. See §§ 175–81 (rivers), 287–9 (maritime flag), 193 (ports). See also Charles de Visscher, Le Droit international des communications (1924); Toulmin, BY (1922–23), pp 167–78; Hostie, RI, 3rd series, 2 (1921), pp 83–124; Hålländer, AJ, 17 (1923), pp 470–88; Ripert, Clunet, 52 (1925), pp 14–23; Haas in Problems of Peace (2nd series, 1928), pp 212–20; Kunz, ZOR, 13 (1933), pp 408 et seq. For the Statute of the Organisation, see Hudson, Legislation, iii, p 2106. On the various questions of international communications which came before the PCIJ, see Hostie, RI (Paris), 12 (1933), pp 58–129, and 17 (1936), pp 481–537. See, generally, as to the earlier rules of international law in the matter of transit and communications, Hostie, HAG R, 40 (1932), ii, pp 403–518; Leener, ibid, 55 (1936), i, pp 5–81.
6 For an interpretation of this clause in connection with the closure of railway traffic see Railway Traffic between Poland and Lithuania, Advisory Opinion of 15 October 1931: PCIJ, Series A/B, No 42, p 119.
7 For bibliography, see 8th ed of this vol, p 322, n 2.
8 Article 1.
(a) road traffic; (b) river transport; (c) rail traffic; (d) civil aviation; (e) traffic by sea; (f) postal communications; and (g) radio communications.

The principal treaties concluded after the Second World War include: (1) Convention on Road Traffic, 19 September 1949 (TS No 49 (1958); UNTS, 125, p 3); (2) Protocol on Road Signs and Signals, 19 September 1949 (TS No 50 (1967); UNTS, 182, p 229); (3) European Agreement of 16 September 1950, supplementing the two preceding instruments (TS No 60 (1966); UNTS, 182, p 286); (4) Decision of 16 September 1950 on the Construction of Main International Traffic Arteries (TS No 12 (1952); UNTS, 92, p 91); (5) Convention concerning Customs Facilities for Touring 1954 (TS No 70 (1957); UNTS, 276, p 191); (6) Customs Convention on the Temporary Importation of Private Road Vehicles 1954 (TS No 1 (1959); UNTS, 282, p 249); (7) Customs Convention on the Temporary Importation of Commercial Road Vehicles 1956 (TS No 1 (1960); UNTS, 327, p 123); (8) Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956 (TS No 90 (1967); UNTS, 399, p 189); (9) Convention on the Taxation of Road Vehicles Engaged in International Passenger Transport 1956 (TS No 43 (1963); UNTS, 436, p 131); (10) Convention on the Taxation of Road Vehicles for Private Use in International Traffic 1956 (TS No 32 (1963); UNTS, 339, p 3); (11) Convention on the Taxation of Road Vehicles Engaged in International Goods Transport 1956 (TS No 112 (1969); UNTS, 436, p 115); (12) European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) 1957 (TS No 83 (1968); UNTS, 619, p 77); (13) European Agreement on Road Markings 1957 (TS No 372 (1969); UNTS, 372, p 159); (14) Customs Conventions on the International Transport of Goods under Cover of TIR Carnets 1959 (TS No 18 (1960); UNTS, 348, p 13) and 1975 (TS No 56 (1983)); (15) Convention on Road Traffic 1968 (Cmnd 4032) – replacing, as between the parties, the Convention at (1) above; (16) Convention on Road Signs and Signals 1968 (Cmnd 4139); (17) European Agreement of 1971 supplementing the preceding Convention (Cmnd 5096); (18) European Agreement concerning the Work of Crewe of Vehicles Engaged in International Road Transport (AETR) 1971 (TS No 103 (1978)); (19) Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) 1973 (Cmnd 5622); (20) European Agreement Main on International Main Traffic Arteries (AGR) 1975 (Cmnd 6993). For Central America, see (21) Central American Agreement on Road Traffic 1958 (UNTS, 454, pp 115, 146) and (22) Central American Agreement on Uniform Road Signs and Signals 1958 (ibid, 211, 232). For treaties concluded before the Second World War, see 8th ed of this vol, pp 321, n 2 (at pp 322), and p 1022, n 1 (at 1023). And see Whitman, Digest, 9, pp 1121–2, 1165–78.

Note also the provisions regarding the development of transport in the Final Act of the Conference on Security and Co-operation in Europe in 1975 (§ 105, n 3), and in furtherance of those provisions, the UK – USSR Agreement concerning International Road Transport 1988 (TS No 4 (1989)).


In matters of trade and finance the needs of the international community have similarly been met by commercial treaties between states, loans agreements, aid arrangements, investment promotion and protection agreements, and the like. There is, indeed, probably no area of regular intercourse between states which is not the subject of a network of bilateral and multilateral treaties.

In addition to the many treaties laying down particular rules applicable to the contracting states, the increasing needs of the members of the international community, reflecting their growing interdependence, have also led to the establishment of both worldwide and regional international organisations providing a continuing basis for facilitating and regulating the more important aspects of the intercourse between them. It would go beyond the scope of this volume to discuss these various organisations in detail. Mention should, nevertheless, be made of those organisations which have become specialised agencies of the United Nations as a result of agreements concluded pursuant to Articles 57 and 63 of the Charter. On 1 January 1990 there were 16 such agencies, namely the Food and Agriculture Organisation, the International Bank for Reconstruction and Development, the International Civil Aviation Organisation, the International Development Association, the International Finance Corporation, the International Fund for Agricultural Development, the International Labour Organisation, the International Maritime Organisation, the International Monetary Fund, the International Telecommunications Union, the United Nations Educational, Scientific and Cultural Organisation, the United Nations Industrial Development Organisation, the Universal Postal Union, the World Health Organisation, the World Intellectual Property Organisation, and the World Meteorological Organisation; the International Atomic Energy Agency has a status in many ways equivalent to that of a specialised agency. There are in addition many other international organisations open to worldwide membership, and even more which are open to membership on a more limited, usually regional, basis.
JURISDICTION


§ 136 State jurisdiction in general

State jurisdiction concerns essentially the extent of each state’s right to regulate conduct or the consequences of events. In practice jurisdiction is not a single concept. A state’s jurisdiction may take various forms. Thus a state may regulate conduct by legislation; or it may, through its courts, regulate those differences which come before them, whether arising out of the civil or criminal law; or it may regulate conduct by taking executive or administrative action which impinges more directly on the course of events, as by enforcing its laws or the decisions of its courts. The extent of a state’s jurisdiction may differ in each of these contexts.1

Jurisdiction concerns both international law and the internal law of each state. The former determines the permissible limits of a state’s jurisdiction2 in the various forms it may take, while the latter prescribes the extent to which, and manner in which, the state in fact asserts its jurisdiction.3 Much of the law relating to jurisdiction has developed through the decisions of national courts applying the laws of their own states. Since in many states the courts have to apply their national laws irrespective of their compatibility with international law, and since courts naturally tend to see the problems which arise primarily from the point of view of the interests of their own state, the influence of national judicial decisions has contributed to the uncertainty which surrounds many matters of jurisdiction and has made more difficult the development of a coherent body of jurisdictional principles.

International problems of jurisdiction arise almost exclusively where a state, either directly or through proceedings in its courts, seeks to assert its authority over persons, property or circumstances which (at least arguably) are or occur abroad. In such cases the questions which usually arise concern the actual or constructive location of the persons, property or circumstances in question;4 if their location is abroad, the extent to which the laws of the forum state are to be construed so as to apply extra-territorially;5 and, if they are so construed, whether the exercise of jurisdiction involves any infringement of the rights of other states, or of generally accepted limits to national jurisdiction.

Jurisdiction is not coextensive with state sovereignty, although the relationship between them is close: a state’s ‘title to exercise jurisdiction rests in its sovereignty’.6 That jurisdiction is based on sovereignty does not mean that each state has in international law a sovereign right to exercise jurisdiction in whatever circumstances it chooses. The exercise of jurisdiction may impinge on the interests of other states. What one state may see as the exercise of its sovereign rights of jurisdiction another state may see as an infringement of its own sovereign rights of territorial or personal authority. In practice, however, it is only in relatively few cases that overlapping claims to jurisdiction cause serious problems, usually where the states concerned attach importance to the assertion of their competing claims, and more often in criminal cases (where the element of public authority is more evident)7 than in civil cases. Usually the coexistence of overlapping jurisdiction is acceptable and convenient; and forbearance by states in the exercise of their jurisdictional powers8 avoids conflict in all but a small (although important) minority of cases.

Although it is usual to consider the exercise of jurisdiction under one or other of more or less widely accepted categories, this is more a matter of convenience than of substance. There is, however, some tendency now to regard these various categories as parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the

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1 See also Basdevant and others, Dictionary of the terminology of the droit international (1960), pp 354–7, for a useful description of several senses of ‘jurisdiction’, including some of the ‘competence’ aspects.

The meaning of ‘jurisdiction’ has had to be considered in several cases before the European Commission and Court of Human Rights, since Art 1 of the European Convention on Human Rights obliges each state party to secure the rights in question to ‘everyone within its jurisdiction’. That provision has been held to apply in various circumstances where a state has exercised authority or control abroad in a manner relevant to the exercise of the right in question: see § 440, n 30, and § 442, n 5.

To the extent that jurisdiction is a matter of the limits of the exercise of authority, it may be noted that questions of jurisdiction may arise not only in relation to states but also in relation to other entities which exercise authority internationally, such as international organisations and, perhaps less clearly, multinational corporations.

2 In the Lotus case the PCIJ, while stating that international law generally left states ‘a wide measure of discretion’ in the application of their laws and the jurisdiction of their courts, added that this discretion was ‘limited in certain cases by prohibitive rules’ and that it was ‘required of a State … that it should not exceed the limits which international law places upon its jurisdiction’: PCIJ, Series A, No 10, at p 19.

3 As to so-called ‘organic’ jurisdiction of states and international organisations (ie jurisdiction over their organs as such) see Seyersted, ICLQ, 14 (1965), pp 31–82, 493–527.

4 See § 137, nn 5–10.

5 This is essentially a matter of domestic law and the interpretation of the relevant provisions of statute or common law. See § 20, as to the presumption that statutes do not apply extra-territorially.


7 An added complication may arise where one state wishes to punish as criminal conduct which another does not regard as involving an offence.

8 See pp 463–4.
state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states. 9

§ 137 Territorial jurisdiction As all persons and things within the territory4 of a state fall under its territorial authority,5 each state normally has jurisdiction—legislative, curial and executive—over them. Territoriality is the primary basis for jurisdiction; even if another state has a concurrent basis for jurisdiction, its right to exercise is limited if it was in conflict with the rights of the state having territorial jurisdiction. Thus even though a state has personal jurisdiction over its nationals abroad, its ability to enforce that jurisdiction is limited so long as they remain within the territory of another state, as the Permanent Court of International Justice said in the Lotus case in 1927, 'a State . . . may not exercise its power in any form in the territory of another State'; jurisdiction 'cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention'.4

Territoriality cannot, however, always be applied in a straightforward manner. Thus while in both civil and criminal cases the presence of the defendant within the state's territory will usually be sufficient to found jurisdiction, the laws of most, if not all, states have established rules whereby not only the defendant's physical presence in the state, but also his constructive presence, is sufficient, where circumstances establish a basic level of contact by the defendant with the forum state sufficient to justify the exercise of jurisdiction over him.3

Such circumstances may include the defendant owning property there (at least if it is the subject matter of the proceedings, or directly related to them),6 conducting business there7 (again, at least if that business has given rise to or is directly related to the proceedings), by having made visits either in person8 or by agents9 or employees (at least if those visits were connected with the matter being litigated) or, in the case of a foreign company as defendant, having within the forum state a wholly-owned subsidiary which has no independent power of decision.10

Similarly, where it is the territoriality of conduct or events which is relevant to jurisdiction (for example, establishing that an offence occurred in the state's territory, attributing to them a location may also in some circumstances not be straightforward. The problem is traditionally exemplified by the person who, standing on one side of an international frontier, fires a gun which kills a person on the other side.11 To meet this kind of situation, the territorial principle of jurisdiction is often, particularly in relation to the application of criminal laws, given a constructive interpretation which allows of so-called subjective and

Note also the element of constructive presence within a state's waters which is permitted as a basis for the right of hot pursuit: see Convention on the High Seas 1958, Art 23.3, and generally §294.

1 The US Supreme Court has indicated that there would almost invariably be a sufficient basis for jurisdiction in rem: Shaffer v Heitner (1977) 433 US 186. See generally on developments in US law as to the circumstances which give a state jurisdiction over a non-resident defendant. See generally, as to the special case of a subsidiary, see generally Dicey and Morris, pp 288ff.

7 See eg Helicopteros Nacionales de Columbia v Hall (1984) 104 S Ct 1868, where the US Supreme Court denied jurisdiction in civil proceedings where the alien defendant's links with the USA were too insubstantial, being effectively limited to regular purchases of helicopters: and see generally, as to the special case of a subsidiary, see generally Dicey and Morris, p 227.

9 For eg, the decision of a US Court of Appeals in Republic International Corp v Arno Engineers Inc (1975) 516 F 2d 161.

10 The conduct of the subsidiary may be attributed to the parent company so as to constitute its acts occurring within the state, and the parent company may be regarded as itself within the state so as to permit penalties being imposed on it in relation to that conduct: ICC Ltd v Commission of the European Communities (1972) ECR 619, 664–7. For comment see Steindorf, CMR Rev (1972), pp 502–10; Acevedo, MLR, 36 (1973), pp 317–20; Mann, ICLQ, 22 (1973), pp 35–50. See also Europemballage Corp and Continental Can Co Inc v Commission of the European Communities (1972) ECR 157, 1973 ECR 215; Wells Fargo & Co v Wells Fargo Express Co, AJ, 72 (1976), pp 153; and US v First National City Bank (1966), ILR, 38, n 112 (as to a branch office abroad); Volkskrant, Netherland, 26 (1976), p 1092 (with comment by White, Harv ILJ, 30 (1989), pp 277–86). But the extent of the foreign parent company's control of its subsidiary within the jurisdiction of the forum state depends on the facts of each case, as does, accordingly, the degree to which that control gives the forum jurisdiction over the foreign parent company. See eg for links held to be insufficient to found jurisdiction, Kramer Motors Inc v British Leyland Inc, AJ, 75 (1981), p 668, decided by a US Court of Appeals. As to the implications of the relationship between head office and branch, and between parent company and subsidiary, on jurisdiction, see generally F A Mann, Hag R, 186 (1984), ii, pp 53–66; Restatement (Third), p 269–82. See also § 138, nn 11. On multinational corporations generally see § 380, n 15.

11 See generally on criminal jurisdiction in English law in cross-frontier offences, First, LQR, 97 (1981), pp 80–101. See also § 415, n 7.
objective applications of the basic territorial principle. The subjective application of the principle allows jurisdiction over offences begun within the state but not completed there;12 objective territorial jurisdiction allows jurisdiction over offences having their culmination within the state even if not begun there.13 To the extent that they do not strictly involve the exercise of extra-territorial jurisdiction, both may be said to be applications of the territorial principle. Territoriality also underlies the claim sometimes made that a state has jurisdiction over conduct taking place abroad if it has effects within the state, but such claims are controversial.14

International law, however, gives every state a right to claim exemption from local jurisdiction, chiefly for itself,15 its Head of State,16 its diplomatic envoys,17 and its armed forces abroad.20 It may be noted, however, that this does not prevent the local law applying to those benefiting from the exemption, although it does prevent the enforcement of the law against them.21 Furthermore, although aliens are subject to the territorial jurisdiction of the state in whose territory they are,22 state is not wholly free to subject them in every respect to its laws: thus it may probably not enforce upon them for its armed forces,23 or levy taxes on them if (or the property or transaction in relation to which the tax is to be levied) are only transiently within the state;24 nor can it be assumed that the national state of an alien would have no ground of complaint in international law if the state of residence asserted its territorial jurisdiction over the alien in respect of all his acts whenever and wherever they took place, perhaps abroad and long before he took up residence.25

During the Second World War the presence in the United Kingdom of a number of governments of countries invaded by Germany as well as of allied armed forces gave rise to certain relaxations, for the benefit of such governments and forces, of the principle of territorial authority;26 extending even to governments-in-exile being permitted to establish courts and to issue, though not to enforce, legislative and administrative decrees. Although these relaxations of territorial authority were adopted in order to meet an exceptional situation in time of war, they show that there is intrinsically no such degree of rigidity in the concept of territorial authority as to rule out reasonable adaptations thereof to exceptional circumstances.27

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12 As to the subjective application of the territorial principle, see Board of Trade v Owen [1957] AC 602; Treacy v DPP [1971] AC 537; Public Prosecutor v DS, ILR, 26 (1958–II), p 209; Re Feld and Neumann [1957], ILR, 48, p 88; Adams v Staatsverwaltungs Des Kantons Basel-Stadt [1978] 3 CMLR 489; Re Chapman [1970], ILR, 55, p 101.

13 It may be noted that in some circumstances involving a transboundary element an offence will, under the forum state’s laws, have been completed entirely within that state, without the need to take into account the further factor involving action abroad: see eg Italian South Tyrol Terrorism Case (1) [1968], ILR, 71, p 235 (possession of explosives for use abroad), Re Treacy [1971] AC 537 (blackmail of a person abroad), Re El-Hakawati [1975] 1 WLR 396 (conspiracy to endanger life abroad). Cf Attorney General’s Reference (No 1 of 1982) [1983] 1 QB 751 (conspiracy to defraud persons abroad).

14 The leading example of the subjective application of the territorial principle is probably the Lotus Case, PCIJ, Series A, No 10 (see §140), where the Court accepted that ‘the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effect, have taken place there’ (at p 267). See also eg Moharik Ali Ahmed v State of Bombay, ILR, 24 (1957), p 156; Attorney-General (No 1) v Tjong Khim-Tsijn [1965], ILR, 59, p 325; Re Kote, Mazelki and Nowajim [1966], ILR, 47, p 267; Mussi v Republic [1969], ILR, 48, p 90; Charron v US [1969], ILR, 54, p 230; Re Baxter [1972] 1 QB 1; Public Prosecutor v Jonas V [1972], ILR, 71, p 229; Public Prosecutor v Lob Ab Hoo [1974], ILR, 56, p 61; US v Fernandez [1974], ILR, 61, p 186; Re Markow [1976] AC 35. For jurisdiction over an attempt to commit a crime in a state, all elements of the attempt must be taken place abroad but where the crime had it been completed would have been subject to that state’s jurisdiction, see DPP v Stonehouse [1978] AC 35, and comment by Crawford, BY, 49 (1978), pp 279–81. As to a state’s jurisdiction in respect of a conspiracy abroad to commit a crime within the state, see Ford v US (1927), 273 US 593; DPP’s Door [1973] AC 807; Maron v US (1965), ILR, 42, p 143; R v US, AJ, 61 (1967), p 1065; Somchait Liansongprapart v Government of the United States of America [1990] 3 WLR 606; R v Sansom [1991] 2 WLR 366; cf Re Cox [1968] 1 ALL ER 140.

15 See § 139, n 37ff, on the ‘effects’ basis for jurisdiction, which is to be distinguished from the objective territorial basis for jurisdiction in that with the latter, but not the former, the consequences taking place within the ‘objective’ jurisdiction are essentially a constituent part of the offence. This important distinction may be obscured when consequences which are constituents of the offence are referred to as ‘effects’, as indeed happened in the Lotus case.

16 See §109.

17 For details, see §§ 451ff. See also § 549ff (as to consuls) and §§ 531–3 (as to special missions).

18 Examples of this kind are not confined to states, however. Certain officers and agents of the UN, and judges of the ICJ, for instance enjoy privileges not only when abroad but also, in certain circumstances, in the country of their nationality. See, eg, as to the position of a special rapporteur of a UN body, the Advisory Opinion on Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, ICJ Rep [1989], p 177.

19 For details, see §§ 560–4 – an immunity which is also extended by the law public ships engaged in trade (see § 565). As regards the very limited jurisdiction which are by distress compelled to enter a foreign port, see §§ 603–4.

20 For details, see §§ 556–8.

21 Partly by custom and partly by treaty obligations, certain non-Christian states were restricted in their territorial jurisdiction with regard to foreign resident subjects of Christian powers. See §406.

22 In contrast to persons on board ships entering ports in distress, see §§ 203–4; and as to aircraft landing in distress see Nkondo v Minister of Police [1980], with comment by Dugard, ICLQ, 30 (1981), pp 902–5.

23 See § 404, n 12.

24 For details, see §§ 556–8.

25 For details, see §§ 451ff.

26 For details see §§ 451ff.

27 See § 170, on divisibility of territorial sovereignty, especially §§ 236–40, on state servitudes.
§ 138 Jurisdiction over citizens abroad

International law does not prevent a state from exercising jurisdiction, within its own territory, over its nationals travelling or residing abroad, since they remain under its personal authority. Accordingly, it may legislate with regard to their conduct when abroad, levy taxes in respect of their assets or earnings abroad, or legislate in respect of their foreign property. In all such cases, however, the state’s power to enforce its laws depends upon its national being in, or returning to, its territory or having there property against which they can be enforced.

The extent to which states assert jurisdiction over their nationals abroad varies, particularly as regards the application of criminal law to their conduct and consequently the jurisdiction of their courts to try such nationals for their conduct abroad. In the first place this is a matter for the municipal law of each state, and will often involve the question whether the relevant statute is to be construed so as to apply extra-territorially. In some states, including the United Kingdom, very few acts committed by nationals abroad constitute criminal offences under their laws; for such states the application of their criminal law is largely governed by territorial principles, sometimes because (as with the United Kingdom) the essentially oral procedures of criminal trials involve in particular the cross-examination of witnesses impose severe practical difficulties in relation to offences committed abroad. Many other states, however, with different traditions and procedures, assert almost complete jurisdiction over the criminal conduct of their nationals abroad, sometimes subject to other conditions being met, such as that the offence is also punishable under the law of the place where it occurred or that the victim was also a national. But whatever the extent to which a state asserts criminal jurisdiction over its nationals abroad, since the state cannot exercise its sovereign power in a foreign state, it must normally await the return of its nationals before it can take effective steps to exercise its jurisdiction over them.

As every state can also exercise jurisdiction over aliens within its boundaries, such aliens are often under two concurrent jurisdictions. The practical inconvenience, and sometimes injustice, which can result are left to be regulated by treaty, or by the application of states of considerations of good sense and reasonableness. Thus states regularly conclude treaties to avoid or mitigate such hardship which would be suffered by individuals who might find themselves liable to pay taxation to two different states in respect of the same income or assets. Furthermore, although states are entitled to legislate in respect of the conduct of their nationals abroad, most states do not exercise to the full their right to do so in respect of criminal offences committed by their nationals, and in cases of urgency they are sometimes not capable of maintaining a permanent legal presence abroad in a manner consistent with the practical requirements of the situation.


2. According to the law of each state, however, the state’s power to enforce its laws depends upon its national being in, or returning to, its territory or having there property against which they can be enforced.

3. Re the practical inconvenience and sometimes injustice, which can result are left to be regulated by treaty, or by the application of states of considerations of good sense and reasonableness. Thus states regularly conclude treaties to avoid or mitigate such hardship which would be suffered by individuals who might find themselves liable to pay taxation to two different states in respect of the same income or assets. Furthermore, although states are entitled to legislate in respect of the conduct of their nationals abroad, most states do not exercise to the full their right to do so in respect of criminal offences committed by their nationals, and in cases of urgency they are sometimes not capable of maintaining a permanent legal presence abroad in a manner consistent with the practical requirements of the situation.

Apart from any relevant laws adopted by the state in which the documents are in the course of proceedings in the USA, see eg Radio Corp of America v Realand Corp [1956] 1 QB 618; Rio Tinto Zinc Corp v Westinghouse Electric Corp [1978] AC 547; Re Ashton's Insurance Coverage Cases [1985] 1 WLR 331.

13 See § 139, nn 48-50.


15 See Interamerican Reinsurance Corp v Texaco Macarabo Inc (1970), ILR, 56, p 30, holding that conduct by the defendant which might otherwise be a violation of anti-trust legislation will not be so considered where it is the direct result of orders by a foreign government to the defendant on a matter within that government's jurisdiction. In US v Watchmakers of Switzerland Information Centre (1963) Trade Cases 77, 414, the Court acknowledged that it could not order the defendants to refrain in Switzerland from activities 'required by Swiss law', but found that in the particular circumstances those activities were not 'required' by Swiss law although they were in practice allowed and tolerated by the Swiss government; see also Mackinnon v Donaldson Luskin and Jenrette Corp (1979), ILR, 66, p 487. The risk of criminal proceedings in the other state may be disregarded if it is no more than fanciful: see Securities and Exchange Commission v Certain Unknown Purchasers and Sellers of Shell Stock, ILM, 23 (1984), pp 511, 515. If execution of a court order would give rise merely to a civil action in contract or tort against the person to whom the order is addressed, it is less likely that the court will waive compliance with the order: see US v First National City Bank, AJ, 63 (1969), p 148. A distinction may be drawn between the validity of a requirement to produce documents held abroad, and proceedings for contempt for failure to comply, violation of the law of the state where the documents are located being more relevant as a defence in the latter situation: Civil Aeronautics Board v Deutsche Lufthansa AG, AJ, 73 (1979), p 511. Since a number of American cases involved questions of compliance with Swiss law, particularly relating to banking secrecy, the USA and Switzerland sought to resolve certain differences between them by concluding a Treaty Mutual Assistance in Criminal Matters 1973 (see § 143, n 8), but the treaty did not apply to 'ordinary civil or commercial proceedings ... for the purpose of enforcing cartel or anti-trust laws': Art 2.2(c)(4). See generally the same, on similar mutual assistance agreements with other states. As to what became known as the Santa Fe case, see the decisions of courts in Switzerland and England (ILM, 22 (1983), p 785); 23 (1984), p 511, and 24 (1985), p 745), and AJ, 79 (1985), p 722-9.

See also s 178(6) of the Financial Services Act 1986, enacted in the UK, under which it is not a reasonable excuse for refusing to provide requested information that a foreign law prohibited its disclosure, if consent to disclosure, or exemption from the law, could have obtained: and see Lowe and Warbrick, ICLQ, 36 (1987), pp 403-4.

For a valuable note on the limitations of the US federal judicial power to compel acts violating foreign law, see Col Law Rev, 63 (1963), No 8, pp 1441-95. See generally on the exercise of jurisdiction involving conflicting requirements of conduct and the availability of the 'foreign sovereign compulsion' defence, Whitman, Digest, 6, pp 154-9; AS Proceedings (1978), pp 97-117; Mann, ICLQ, 31 (1982), pp 199-202 (commenting on the decision of a US Court of Appeals in US v Vetco Inc and Deloitte Haskins & Sells (1981) 644 F 2d 1324; Restatement (Third), i, pp 341-66. See also § 139, n 46, as to the need to balance the competing interests of the forum state and the state where documents are held or where conduct is to take place.
the forum state against the interests of the foreign state where the conduct is to take place and the likely damage to international comity if the court gives precedence to the requirements of the forum state's laws, and only to accord them that priority where the balance of interest clearly lies in that direction.16

§ 139 Jurisdiction over foreigners in foreign states

As a general rule states do not seek to exercise civil or criminal jurisdiction over foreign nationals in foreign states.1 Nevertheless the laws of many states do contain provision for doing so in limited categories of cases, both civil17 and criminal. In this context both civil and criminal proceedings have a potential for encroaching upon the territorial sovereignty of the foreign state concerned, since both may involve the exercise of state authority; but this is more evident, and creates more serious problems, in relation to criminal cases3 where the involvement of the public authority of the forum state is concerned.

3 The assertion by states of jurisdiction to treat as criminal certain acts committed abroad by foreigners usually relates to acts either against the state itself, such as high treason, forging bank notes, and the like, or against its citizens, such as murder and rape, libel and the like. These states cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory. But if, after the commission of such an act, he enters their territory and comes thereby under their territorial authority, they have an opportunity of inflicting punishment.4 The question is, therefore, whether states have a right5 to exercise jurisdiction over acts of foreigners committed in foreign countries, and whether under customary international law6 the home state of such an alien has a duty to acquiesce in the latter's punishment in case he comes into the power of these states. Some answer this question in the negative.9 They assert that at the time

16 See § 139, n 46.

In certain cases the relationship between two countries may be such as to exclude their being 'foreign' to each other for this purpose: see eg Rose v McNamara, AJ, 62 (1968), p 191, as to the USA and Okinawa. The same consideration arises as between most states members of the Commonwealth of Nations, which are not 'foreign' states to one another and nationals of which share a common status as 'British subjects' or 'Commonwealth citizens' and are not aliens in each other's countries: see § 79, n 12. However, for the UK s 3 of the British Nationality Act 1948 limits the criminal liability of British subjects in respect of conduct outside the UK (except for offences under the Merchant Shipping Acts) to those who are citizens of the UK and Colonies.

3. Thus in the UK there is provision for the service of process in civil proceedings on defendants abroad. See in this context dicta by Roskill LJ and Lord Simon in Derby & Co v Lawson (1976) 1 All ER 401, at 409, 413–14. But note particularly the presumption applied by many states as to the territorial limits to the application of their laws, as stated in § 20.


While it is convenient to refer to 'criminal' jurisdiction over foreigners abroad, the present section concerns situations which, even if not criminal in a technical sense, involve the various enforcement of the general public law of the state claiming to exercise jurisdiction; it includes, therefore, jurisdiction to enforce laws of a primarily economic or social content, such as those relating to monopolies and trade practices, where the observance of the law is ensured by coercive action taken by state authorities.
such criminal acts are committed the perpetrators are neither under the territorial nor under the personal authority of the states concerned; and that a state can only require respect for its laws from such aliens as are permanently or transiently within its territory. This view is sound with regard to many cases; and for a state, either generally or in relation to a very wide range of offences, to assert and exercise jurisdiction over offences committed abroad by aliens is widely regarded as not consistent with international law. However, it is not a view which, consistently with the practice of states and with common sense, can be rigidly adopted in all cases. In the _Lotus_ case the Permanent Court of International Justice, while recognising the essentially territorial character of criminal law, found that 'international law as it stands at present' does not contain 'a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory.' The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.\(^{11}\) Even those states, particularly common law states such as the United Kingdom, which traditionally adopt an almost exclusively territorial approach to criminal jurisdiction, assert jurisdiction over a limited number of offences committed abroad by aliens.\(^{12}\) It is accepted that in certain circumstances and within certain limits it is consistent with international law for a state to exercise criminal jurisdiction in respect of the conduct of aliens abroad. Those limits are not clearly established; however, it seems probable that in the absence of any direct and substantial connection between the state exercising jurisdiction and the matter in relation to which jurisdiction is exercised,\(^ {13}\) the exercise of jurisdiction would be a violation of international law. It is a matter for determination in each case whether a direct and substantial connection exists which is sufficient to justify a state treating as criminal the conduct of aliens taking place within the area of another state's sovereign authority.\(^ {14}\)

There are several situations in which it is accepted that the territorial principle does not apply so as to exclude the exercise of a state's jurisdiction to conduct abroad. Thus the territorial principle cannot apply to acts done abroad in preparation of and participation in common crimes committed or attempted to be committed in the country claiming jurisdiction (although they may be brought within the scope of that principle by the so-called subjective or objective applications of it).\(^ {15}\)

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For a list of such states, see Akehurst, _BY_, 46 (1972-73), at p 164. As to s 40 of the Austrian Criminal Code, which allows Austrian courts to exercise jurisdiction over common crimes committed abroad by aliens if their home state or the state where the offence was committed does not prosecute them, see _Universal Jurisdiction (Austria) Case_, ILR, 28 (1958), p 341, and _Hungarian Deserters (Austria) Case_ (1959), _ibid_ p 343.


18 See nn 17, 18; see also § 20, as to the presumption against the extra-territorial application of statutes. See also paras 17–33 of the Report of the Joint UK–Irish Law Enforcement Commission 1974 (Cmnd 5627).

19 In cases of universal jurisdiction (n 19f) the state's interest is as a member of the international community.

20 Different considerations apply where the conduct takes place in areas outside the territory of another state, eg on the high seas: see § 287ff.

21 See § 137, nn 12, 13.

Furthemore, some states appear to treat certain categories of aliens as sufficiently closely connected with the state to justify the application to them of its criminal law, or parts of it, even if they are abroad. Thus some states claim jurisdiction over crimes committed abroad by permanent residents. In the United Kingdom certain exchange control offences can be committed abroad by persons who are residents in the United Kingdom;\(^ {12}\) and jurisdiction is also claimed over crimes committed in foreign states by seamen employed on British ships.\(^ {18}\) In all such cases the exercise of jurisdiction is probably not open to serious objection, as long as the basis of jurisdiction establishes a sufficiently close connection between the offender and the state claiming jurisdiction for the particular purpose in question.

The territorial principle also does not apply to certain offences, generally regarded as offences of an international character of serious concern to the international community as a whole, which it is accepted may be punished by whichever state has custody of the offender.\(^ {19}\) Piracy\(^ {20}\) is a well-established example of jurisdiction exercisable on such a universal basis. Other offences in

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16 Akehurst, _BY_, 46 (1972-73), at p 156, cites Denmark, Iceland, Liberia, Norway and Sweden in this context; and see _Harro Research_ (1935), pp 533–4, 536–42. In some of these instances residence may be regarded as giving rise to a degree of allegiance sufficient for the purposes of a particular law to justify its application to resident aliens even in respect of their conduct abroad; see eg _Amsterdam v Minister of Finance_, ILR, 19 (1952), No 50, at pp 239–40. See also _Re P(G)E (An Infant)_ cited in n 17; and _Art 4 of the Tokyo Convention on Offences and certain other Acts Committed on Board Aircraft_ 1963 (ILR, 141, n 7). The Foreign Corrupt Practices Act 1977 enacted by the USA (ILM, 17 (1978), p 214) to restrain bribery of foreign officials applies not only to US nationals but also to residents of the USA and companies having their principal place of business there; see _Juster, Harv IJL_, 20 (1979), pp 716–20.

17 Exchange Control Act 1947, s 1 (1). For jurisdiction of English courts in wardship proceedings based on an alien child's allegiance to the Crown resulting from prior (but now terminated) residence in the UK, see _Re P(G)E (An Infant)_ 1965 (Ch) 568.

18 Taxes, and criminal offences associated with taxation, are often based on residence. State practice would seem to accept that it is not contrary to international law for a state to tax property present in that state (other than transiently), and income arising in that state, even though the owner may be abroad or an alien; and for an alien resident in a state to be subject generally to that state's tax law, even in respect of his property abroad and income arising abroad. See also § 138, n 2.

19 _Merchant Shipping Act_ 1894, s 687. See also _Joyce v DPP_ (1946) _AC_ 347 – a case in which the accused was not an alien pure and simple but a person owing allegiance to the Crown – for an important qualification of the rule that English courts have no jurisdiction over aliens for crimes committed abroad. See _H Lauterpacht_, _CLJ_, 9 (1947), pp 342–48; _Glanville Williams_, _CLJ_, 10 (1948), pp 54–76. See also _Theophilus v Solicitor-General_ (1950) _AC_ 186, as to an act of bankruptcy committed abroad by an alien domiciled abroad; and _Air India v Wiggins_ (1980) _All ER_ 192, as an offence committed abroad on a foreign aircraft on its way to a destination in the UK. A number of the acts which are offences in the UK if committed abroad by a UK citizen (see § 138, n 5) are also offences in the UK if committed abroad by an alien. For a list of offences which are sometimes suggested as being subject to universal jurisdiction, see _Harro Research_ (1935), pp 476–480, 569–72; see also pp 573–92 as to certain other non-international offences which may, subject to stringent conditions, be subject to universal jurisdiction, particularly if committed in areas where no state has authority; See also _Restatement (Third)_ 1, pp 254–8. See also § 148 as to the work of the ELC on those internationally serious crimes treated as crimes against the peace and security of mankind.

20 See § 299.
respect of which universal jurisdiction is often said to exist include war crimes, possibly terrorism and the most serious violations of human rights such as torture, and, as a result of treaties, grave breaches of the Geneva Conventions of 1949, the hijacking and sabotage of aircraft, and apartheid.

It is also accepted that (by virtue of what is sometimes referred to as the 'protective principle') the limitations of the territorial principle do not apply to serious crimes against a state's own safety, including not only such offences as

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21 See vol II of this work (7th ed), §§ 251-7; Wright, AJ, 39 (1945), pp 257, 282-4; Cowles, Calif Law Rev, 33 (1945), pp 177-218; Brandt, BY, 26 (1949), pp 414-27; Baxter, BY, 28 (1951), pp 282-93, and in International Criminal Law (ed Bassioumi, vol 2, 1973), pp 65-86; Röling, Hag R, 100 (1960), ii, pp 357-63; Carnegie, BY, 39 (1963), pp 402-25. Judicial decisions involving the commission abroad by aliens of war crimes against foreign nationals include Re Tesch and Others (Zyklon B Case), AD, 19 (1950), No 109; Re Klein and Others (Hudson Sanatorium Case), ibid, No 110; Re Ohlendorf and Others (Einsatzgruppen Trial), AD, 15 (1948), No 217. See also § 119, n 15, as to Attorney-General of Israel v Eichmann, involving the trial of the accused in Israel on charges of war crimes, all the offences having been committed before the State of Israel existed, outside what later became Israel, and against people who could not at the time have been Israeli nationals. See also Demjanjuk v Petrovsky (1985), ILR, 79, pp 535-446. See also § 435, as to crimes against humanity.

22 See generally § 122, n 42f; and Cassese, ILCQ, 38 (1989), pp 589-608. Even if terrorism is not yet generally regarded as an offence subject to universal jurisdiction, it is an offence in respect of which states have been increasingly willing to assert, or acquiesce in the assertion by other states of, jurisdiction to try aliens for conduct abroad. See eg the Criminal Jurisdiction Act 1975 (Northern Ireland); Extra-territorial Criminal Law Jurisdiction Act 1976 (Republic of Ireland); and statutes in various states giving effect to treaties countering terrorist acts against aircraft (§ 141, n 14).

23 See Filartiga v Pena-Avalos (1980-84), ILR, 77, p 169. These proceedings were brought in the USA under the Aliens Tort Claims Act, which allows proceedings by aliens for a tort 'committed in violation of the law of nations': see Fawcett, BY, 38 (1962), pp 181, 205-8; Carnegie, BY, 39 (1963), pp 402, 408-9.

24 See § 141, n 12.

25 See § 141, n 14.


27 In 1883 the Institute of International Law (see Annuaire, vii, p 156), among a body of fifteen articles setting out the conflict of the criminal laws, adopted a resolution (of value de lege ferenda only) which contained the following (Art 8):

> 'Every State has a right to punish acts committed by foreigners outside its territory and violating its penal laws when those acts contain an attack upon its social existence, or endanger its security, and when they are not provided against by the Criminal Law of the territory where they take place.'

Similarly, in Harv Research, op cit in bibliography preceding § 136, which contains an admirable exposition of the subject, such jurisdiction is limited to cases in which 'the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed' (p 543). But, it will be noted, Harv Research allows a right to try in such cases, for the reasons set out in the above cited resolution of 1883.

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29 The Convention on Suppression of Counterfeiting Currency of 1 May 1929, provides that states which recognise the principle of the prosecution of offences committed abroad shall punish foreigners who are guilty of that offence in the same way as if the offence had been committed in their country: LNTS, 112, p 371; Hudson, Legislation, p 320. See also the Counterfeiting Currency (Convention) Act 1935, amending in certain respects the Forgeries Act 1913, the Coinage Offences Act 1861, and the Extradition Act 1870. See on that Convention Dupriez, RI, 3rd series, 10 (1929), pp 511-30; Garner, AJ, 24 (1930), pp 135-39; Pella and Donnedieu de Vabres, Revue pénitentiaire et de droit pénal (1930), pp 312-32, 328-44; Fitzmaurice, AJ, 26 (1932), pp 533-51; Mitterberg, ZV, 3 (1932), pp 76-94. See also Pella, RG, 24 (1927), pp 673-768; Hackworth, ii, § 159; Whitman, Digest, 6, pp 268-70.

28 See also Public Prosecutor v F., ILR, 18 (1951), No 48; Georgios Petrides v Republic (1964), ILR, 48, p 69; Re Paris, ILR, 24 (1957), p 48. Note also the reference in R v Thompson (1978) ECHR, p 2275 to 'the need to protect the right to mint coinage which is traditionally regarded as involving fundamental interests of the State'.

29 See Nan Molwan v Attorney-General for Palestine (1948) AC 351, 370-71; Rohat et al v US (1960), ILR, 32, p 112; US v Piersons, (1965), 105, pp 975; cf US v Baker, ILR, 22 (1955), p 320. See also the Notes from the British Embassy Washington in 1981, UKMIL, BY, 33 (1982), pp 442-6, and the statement by the Attorney-General at UKMIL, BY, 56 (1985), p 418-19. See generally on this and other boycotts, § 129, n 14. And also see n 51, as to US action in relation to the Siberian gas pipeline, in furtherance of US foreign policy objectives. The US anti-boycott regulations are just one example of action under the Export Administration Act 1955 (replacing an earlier Act of 1979) which, in so far as they have purported to have extra-territorial application to non-US nationals, have occasioned protest. See eg as to the rejection by the UK of the attempted application in this way of certain US controls on the re-export of goods from the UK, the statement by the Attorney-General at UKMIL, BY, 57 (1986), pp 569-70; and UKMIL, BY, 56 (1985), pp 480-81. See also UKMIL, BY, 59 (1988), p 599, and RG, 93 (1989), p 98, as to representations made by the UK and EEC against the application of US legislation on sanctions against South Africa to US subsidiaries of British and other European companies doing business with South Africa.
often referred to as the ‘passive personality’ basis of jurisdiction. It is not a basis for jurisdiction which has met with wide acceptance, although it has been accepted in certain contexts such as war crimes, and in treaties dealing with such matters as offences committed on board aircraft and offences relating to cultural property.

The attempt by states to regulate activities which they consider to be of direct concern to themselves has led in some instances to them extending the territorial principle of jurisdiction so as to cover conduct abroad, of aliens as well as of nationals, which has effects within their territories. The assertion of jurisdic-

Note the criticism by Judge Moore in the Lotus Case, PCIJ, Series A, No 10. In that case the Turkish law in question referred the ‘passive personality’ principle and France claimed that this was not permitted by international law; the Court did not find it necessary to consider the point (pp 22–3). For a list of 28 states which have adopted the principle see Harv Research (1935), p 976; many of them still retain it. In some states the ‘passive personality’ principle is applied as an additional condition to be met if a national is to be prosecuted for an offence committed abroad: see § 138, n 8. In some respects a provision like that in Art 14 of the French Civil Code (giving French courts jurisdiction over aliens abroad in cases where the plaintiff is a French national; see eg Société Air Algérie v Larbière (1966), ILR, 47, p 127) reflects a ‘passive personality’ principle in civil matters, the plaintiff being the person claiming to have suffered damage of some kind, by the Comprehensive Crime Control Act of 1984 the USA took jurisdiction in respect of serious crimes committed ‘outside the jurisdiction of any nation’ (eg on the high seas); and see n 34 of this section, as to US jurisdiction in respect of terrorist offences against US nationals or interests.

The case célèbre in the context of the ‘passive personality’ principle of jurisdiction arose in 1986 when Cutting, a citizen of the USA, was arrested in Mexico for an alleged libel against a subject of Mexico, which was published in a newspaper in Texas. Mexico maintained that it had a right to punish Cutting because, according to its criminal law, offences committed by foreigners abroad against Mexican subjects were punishable in Mexico. The USA, however, intervened, and demanded Cutting’s release. Mexico refused to comply with this demand. Nevertheless Cutting was eventually released, as the plaintiff withdrew his action against him. Since Mexico likewise refused to comply with the demand of the USA to alter its criminal law for the purpose of avoiding a similar incident in the future, the incident cannot be said to have settled the subject. See Westlake, i, p 252; Calvo, vi, §§ 171–73; Moore, ii, § 201, and his Report on Extra-territorial Crime and the Cutting Case (1887); Rolin and Gamboa, RJ, 20 (1888), pp 559–77, and 22 (1890), pp 234–50; Hyde, i, § 243. The case is fully discussed and the American claim is disputed by Mendelssohn Bartholdy, Das räumliche Herrschaftsgebiet des Strafgesetzes (1908), pp 135–43. For the judgment of the Mexican Court see Scott, Cases, pp 387–93; and see Judge Moore’s comment in his judgment in the Lotus Case, PCIJ, Series A, No 10, at pp 93.

See Re Gerisch, AD, 16 (1949), No 143; Re Robig, Brunner and Heines, ILR, 17 (1950), No 125. The passive personality principle was also relied upon in Attorney-General for Israel v Eichmann (1961–62), ILR, 36, p 5, but with the difference that, the victims having been killed before Israel existed as a state, it was the fact that they were Jews which was invoked: see generally on the case, § 119, a 15, para 3. The passive personality principle is a more limited basis for jurisdiction over war crimes than the universal principle (n 149); see also the observations in Demjanjuk v Petrovsky (1985), ILR, 79, pp 535, 545. As regards terrorist offences, note also the Diplomatic Security and Anti-Terrorism Act 1986, enabling US courts to try persons (including aliens) who abroad kill a US national, with the intention of coercing, intimidating or retaliating against a government or civilian population. See also § 141, n 13.

See Art 4(b) of the Tokyo Convention on Offences and certain other Acts Committed on Board Aircraft 1963, § 141, n 7.


Even some earlier writers who denied the lawfulness of extra-territorial criminal jurisdiction over foreigners generally nevertheless conceded it when, though the perpetrator was corporeally abroad, his criminal act took effect within the territory of the state; see Judge Moore’s dissenting judgment in the Lotus case, PCIJ, Series A, No 10 (see § 140). See also Bruns, ZvG, i (1929), pp 50–56; Drost, ZL, 43 (1931), pp 111–40; Cook, West Vir LQJ, 40 (1934), pp 303–29. Harv Research (1935), pp 493–4, 497 records a number of states which claimed criminal jurisdiction over acts abroad which had their effects within the state; in some cases much the same result is achieved indirectly by denying an offence to have been committed where it did in fact take place, but also where it took effect (eg § 1(5) of the Perjury Act 1911, and Art 7 of the Swiss Penal Code). Many of these legal provisions relate to those effects of conduct which form a constituent part of the offence (and in respect of which jurisdiction may be asserted on the basis of the objective application of the territorial principle: see § 137, n 13) rather than those which are merely consequences of conduct completed abroad. This distinction has not always been fully appreciated in some – particularly earlier – statements which might be thought to constitute authority for the ‘effects’ doctrine but which do not on examination bear such an interpretation. See, as to certain such observations in the Lotus Case, PCIJ, Series A, No 10, Jennings, Hag R, 121 (1967), ii, p 520. The same is probably true of the remarks of Lord Diplock in Treacy v DMP [1971] AC 537, 562, referring to acts done abroad ‘which have had harmful consequences on victims in England’. In upholding the constitutionality of a law which provided for the jurisdiction of Irish courts over certain acts performed in Northern Ireland, the Irish Supreme Court (relying on the Lotus case) concluded that in international law an act committed abroad which had an effect within the state of another country had to be regarded as within its jurisdiction: see also the observations of Lord Diplock in Treacy v DMP [1971] AC 537, 562, referring to acts done abroad ‘which have had harmful consequences on victims in England’.

Similar problems to those which arise in anti-trust matters also arise where a state imposes on foreign companies requirements that they conduct themselves abroad in a manner dictated by that state’s laws implementing its policy of boycotting goods going to or coming from another state: see generally § 129, n 14.

See Mann, Hag R, 111 (1964), i, at pp 103–4, for comment on Danish and Federal German restrictive practices laws which operate on the basis of effects within the state. For comment on certain extra-territorial aspects of the UK’s Restrictive Practices Acts, see Leven in Comparative Aspects of Anti-Trust Law in the United States, the United Kingdom and the European Economic Community (1963), ICLQ Suppl Publication No 6, pp 95–116. For an Australian decision holding that Australian legislation prohibiting combinations in restraint of trade did not apply to agreements made between foreigners outside Australia without having certain consequences felt within Australia, see Meyer Heine Pty Ltd v China Navigation Co Ltd (1966), ILR, 52, p 291.
to the shipping industry contained provisions for the imposition of penalties upon offending persons and companies for non-compliance with certain American requirements, which provisions the American courts and authorities have held to be applicable to transactions by foreigners taking place outside the United States of America. The assertion of such so-called 'long-arm' jurisdiction is not limited to anti-trust matters. It extends also, for example, to the commercial activities of states under the Foreign Sovereign Immunities Act 1976, in which the United States of America asserted jurisdiction over foreign states in respect of acts committed abroad in connection with a commercial activity abroad, but causing a 'direct effect in the United States'.

The justification for such assertions of jurisdiction on the basis of an alleged 'effects' principle of jurisdiction has not been generally accepted, and the matter is still of controversy. The exercise of jurisdiction because of the effects of an act within the state may amount to no more than an 'objective' application of the territorial principle of jurisdiction, but where the effects relied on are not a constituent part of the offence in question but are mere consequences or repercussions of the act done, the legitimate bounds of the territorial principle of jurisdiction are overstepped, particularly if the effects are only incidental and insubstantial; in this lies the danger of impropriety in resort to the 'effects' principle as a basis for jurisdiction and the doubtful consistency of that principle with international law. Concern expressed by many other states has led certain United States courts to have some regard to the legitimate interests of other states, by requiring not only that the foreign conduct of aliens must have actual or intended effects within the United States, causing sufficient injury there, but also that the interests of, and links to, the US — including the magnitude of the effects on American foreign commerce — are sufficiently strong, vis-à-vis those on other
nations, to justify the assertion of extra-territorial authority.\(^\text{46}\) By balancing the competing interests of the states concerned in this way some of the more serious excesses of an effects doctrine may in practice be avoided in particular cases, although objections of principle are still likely to remain.

With any assertion of criminal jurisdiction in relation to conduct of aliens\(^\text{47}\) in a foreign state there is a danger of infringing the sovereign rights of that state to regulate matters taking place in its territory; in extreme cases the assertion of jurisdiction may infringe the principles of non-intervention and the sovereign equality of states. This applies to jurisdiction asserted on the basis of the 'effects' principle as well as jurisdiction asserted on other bases, although the doubtful international legality of the former makes states particularly sensitive to encroachments upon their sovereign rights on that basis. There comes a point, which cannot be precisely defined in general terms, at which the application of a state's criminal law to the activities of foreigners in a foreign state involves an infringement of the territorial sovereignty and jurisdiction of the foreign state to which it may properly object. Thus the United Kingdom concluded that, at least in some circumstances, that point was reached with regard to the anti-trust shipping laws of the United States; in the Shipping Contracts and Commercial Documents Act 1964 powers were taken to procure compliance with certain foreign requirements to produce commercial documents if it appears that the requirement constitutes 'an infringement of the jurisdiction which, under international law, belongs to the UK' (s 2).\(^\text{48}\) In the face of continuing assertions by

United States courts and regulatory authorities of the right to apply United States anti-trust legislation in relation to extra-territorial activities of foreign nationals, the defensive effects of that Act were extended and strengthened in the Protection of Trading Interests Act 1980,\(^\text{49}\) which superseded and repealed the earlier Act. Even where a court has undoubted jurisdiction over a foreign defendant, as where he is resident in the state of the forum, its orders to the defendant to pursue a certain course of conduct in a foreign state or to produce documents held there may be open to challenge if they involve an infringement of the foreign state's jurisdictional sovereignty, including a breach of its criminal laws relating to conduct on its territory.\(^\text{50}\) Attempts to regulate in this way the conduct of foreigners abroad can create serious difficulties in international law, as was well illustrated by the dispute which arose over measures taken by the United States of America in 1981 and 1982, in response to the imposition of martial law in Poland, to prohibit dealings on a number of specified matters with the Soviet Union; this prohibition applied in particular to supplies of material for the construction of a gas pipeline from Siberia to Europe, and covered material


\(^{49}\) For the exercise in 1983 of the powers conferred by the Act in relation to US inquiries into alleged practices concerning international air transport see UKMIL, BY, 54 (1983), pp 484–7.

\(^{50}\) For a list of occasions when orders or directions have been made under the Act, see UKMIL, BY,

\(^{46}\) §

\(^{46}\) §
committed outside its territory. The territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty. The judgment of the Court, one of whose possible effects is to subject seamen to foreign criminal law of which they may have no knowledge, met with widespread criticism. A contrary rule was adopted in the Brussels Convention of 10 May 1952, relating to penal jurisdiction in matters of collisions or other accidents of navigation, in Article 11 of the 1958 Geneva Convention on the High Seas, and in Article 97 of the Convention on the Law of the Sea 1982.

§ 141 Jurisdiction at sea and in the air

Although the high seas are not part of the territory of any state, and are thus not within the scope of its territorial jurisdiction, states do have certain rights of jurisdiction over persons and things on the high seas. These are more fully discussed below. Somewhat different considerations apply in respect of airspace. Although that part of the airspace which is above the high seas is, like the high seas, not within the territorial jurisdiction of any state, that part which is above a state’s territory falls within its territorial jurisdiction. Accordingly, in a long-distance flight an aircraft, with its crew and passengers, may pass through the territorial jurisdiction of several states as well as being for a time outside the territorial jurisdiction of any state.

In respect of events occurring on board the aircraft the jurisdictional position can be complex. A state which in principle has territorial jurisdiction will in practice find it difficult to give any effect to its jurisdiction if the aircraft is merely overflying the state and not landing in it; and in the case of acts which take some time to complete, the aircraft may have flown through the airspace of several states during the commission of the act. Passengers and crew will, of course, also

§ 140 The Lotus case

The question of the extent of a state’s criminal jurisdiction came before the Permanent Court of International Justice in 1927 in the Lotus case. A collision had occurred on the open sea between the French steamship *Lotus* and the Turkish steamship *Boz-Koçurt*, resulting in the loss of the latter and the death of eight Turkish subjects. When the *Lotus* arrived at Constantinople, the Turkish Government instituted joint criminal proceedings against the captain of the Turkish vessel and the French officer of the watch on board the *Lotus*, and they were both sentenced to imprisonment. The French Government protested on the ground that Turkey had no jurisdiction over an act committed on the open sea by a foreigner on board a foreign vessel, whose flag state (it asserted) had exclusive jurisdiction as regards such acts. The dispute was referred by agreement to the Permanent Court of International Justice, which held, by the President’s casting vote, that Turkey had ‘not acted in conflict with the principles of International Law’ in instituting the criminal proceedings, because ‘inter alia’ the act committed on board the *Lotus* produced its effects on board the *Boz-Koçurt* under the Turkish flag, and thus, as it were, on Turkish territory, whereupon Turkey acquired jurisdiction over its foreign perpetrator. The Court also expressed the opinion that there is no rule of international law which prohibits a state from exercising jurisdiction over a foreigner in respect of an offence


54 There was a majority of seven to five judges in favour of the precise ground of the judgment as stated above in the text.

55 At p 20.

56 See § 291, n 3. In January 1929 the League of Nations Advisory and Technical Committee for Communications and Transport considered a communication from the International Association of Mercantile Marine Officers expressing their concern about the decision of the PGIJ, as tending to expose masters to double prosecutions. The matter was subsequently considered by the Joint Maritime Commission of the International Labour Organisation and the International Maritime Committee. See *Official Bulletin of the International Labour Office*, 13, pp 67, 143 and 14, pp 43, 56; International Maritime Committee, *Reports of the Antwerp Conference* (1930) and the Oslo Conference (1933). See also Jessup, *AJ*, 29 (1933), pp 495–9.

57 See § 291, n 3.

58 See § 291.

59 See §§ 287–98, 304. See also §§ 202–3 and 205 as to jurisdiction over foreign vessels in ports, the territorial sea and adjacent maritime zones.

60 See § 218ff.

be subject in some degree to the jurisdiction of the states of which they are nationals.

The state in which the aircraft is registered, and the nationality of which the aircraft is for most purposes regarded as having, will also have a claim to jurisdiction: there has not, however, developed a clear rule that the law of that state applies on board the aircraft in the same way as the law of the flag state applies on board ships, and the extent to which a state's laws apply to events occurring on board an aircraft registered in its territory has been largely left to states to determine for themselves. Thus not only may several states have concurrent claims to jurisdiction, but it may happen that no state has jurisdiction over a particular incident.6

In an attempt to establish some agreed rules in this area the Tokyo Convention on Offences and certain other Acts Committed on Board Aircraft was concluded in 1963.7 The Convention applies in respect of offences against penal law and acts which jeopardise the safety of the aircraft or of persons or property thereon or which jeopardise good order and discipline aboard; and it applies when the aircraft, being registered in a contracting state, is in flight or on the surface of the high seas or of any other area outside the territory of any state.8 Article 3 of the Convention provides that the state of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board, and obliges each contracting state to take the necessary measures to establish its jurisdiction on that basis. The Convention does not, however, exclude any criminal jurisdiction exercised in accordance with national law. Under Article 4 a contracting state which is not the state of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board unless the offense has effect on the territory of that state, or the offense has been committed by or against a national or permanent resident of that state, or the offence is against the security of that state, or the offence consists of a breach of any rules or regulations relating to flight or manoeuvre of aircraft in force in that state, or the exercise of jurisdiction is necessary to ensure the observance of the obligation of that state under a multilateral international agreement. Article 16 provides that for purposes of extradition offences committed on aircraft registered in a contracting state shall be treated as if they had been committed not only in the place in which they have occurred but also in the territory of the state of registration of the aircraft. The Convention also provides for extensive powers of an aircraft commander, including powers to restrain persons reasonably suspected of having committed or being about to commit an offence or act to which the Convention applies, to disembark them and to deliver them to the competent authorities of a contracting state; and also provides for corresponding powers and duties on the part of the state where a person has been disembarked or to whose authorities he has been delivered. The Convention does not apply to aircraft used in military, customs or police services.

The Tokyo Convention contained only a modest provision about the unlawful seizure of aircraft, requiring contracting states to take 'all appropriate measures' to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft, and, where a hijacked aircraft lands in a contracting state, to permit its passengers and crew to continue their journey and to return the

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6 See § 221.
9 See generally as to the position in the UK, McNair, Law of the Air (3rd ed, 1964), ch 9; Shawcross and Beaumont, Air Law (4th ed, 1977), ch 11. Akehurst, BY, 46 (1972–73), at p 162, cites examples of wide claims to jurisdiction made by several states in relation to crimes committed on board aircraft, including 'passive personality' (see § 139, on 33–6) and jurisdiction based on the state being the next landing place after the commission of the offence.

As to jurisdiction over persons on board an aircraft landing in distress, see Dugard, ICLQ, 30 (1981), pp 902–5, commenting on Nkondo v Minister of Police, 1980(2) SA 894. As to the local state's jurisdiction over persons or goods on an aircraft in transit through its territory see Kamolpraimpan (1973), ILR, 72, p 671; Orsini (1973), ILR, 73, p 661; and Males (1973), ILR, p 698. See also Annex 9 to the Chicago Convention on International Civil Aviation 1944 (on which see generally § 220).


The Tokyo Convention, and the later Hague and Montreal Conventions (discussed below, in the text), make special provision for those cases where states establish joint air transport operating organisations or international operating agencies which operate aircraft subject to joint or international registration: the states are to designate for each aircraft the state which is to exercise jurisdiction and have the attributes of registration for purposes of the Convention in question.

9 Under Art 2 the Convention does not require any action in respect of political offences or offences against laws based on racial or religious discrimination, except when the safety of the aircraft or of persons or property on board so requires; furthermore, Art 2 is without prejudice to Art 4 (concerning the circumstances permitting the exercise of criminal jurisdiction by a state other than the state of registration of the aircraft).

For the purposes of the Convention an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends: Art 1.3.

10 Article 4 does not expressly define the 'State which is not the State of registration'. It could refer either to the state in whose airspace, or on whose territory, the aircraft is in flight at the time of the commission of the offence, or to any state (other than the state of registration) which is connected with the offence by one of the factors listed in the Article. The latter interpretation may draw support from the drafting history of the provision, since earlier drafts prepared by the ICAO Legal Committee in 1958, 1959 and 1962 included an expression which would have limited the Article to the state in whose airspace the offence was committed, but that expression was eventually deleted; it may be considered that the former interpretation is supported by the wording of the provision (which contains certain pointers to the territorial state) and the purpose of the Convention (which is to create uniform rules of jurisdiction and the elimination of conflicts of jurisdiction).
aircraft and its cargo to the persons lawfully entitled to possession. The con-
tinued hijacking of aircraft, however, called for more comprehensive provi-
sions, and in 1970 the Hague Convention for the Suppression of Unlawful Seizure of Aircraft was concluded. This, in Article 9, repeated the substance of the Tokyo Convention provision, and added others. Under Article 1 of the 1970 Convention it is an offence for any person on board an aircraft in flight, unlawfully by force or threat thereof or by any other form of intimidation, to seize or exercise control of that aircraft; it is also an offence to attempt to perform any such act or to be an accomplice of a person who performs or attempts to perform any such act. Each contracting state undertakes in Article 2 to make the offence punishable by severe penalties. Under Article 4 each contracting state must also take the necessary measures to establish its jurisdiction over the offence, and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, when (a) the offence is committed on board an aircraft registered in that state, (b) the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board, (c) the offence is committed on board an aircraft leased without a crew to a lessee who has his principal place of business or, if he has none, his permanent residence in that state, or (d) the alleged offender is present in its territory and it does not extradite him to any of the states referred to in (a), (b), or (c). The Convention does not, however, exclude any jurisdiction exercised in accordance with national law. Under Article 7 a contracting state in which an alleged offender is found must either extradite him or submit the case to its competent authorities for the purpose of prosecution, whether or not the offence was committed in its territory. Article 8 deems the offence to be included in existing extradition treaties between contracting states, and obliges contracting states to include it in extradition treaties concluded between them in the future; it further allows contracting states which make extradition conditional on the existence of a treaty the option of considering the Convention as the legal basis for extradition in respect of the offence; finally, the Article provides for the offence to be treated, for extradition purposes, as if it had been committed not only where it in fact occurred but also in the territories of the states required to establish their jurisdiction in the circumstances referred to in (a), (b) and (c) above.

To counter acts of sabotage against aircraft a further Convention, for the Suppression of Unlawful Acts against the Safety of Civil Aviation, was concluded at Montreal in 1971. This follows a pattern similar to that of the Hague Convention. Article 1 defines the offences with which the Convention deals, broadly speaking acts of sabotage likely to endanger the safety of the aircraft. Under Article 3 each contracting state undertakes to make the listed offences punishable by severe penalties. Article 5 requires each contracting state to take the necessary measures to establish its jurisdiction over the offence when it is
committed in the territory of that state, and also in circumstances broadly the same as those stipulated in Article 4 of the Hague Convention. Similarly, Article 5 does not exclude any criminal jurisdiction exercised in accordance with national law. The Convention, in Articles 7 and 8, also lays down, in respect of extradition, provisions similar to those in the Hague Convention. The 1971 Montreal Convention was supplemented by a Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, concluded at Montreal in 1988.\(^4\)

\(^4\) See § 113.\(^5\) See § 140.

\(^5\) On the relationship between private international law and rules of international law relating to jurisdiction, see Mann, Hag R, 111 (1964), i, at pp 17–22, 54–62.


§ 142 Warsaw and Rome Conventions Mention may also be made of other multilateral conventions which deal with matters arising from the international operation of aircraft, though principally concerned with questions of private law and of private international law.

The Warsaw Convention for the Unification of Certain Rules regarding International Air Transport 1929 has the object of laying down uniform rules governing the liability of the carrier where damage or injury is sustained during international carriage.\(^7\)

The Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface 1952 established a system of absolute liability of operators for damage to third parties on the surface, caused by foreign aircraft.\(^7\)

§ 143 Legal cooperation and assistance If a state has exercised its jurisdiction within the limits acknowledged by international law, other states will in appropriate circumstances usually be willing to accept the results flowing from that exercise of jurisdiction.\(^7\) Thus, when the courts of a state have before them a case involving a foreign element, they will often apply laws enacted by a foreign state; and judgments of the courts of one state are often recognised and enforced in another. Such matters are primarily regulated in accordance with each state's rules of private international law. Where a state or its courts have acted contrary to international law, including the rules relating to the exercise of jurisdiction, other states are in international law entitled (but not compelled) to refuse to give any effect to the illegal act, or to claim damages (as France did in the Lotus case).\(^3\) In practice most states, in their rules of private international law, ensure that a foreign state's laws and decisions which exceed the limits of jurisdiction permitted by international law are not recognised or enforced abroad.\(^4\) However, rules of private international law often prescribe non-recognition or non-enforcement for reasons other than that an act is contrary to international law; accordingly, the refusal of one state to accept or apply another's laws or judicial decisions does not necessarily mean that the state considers them to have been made or delivered in violation of international law in general or of rules relating to the extent of jurisdiction in particular.

Increasing travel, transactions and communications between people in two or more states have led many states to adopt laws and conclude bilateral and multilateral treaties regulating various aspects of judicial and legal cooperation between states. Thus there are many treaties providing for the mutual recognition and enforcement of civil and commercial judgments, and facilitating the taking of evidence in one state for use in proceedings before the courts of
another, 6 Treaties have also been concluded dealing with the extradition of accused persons from one state to stand trial in another, 7 other forms of mutual assistance in criminal matters, 8 the transfer of criminal proceedings from one state to another, 9 the acceptance of the validity of criminal judgments given in other states, 10 and the transfer of prisoners to serve sentences in one state (usually the state of their nationality) after being convicted by the courts of another. 11 The development of mutual legal assistance by states has been given considerable impetus by growing international concern at the socially harmful effects of illegal drug use, 12 both in their effects on users and in the increase in serious international crime associated with those engaged in drug trafficking. International attempts to suppress the illegal trade in drugs have a considerable history, 13 and are most recently reflected in the Single Convention on Narcotic

6 Courts in different states also assist each other in such matters as the taking of evidence. As to 'letters of request' ('letters rogatory') in English law, see Dicey and Morris, pp 201, 204–9; the Evidence (Proceedings in Other Jurisdictions) Act 1975; Rio Tinto Zinc Corp v Westminster Electric Corps [1978] AC 547. As to the grant of powers in English law for UK authorities to carry out inquiries into companies in the UK and in the UK, see the Companies Act 1989, ss 82–91. Among several similar bilateral conventions concluded by the UK on mutual assistance regarding legal proceedings in civil and commercial matters, see those with the Netherlands in 1932 (TS No 24 (1933)) and Israel in 1966 (TS No 2 (1968)). See also the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (TS No 20 (1977)), laying down procedures for taking evidence abroad. But note Art 12 allowing a state to refuse enforcement of letters rogatory where its sovereignty would thereby be prejudiced; see also, for the UK, s 4 of the Protection of Trading Interests Act 1980, precluding a UK Court from giving effect, under the Evidence (Proceedings in Other Jurisdictions) Act 1975, to a request issued by an overseas court if the request infringes the jurisdiction of the UK or is otherwise prejudicial to the sovereignty of the UK. The US Supreme Court has held that the procedures prescribed by the Convention are not exclusive or mandatory, and the procedures of the forum state relating to discovery of documentary evidence abroad may still be used, the choice of resorting to the Convention's procedures being based on what is reasonable in the light of the facts, the sovereign interests involved, and the likelihood that resort to any other procedure might prove ineffective, this examination of the interests involved being called for by counts of freedom. International Commercial Court: Société Industrielle Nationale Recherche et Industrie Chimie (French company) v Wagenwerk AG v Schlunk, ILM, 26 (1987), p 1021. The same court later held that service on a foreign company's subsidiary within the forum state was valid service on the foreign company without the need to effect service on it under the Hague Convention: Volkswagenwerk AG v Schramp, ILM, 26 (1987), p 1092, on which see Leiner, Journal of World Trade Law, 20 (1987), pp 97–102; White, Harv LJ, 30 (1988), p 234; and the Conferencia de las Naciones Unidas sobre Tráfico de Drogas y Su prefectura, 16 (1987), p 150; McLean, ibid, pp 1408–18. Some bilateral agreements allow for the seizure of proceeds of crimes committed in the one state where those proceeds are found in the other: see n 20.


10 See, eg European Convention on the International Validity of Criminal Judgments 1970 (European TS No 70).


12 See § 139, n 31.

13 See generally with regard to the regulation and control of the use and consumption of and trade in opium and other narcotic drugs: International Opium Convention, 23 January 1912 (LNTS, 8, p 187); Agreement concerning the Suppression of the Manufacture of, Internal Trade in, and Use of Opium, 11 February 1925 (LNTS, 51, p 337); TS No 13 (1928)); International Opium Convention, 1925 (LNTS, 81, p 317; TS No 27 (1928)); Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 13 July 1931 (LNTS, 139, p 301; TS No 31 (1933)); BISF, 134 (1931), p 361); Agreement concerning the Suppression of Opium Smoking, 27 November 1931 (LNTS, 177, p 373); Convention for the Suppression of the International Traffic in Dangerous Drugs, 26 June 1966 (LNTS, 198, p 302); Protocol of 11 December 1946, amending various previous treaties (LNTS, 12, p 179; TS No 35 (1947)); Protocol bringing under international control certain additional drugs, 11 December 1946 (LNTS, 44, p 277); Protocol for Limiting and Regulating the Cultivation of the Poppy Plant and the Production, Trade in and Use of Opium, 23 June 1953 (LNTS, 456, p 3). For writings before 1945, see 8th ed of this vol, p 984, n.
Drugs 19614 (as amended by a protocol concluded in 1972),15 the Convention on Psychotropic Substances 1971,16 and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.17 The international community’s efforts in this area are coordinated primarily through the Commission on Narcotic Drugs18 (established in 1946 by the Economic and Social Council of the United Nations) and the International Narcotics Control Board (proposed for in the 1961 Single Convention). These multilateral efforts have increasingly been supported in recent years by the conclusion of many bilateral agreements,19 involving cooperative action to trace, freeze and confiscate the proceeds of drug trafficking.20 The seriousness of drug trafficking offences has led to their consideration by the International Law Commission as a crime against the peace and security of mankind.21

§ 144 Non-enforcement of foreign public law

While effect is as a rule given to private rights acquired under the legislation of the foreign states3 (subject which falls within the domain of private international law — the courts of many countries, including British and American courts, decline to give full effect to the public law, as distinguished from private law, of foreign states* (unless otherwise required by any relevant treaty).4 In particular they refuse, in respect of assets within their jurisdiction, to enforce directly or indirectly5 on behalf of a foreign state6 its revenue laws7 as well as its penal8 and confiscatory9 legislation. It is in

The distinction between ‘public’ and ‘private’ law, although very widely adopted in the present context and of undecided value, is on analysis less easy to define than at first sight might appear. See F A Mann, Grotius Society, 40 (1954), at pp 32–4, who suggested ‘prerogative rights’ and ‘claims sure imperit’ as terms conveying the meaning of ‘public law’. The existence of an agreement between the US and the USSR, which in one of the significant elements in US v Park, as to which see n 32. Also see n 20, as to Art VIII(2)(b) of the IMF Agreement; and §§ 415–24 as to extradition treaties. For the operation of a Franco–Belgian treaty of 1931 providing for reciprocal assistance in recovering taxes, see Re D (1966), ICL, p 57. For a bilateral Franco–Czechoslovak agreement providing for the mutual exchange of information on narcotic control legislation, see Statis Banku v Englander (1966), ICL, p 157.

A foreign state’s public law would be directly enforced if eg the state were to be allowed to assert a claim in the courts of another state for sums due under tax legislation (see Government of India v Taylor (1955) AC 491). The same substantive result — recovery of taxes by or for the foreign state — cannot be achieved indirectly, as by the state first obtaining in its own courts a judgment for the sums due to it and then suing in a foreign public court ostensively on the basis of the judgment debt (US v Harden (1963), ICL, p 114; Commissioner of Taxes (Federation of Rhodesia and Nyasaland) v McFarland (1965) (1) SA 470(W), with comment by Spéirs, ICLQ, 14 (1966), pp 987–92; or by a company being allowed to sue for sums to be used solely to meet a revenue debt (Buchanan and Mackay v McVey, ICL, 22 (1955), p 46); or by a defendant being allowed to rely upon a foreign state’s garnishment upon a debt owed to the plaintiff, where the garnishee was in respect of unpaid taxes (Rosaio v Manufacturers Life Insurance Co [1963] 2 QB 352; but cf Korthorus v Niarhos, ICL, 17 (1950), No 9, allowing an employer to invoke as a defence that a deduction from wages due to an employee was in respect of taxes due to a foreign state to whose revenue laws both employer and employee were subject, and Kahler v Midland Bank [1950] AC 24 (and n 21) allowing a defence by the bank that action required of it in the forum state would involve a breach of a foreign state’s exchange control laws). No question of indirectly enforcing a foreign state’s revenue law arises where a contract between two private parties is the subject matter of the contract: see Iljoski v Spriankas, AD, 10 (1941–42), No 6. Note the distinction between enforcing a foreign revenue law and rendering a foreign court judicial assistance (by taking evidence) in proceedings before it to enforce such a law, allowing the latter even though the former would be excluded: Lange v Minister of Justice (1959), ICL, 28, pp 88, 90; Re State of Norway’s Application [1989] 1 WLR 458 20 (and n 21) allowing a defence by the bank that action required of it in the forum state would involve a breach of a foreign state’s exchange control laws). No question of indirectly enforcing a foreign state’s revenue law arises where a contract between two private parties is the subject matter of the contract.

Section 1(2)(b) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 excludes from the scope of the Act foreign judgments for sums payable in respect of taxes or fines or other penalties, and such judgments are accordingly excluded from the scope of treaties concluded by the UK for the enforcement of foreign judgments.
clear cut. Thus the distinction between penal and confiscatory laws cannot always be sharply drawn, since for example a confiscation may be the penalty for a criminal offence or may be tantamount to the imposition of a penalty. It is also uncertain as to what extent enforcement is to be refused to categories of tax law other than revenue, penal or confiscatory laws. An underlying principle of territorial sovereignty would suggest that all foreign public laws should be refused enforcement in the territory in which they are not valid, however, courts have not always acted in this way, especially where they discern no compelling reason of public policy requiring them to do so. It can probably only be said that revenue, penal and confiscatory laws are not the only categories of public law the enforcement of which is to be refused, although there is no established practice according to which all, or any particular, other categories of public law are refused enforcement. In this context exchange control laws call for particular

As to extradition for fiscal offences, see R v Chief Metropolitan Stipendiary Magistrate (1988) 1 WLR 1204, and §419, n.11. See nn 18-21, as to foreign exchange control laws; and nn 22-6, as to the recognition or application (as opposed to the enforcement) of foreign public laws.

It has long been established that a state does not enforce the penal laws of another state: see Follia o Ogden (1789) 1 H Bt, 123, 135; The Antelope (1825) 10 Wheat 66, 123 (US Supreme Court, per Marshall CJ); Huntington v Atrill (1893) AC 150. For a modern example see USA v Inkle (1988) 3 WLR 304. The triple damages payable under US anti-trust legislation to persons claiming to have suffered damage as a result of conduct in breach of that legislation is regarded by the UK Government as penal in character, and their enforcement in the UK is prohibited. See the Protection of Trade Interests Act 1980, s.5, and Parliamentary Debates (Commons), vol 973, col 1536 (15 November 1979).

Wendtberger (1974), ILR, 66, p 151; and nn 22-6, as to the recognition or application of foreign public laws (as opposed to their enforcement). See §143, n.11, as to treaties providing for prison sentences imposed in one state to be completed in another. See in 27H.


Thus in appropriate cases a claim will be rejected even though the party presenting it is not the foreign public law, and even though the claim might in form be founded in contract or tort, or might have some other private law basis. See eg Huntington v Atrill (1893) AC 150; Banco de Vouca v Don Alfonso de Bourbon y Austria (1935) 1 KB 140; Ilgovski v Shprinski, AD, 10 (1941-42), No 6; Frankfurter v Exner (1947) 1 Ch 629; Buchanan and Macharg v McVey, ILR, 22 (1955), p 46; Zwick & Kraus Brothers & Co, Inc, ILR, 23 (1956), p 10; Rossano v Manufacturers Life Insurance Co (1963) 2 QD 352.

See §118.

Thus there is a similarity between the non-enforcement of a foreign state's public law and other matters where the exercise of jurisdiction by one state may be seen by another state as an infringement of its territorial sovereignty: see §138, n.11, as to orders to act in another state in a manner contrary to its laws, and §139, as to attempts to regulate conduct in another state.

It is probably too extreme a view that a state's public law is inherently limited to that state's territory, so that the question of its enforcement abroad cannot arise since the reach of the law is necessarily too restricted. Such a view would be inconsistent with the practice of sometimes providing by agreement for the enforcement abroad of a state's public law (see §4) and with the occasional enforcement of a foreign state's public law even in the absence of an agreement (see n 16). Furthermore, a state has jurisdiction in respect of its nationals abroad (§138) and, at least for purposes of its own law, may legislate for them and their property even if the foreign state of their residence might decline to enforce such legislation: see Amsterdam v Minister of Finance, ILR, 19 (1952), No 50; Republic of Iraq v First National City Bank (1963), ILR, 42, p 29, at p 31. Most states apply their tax laws to certain activities, usually on the part of their nationals, which take place abroad.

As to enforcement of foreign pensions, see eg Metall Industries (Salvage Ltd v Owners of ST Halle (1941), ILR, p 21 (enforcing social security legislation to a revenue law), and Socité Clement-Boutot v Groominge Verwey (1967), ILR, 48, p 84 (enacting patent laws to penal and administrative laws).

Thus a foreign state's public law was enforced in eg Emperor of Austria v Donoshow (1861) 3 De G B & 17 (for an interesting case on which see Mann, Gross, Society, 40 (1954), at pp 37-91; and the Middle Bank [1952] AC 24 (on which see n 21); Kingdom of Belgium v EM/JCH, ILR, 20, p 93; 30; Kingdom of Belgium v Albrecht and Willem Wannin, ibid, p 28; Jificador v Custodian of Attorney's Property [1954] 1 All ER 145; Ammon v Royal Dutch Company, ILR, 21 (1954), p 25 (enacting public law enforceable if it is primarily aimed at the protection or prevention of crime, a similar consideration is evident from the decision (as opposed to dictate) in Huntington v Atrill (1893) AC 150).

As to public policy as a ground for refusing to apply foreign law, see Carter, BY, 55 (1984), pp 111, 122-31; and Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga) [1984] I All ER, p 717 (and comment by Carter, BY, 55 (1983), pp 297-301).

The issue arose in proceedings brought by the UK in Australia and New Zealand to enforce the duty of confidentiality owed by an employee to his former employer, although in the particular case the employer was the Crown and the ex-employee a former member of the intelligence service. The High Court of Australia refused to enforce the duty of confidence on the ground that to do so in this case would conflict with the rule requiring the non-enforcement of foreign public laws, which applied generally to claims enforcing the interests of a foreign sovereign which arose from the existence of certain powers peculiar to government. HM Attorney-General for the UK v Heinemann Publishers Pty Ltd [1988] 7 ALR 449; the New Zealand Court of Appeal reached a similar conclusion in HM Attorney-General v Wellington Newspapers Ltd [1988] NZLR 129. For comment see F A Mann, LQR, 104 (1988), pp 497-501; Collier, CLJ, 48 (1989), pp 33-6. See also: (i) as to export restrictions, King of Italy v Medici (1918) 34 TLR 623; Nigerian Oil Products Co Ltd v Carew (1972), ILR, 73, p 226; Attorney-General of New Zealand v Ortiz (1982) 3 All ER 432 (affirmed on other grounds by the House of Lords (1984) AC 1), on which see also Nott, ICLQ, 33 (1984), pp 203-7; (ii) as to social security legislation, Caisse Générale Locale de Secours Contre la Maladie de la Commune Urbaine de Juich SA des Ateliers de Godarneville, AD, 5 (1929-30), No 61; Metal Industries (Salvage Ltd v Owners of ST Halle (1963), ILR, 33, p 21; SA Principe de Paterno Moneda v INPS (1966), ILR, 71, p 219; and discussion by F A Mann, Harg R, 132 (1971), i, at pp 173-5; (iii) as to trading with the enemy, Hof Products Ltd v Paul Hof and Skandinaviska Bank Aktiebolag, AD, 12 (1943-45), No
The reluctance of courts to enforce a foreign state's public law does not involve a complete refusal to acknowledge it. The courts of one state do not normally question the legality of the laws of another in their application to persons, property, and events within that other's territory, and the territorial sovereignty of a state is not prejudiced by its courts recognising that a foreign state's public law operates within the foreign state's territory. Thus if a contract is properly subject to the law of a foreign state (for example because it is the proper law of the contract) and the public law of that state renders the contract invalid, or its performance illegal, the courts of the foreign state may also regard the contract as invalid and decline to enforce performance. Furthermore, the courts also refuse

Indonesia v Brummer et al (1959), ILR, 30, p 25; Stichting Leids Kerkhofondsen v Bank Indonesia (1960), ILR, 33, p 23; Bulgarian State v Takvorian (No 3) (1961), ILR, 47, p 40; Banco de Brasil SA v Israel Commodity Co (1963), ILR, 32, p 371; Indonesian Corps PT Esemokban v NV Asuransi Maatschappij de Nederlansen van 1845 (1966), ILR, 40, p 7; Constant v Lanata (1966), ILR, 52, p 10; Banque & Fonds, ILR, 48, p 229; Wilson, Smithett & Cope Ltd v Terraz (1975) 2 All ER 491; Menendez v Saks & Co (1973), ILR, 86, p 122; K v Governor of Pentonville Prison, ex parte Khabubandani (1980) 71 Cr App R 241; and see also many of the insurance cases cited below.


Much of the litigation concerning foreign exchange control laws has concerned the payment of sums due under foreign state's public laws. Of course, the place where the state where the payment is originally taken out has subsequently enacted legislation restricting payment on maturity (although, usually, the state's own currency) or to payment in certain places only or at a specified rate of exchange. Attempts by policy holders to secure payment in accordance with the original terms of the contract are usually turned on findings as to where the contract was originally concluded, where the person for performance was situated in, or where the proper law of the contract. See eg Rosino v Manufacturers Life Assurance Co [1963] ILR, 22, p 128; Theye v Ajuria v Pan American Life Insurance Co (1964), ILR, 36, p 456; Pan American Life Insurance Co v Blanco (1966), ILR, 42, p 149; Confederation Life Association v Vega y Armanon, AJ, 62 (1968), p 986; Johansen v Confederation Life Association, AJ, 66 (1972), p 598.

21 For a discussion (and criticism) of the view sometimes advanced in France, Switzerland and the Federal Republic of Germany, to the effect that a state's public law cannot be applied or otherwise taken into account were the courts of other states, see Mann, MLR, 39 (1972), pp 182–96.

22 See § 112, as to the 'act of state' doctrine.


24 For those states which are parties to the agreement establishing the International Monetary Fund Article VIII(2)(b) provides that 'Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.' Apart from that provision, courts generally refuse to enforce foreign exchange control laws in respect of property or rights situated in the state of the forum.
to enforce a contract which calls for conduct which would involve the commission of a criminal offence in a foreign state. In such cases the courts of the forum state do not themselves enforce the foreign public law, but recognise the consequence of its operation within the territory of the foreign state, and in that sense can be said to apply it. Those courts may, however, sometimes decline even to apply a foreign state's public law in that limited sense, for reasons amounting in essence to public policy.  

With foreign confiscatory legislation25 in particular the distinction between enforcing that legislation in the state of the forum, and giving effect in that state to consequences flowing from the application of the law within the legislating state, is important. Even though a confiscatory law which purports to have extra-territorial effect26 will in principle be regarded by the courts of the legislating state as having that effect,27 it will not normally be enforced28 by the courts of other states so as to deprive the owner of property situated within the territory of those states, for that would be to allow a foreign state's sovereign action to operate directly in another state and would raise serious questions of public policy. 31 However, the considerations of public policy which normally lead

25 See eg Foster v Driscoll [1920] 1 KB 470; Ralli Bros v Compania Naviera Sota y Aznar [1920] 2 KB 287; De Beeche v South American Stores Ltd [1935] AC 148; Regazzoni v RC Sesta [1944] Ltd [1958] AC 301. Cif Bureaux Brasserie v Cebelec, ILR, 23 (1956), p 26. See also § 138, n 11, as to requirements by one state that a person should act in another in a manner contrary to the latter's laws.

26 See eg cases cited at § 113, n 6.


28 A confiscatory law may not purport to affect property outside the legislating state, in which case the question of enforcing it in respect of property abroad does not arise. See The Jupiter (No 3) [1927] p 122, 144–5; Re Russian Bank for Foreign Trade [1933] Ch 745, 767; and n 34. See also the retroactive effect of a government on its prior confiscatory laws, see above, § 47, n 11.

29 Re Law on the Nationalisation of French Banks (1938), ILR, 75, p 700. The question will turn on the construction of the law as having such extra-territorial effect, and any relevant limits on the powers of the legislature.

30 The substance of the action, rather than its form, determines whether it involves, directly or indirectly, the enforcement of a foreign confiscatory law: see eg Banco de Viscaya v Don Alfonso de Bourbon and Austria [1935] 1 KB 140, and n 10.

31 Thus even after the recognition of the Soviet Government by the USA the courts in that country refused to give extra-territorial effect to Russian confiscatory decrees as being contrary to public policy and fundamental legal notions as understood in the various states of the Union: see Vladkova-Dziszewska Railway Co v New York Trust Co (1934) 363 NY 369; AD, 7 (1933–34), No 27;
courts to deny extra-territorial operation to a foreign state's confiscatory
laws may occasionally be overcome by conflicting considerations of public policy
requiring such operation to be allowed.32 Further, the normal rules applied by
courts to foreign confiscatory laws may be held merely requisitioned because,
although the law is apparently confiscatory, it is in all the circumstances of the
case inappropriate so to regard it, as where property is merely requisitioned or where
some, not illusory, provision for payment is made.33

Where the confiscatory laws have already operated on property within the
territory of the legislating state so as to deprive the original owner of title, and
vest title and possession in the foreign state or its nominee or successor, no
considerations of territorial sovereignty or jurisdiction prevent the courts of
other countries from acknowledging and giving effect to that title and possession
as lawful, and they often do so, particularly having regard to the so-called 'act
of state' doctrine.34 But even where a confiscatory law has applied in this way to

32 In a series of cases – of which the leading case is US v Pink (1912) 315 US 203 (see also Tillman v
US (1963), ILR, 34, p 16) – the courts in the USA gave effect to the confiscatory decrees of Soviet
Russia for the exceptional reason that they referred to property covered by certain arrangements
(the so-called 'Livinoff Assignment') made in connection with the recognition of the Soviet
Government by the USA in 1933 and that that recognition, partaking of the nature of a high act
of foreign policy, overruled considerations of public policy, as understood by the individual states
of the Union, prohibiting the application of foreign confiscatory decrees. For a criticism of that
decision, which stretches the consequences of recognition in a manner somewhat also having the
purpose as generally understood, see Borchard, AJ, 36 (1942), p 257, and Jessup, ibid, p 282. See
also Shareholders of the Z AG v A Bank (1961), ILR, 45, p 436, for a waiver by a state in a treaty of
claims of its nationals against the other party, and acceptance of the effect of that waiver on their
property as finally determined by the law of a foreign country (see § 113, n 16). See also Schweizer-
ische Lebensversicherungs- und Rentenanstalt v Elkan, ILR, 20 (1953), p 36; ilich v Banque
Franco-Serbe, ILR, 23 (1956), p 19; Epowe Reynolds v Ministre des Affaires Etrangeres (1965),
ILR, 47, p 53; Expropriations in Czechoslovakia (Austria) Case (1965), ILR, 51, p 22; Cohen v
Sociedad Minera del Teniente SA v Aetikangulari Norddeutsche Allfirma, IL, 12 (1973), p 251,
and associated proceedings at ILM, 13 (1974), p 1115 (concerning the nationalisation by
Chile of certain copper mining interests, on which see generally MacCrate and Goldman, AS
decision of the French Court of Cassation in Bredun Copper Co v Groupeement d'Importation des
Métaux, ILR, 42, p 118, 187; BP Exploration Co v Libya (Libya) Ltd v Asstro Protecor Company
Naviera SA (1973), ILR, 77, p 543 (concerning nationalisation by Libya of certain oil companies'
assets, in which connection see also the US State Department's statement at ILM, 13 (1974), p 767);
Strogosch-Scherbatoff v Weldon (1976), ILR, 66, p 207; Société d'Activité africaine v Serrue
(1981), ILR, 80, p 425; Tchad Co Co v Rockwell International Corp (1985), ILR, 79, p 582;
Société d'Activité africaine v Serrue, JSAC and Acoros (1985) 2 All ER 1025; Williams & Humbert Ltd v W
& H Trade Marks (Jersey) Ltd [1986] AC 368 (concerning the compulsory acquisition of shares: see
Forsyth, CLJ, 44 (1985), pp 376–8; FA Mann, LQR, 102 (1986), pp 191–7, and LQR, 103
(1987), pp 26–8; but of the decision of a US Court of Appeals in parallel proceedings, Williams &
Humbert Ltd v W & H Trade Marks (Jersey) Ltd (1988), ILR, 78, p 646; Dayson v Czechoslo-
vak Socialist Republic (1986), ILR, 79, p 590. The nationalisation of shares in a company by the
government under whose laws that company has been established has been held by a Belgian court still to
leave the company the owner of its subsidiary companies operating abroad, on the ground that the
ownership of shares in those subsidiaries had not been changed by the nationalisation of the
shares of the parent company, which still existed as a company in which the ownership of the
shares in the subsidiary was vested: Shareholders of the Belga-Antwerp Co v Société des Fonderies
Saint-Gobain, ILR, 26 (1987), p 125. See also Holzer v Deutsche Reichsbahn-Gesellschaft (1938)
277 NY 474; AD, 9 (1938–40), No 71, for an example of recognition of contracts made under the law of a
foreign country – public policy notwithstanding.

Since much of the law on this matter turns on the territorial location of the property, the
special position in this connection of ships has often been considered. On the extra-territorial
effect of confiscatory decrees in respect of ships abroad see The El Condado (No 2), Lloyd's List
Law Reports, 63 (1939), p 83; AD, 9 (1938–40), No 77, where it was held that the general principle
denying extra-territorial effect to confiscatory decrees was applicable to foreign ships in British
waters or in foreign waters outside the territory of the confiscating state. See, to the same
effect, The El Condado (No 2), AJ, 59 (1952); Williams & Humbert Ltd v W & H Trade Marks
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waters or in foreign waters outside the territory of the confiscating state. See, to the same
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Holzer v Deutsche Reichsbahn-Gesellschaft (1938) 277 NY 474; AD, 9 (1938–40), No 71, for an
example of recognition of contracts made under the law of a foreign country – public policy
notwithstanding.
was no room for applying to them the general principles relating to foreign confiscatory decrees; accordingly rights over a vessel might be properly acquired by a state while the vessel was outside its territory (on the high seas) and so support a claim to immunity from a third state’s courts, although forcible possession of the vessel acquired in a third state would not be effective for that purpose. Peaceful possession taken of a vessel in foreign waters by a state, in pursuance of its requisition decrees or similar measures, can, however, be effective: see Ervin v Quintanilla (1938) 99 F(2d) 935; AD, 9 (1938–40), No 76. See also The Rigmor, AD, 10 (1941–42), No 63, holding a decree of requisitioning by the Norwegian Government effective as a legal basis for the transfer of possession of the vessel in a Swedish port to the Norwegian Government by the act of the master of the vessel. See also, treating as effective the requisition and subsequent sale of a vessel in a foreign port by its flag state, although forcible possession of the vessel acquired in a third state would not be effective for that purpose. Peaceful possession taken of a vessel in foreign waters by a state, in pursuance of its requisition decrees or similar measures, can, however, be effective: see Ervin v Quintanilla (1938) 99 F(2d) 935; AD, 9 (1938–40), No 76. See also The Rigmor, AD, 10 (1941–42), No 63, holding a decree of requisitioning by the Norwegian Government effective as a legal basis for the transfer of possession of the vessel in a Swedish port to the Norwegian Government by the act of the master of the vessel. See also, treating as effective the requisition and subsequent sale of a vessel in a foreign port by its flag state, Zadeh v United States, ILR, 22 (1955), p 336. See generally as to the requisitioning of merchant ships McNair, Grotius Society, 31 (1945), pp 30–46, and JCL, 3rd series, 27 (1945), pp 68–78; McNair and Watts, Legal Effects of War (4th ed, 1966), pp 441–5. For a clear presentation of the British and American practice in the matter in the course of the Spanish Civil War of 1936–39 see Preuss, AJ, 35 (1941), pp 263–81, 36 (1942), pp 37–55. See also Jaenicke, ZOV, 9 (1939), pp 354–82; Riesenfeld, Minn Law Rev, 25 (1940), pp 62ff.

35 Eq Cie Francaise de Credit et de Banque v Astard (1969), ILR, 52, p 8; and see § 113, n 6. Thus where a defendant bank remitted the plaintiff’s property into the territory of the legislating state from abroad, thereby bringing it within the territorial scope of that state’s confiscatory laws, a US court refused to treat compliance with a foreign confiscatory decree as a ground for relieving the defendant of liability. See Flech v Banque Nationale de la Republique d’Haiti, where the court said: ‘Confiscation, in ostensible compliance with foreign edicts which are void in this State, has sometimes been compared, in its legal effect, to action by thieves or marauders . . . That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognised by us, affords no controlling reason why it should be enforced in our courts’: (1948) 77 NYS 2d 41; AD, 15 (1948), No 7.

36 See § 113.
On state responsibility in general


§ 145 Nature of state responsibility Since, formerly, states alone used to be the subjects of international law, the general topic of international responsibility for wrongs used to be discussed under the heading of 'State Responsibility'. It is still convenient to keep the classic title, while noting that international responsibility now also involves consideration of the position of individuals and of international organisations.

A state may, sometimes, in municipal law, enjoy freedom from legal responsibility, or immunity from the jurisdiction of national courts. In international law, however, a state bears responsibility for its conduct in breach of its international obligations. Such responsibility attaches to a state by virtue of its position as an international person. The sovereignty of the state affords it no basis for denying that responsibility. Failure to comply with an international obligation constitutes an international wrong by the state giving rise to international responsibility of that state from which flow certain legal consequences, both for that state (such as the obligation to make reparation) and for others (such as certain rights for the injured state to seek redress or take countermeasures, or even an obligation in certain cases for all other states to respond to the wrongful act). The most usual consequence of an international wrong is to enable the injured state to avail itself of the measures and procedures available to it in accordance with international law to compel the delinquent state to fulfil its obligations, or to obtain from that state reparation for the failure. Specific forms of redress or other legal consequences may be provided in treaties dealing with particular subjects in the event of a party acting in breach of their provisions. A state may, depending on the circumstances, be jointly responsible with one or more other states, as in the case of joint occupation of enemy territory. A distinction is sometimes made between the original and so-called vicarious responsibility of a state. 'Original' responsibility is borne by a state for acts

See § 6. The international responsibility of international organisations will be covered in the projected vol III of this work. The matter is important not just in relation to international organisations but also, indirectly, in relation to states, since developments in the law relating to the responsibility of international organisations will affect also the law relating to the responsibility of states.


As to the responsibility of member states of an international organisation for the organisation's acts, despite its independent legal personality, see Seidl-Hohenveldern in Festschrift für Hermann Mosler (1983), pp 881–90, and the litigation in the UK concerning the liabilities of the International Tin Council, particularly the decision of the House of Lords in JH Reyner (Mincing Lane) Ltd v Department of Trade and Industry [1989] 3 WLR 969, holding the member states not liable on an organisation's contracts (see § 7, n 21).

See also § 150, n 22 as to claims by international organisations.

In English law, the Crown has, since 1948, generally been liable to suit: Crown Proceedings Act 1947. It is sometimes a defence in English law to plead 'act of state', ie that the defendant acted under the orders of or with the subsequent approval of the British Government: see Strupp, Das völkerrechtliche Delikt (1920), pp 32–5; see also award of the American-Mexican Claims Commission in the 'James' Case (1925), RIAA, iv, pp 282, and AD, 3 (1925–26) No 158. See also Verdross, ZóR, 21 (1941), pp 283–309, and YBILC (1975), ii, p 73, para (11).

Although the terminology is convenient for drawing attention to a useful distinction, it must be noted that a state's responsibility for the act of a private person is not vicarious responsibility strictly sense. The state is in international law not legally responsible for the act itself, but for its own failure to comply with obligations incumbent upon it in relation to the acts of the private person: those acts are the occasion for the state's responsibility for its own wrongful acts, not the basis of its responsibility. The state's responsibility for unauthorised acts of its officials (§ 165) is, however, more nearly a true vicarious responsibility.

Art 27, and Commentary, YBILC (1978), ii, pt 2, pp 99–105: the ICJ regarded only the grant of aid or assistance as sufficient complicity in the wrongful act to be itself a distinct internationally wrongful act of participation. See also Art 12 and Commentary, YBILC (1975), ii, pp 83–6. See, as to questions of complicity in international law, Quigley, BY, 57 (1986), pp 77–131, and, as to questions of joint and several liability of states, Noyes and Smith, Yale JIL, 13 (1988), pp 25–67, and below, n 12. See also Art 3 (f) of the definition of aggression, GA Res 3314 (XXIX) (1974). But where one state, in the exercise of protection or control over the processes of another state, or where one state secures by coercion the commission of a wrongful act by another state, the former state may be held responsible for the acts of the other state (which is not thereby automatically relieved of responsibility for its own acts): Draft Articles on State Responsibility, pt I, Art 29 and Commentary, YBILC (1979), ii, pt 2, pp 94–106. The ICJ regarded incitement as probably not included in the circumstances in which one state may be regarded as responsible for acts carried out by another state: Military and Paramilitary Activities Case, ICJ Rep (1986), at p 129.


Draft Articles on State Responsibility, pt I, Art 2 and Commentary, YBILC (1973), ii, pt 176. See also § 146.


See § 155.


The distinction between original and vicarious responsibility, which was first made, in 1905, in the first edition of this work, was approved by Borchard, § 74, but has been rejected by others, eg Strupp, Das völkerrechtliche Delikt (1920), pp 32–5; and see award of the American–Mexican Claims Commission in the 'James' Case (1925), RIAA, iv, pp 282, and AD, 3 (1925–26) No 158. See also Verdross, ZóR, 21 (1941), pp 283–309, and YBILC (1975), ii, p 73, para (11).
which are directly imputable to it, such as acts of its government, or those of its officials or private individuals performed at the government’s command or with its authorisation. ‘Vicarious’ responsibility, on the other hand, arises out of certain internationally injurious acts of private individuals (whether nationals, or aliens in the state’s territory), and of officials acting without authorisation. It is apparent that the essential difference between original and vicarious responsibility in this sense is that whereas the former involves a state being in direct breach of legal obligations binding on it, and is accordingly a particularly serious matter, with the latter the state’s responsibility is at one remove from the injurious conduct complained of: in such cases the state’s responsibility calls for it to take certain preventive measures and requires it to secure that as far as possible the wrongdoer makes suitable reparation, and if necessary to punish him. But these preventive and remedial obligations of the state in cases of ‘vicarious’ responsibility are themselves obligations for the breach of which (as by refusing to take the remedial action which is required) the state bears direct responsibility.

In 1949 the International Law Commission included the question of state responsibility in its initial list of topics of international law selected for codification. Its work on that topic has not yet been completed. It has considered the topic in two main phases, the first dealing with the origins of international responsibility (the facts and circumstances giving rise on the part of a state to an internationally wrongful act which, as such, is the source of international responsibility), and the second determining the consequences attached by international law to an internationally wrongful act. The Commission has not excluded the possibility of continuing with a third phase, considering certain problems concerning the implementation of the international responsibility of the state. By the end of its 42nd Session in 1990 the Commission had provisionally adopted on first reading the 35 draft articles covering the first phase of its work, and the first five articles of the second phase.

§ 146 Concept of international wrongs An international wrong occurs where an international person acts in violation of an international legal duty. That duty must generally have been incumbent upon the state at the time the act complained of was committed. The comprehensive notion of an international wrong ranges from relatively minor breaches of treaty obligations to grave violations of particular international laws amounting to a criminal act.

An act which is in violation of a state’s international obligations but which is lawful under its internal law is not thereby rendered lawful in international law.

A slowly developing aspect of the law of state responsibility is that which treats of the responsibility owed not so much by one state to another but to the international community as a whole. The acknowledgement of a limited degree of criminal responsibility of states and of a category of obligations owed erga omnes by states are steps in this direction. But the legal procedures available to states still relate essentially to the traditional measures appropriate to action by a particular state in response to the violation of an international obligation owed to it by some other state, and do not yet extend to measures to protect the more general public interest of the international community.

§ 147 States as subjects of international wrongs An international wrong may be committed by any state, whether fully or partially sovereign. Yet partially sovereign states can commit internationally wrongful acts only in spheres in which they have an international status and corresponding international duties of their own; and even then the circumstances of each case determine whether

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14 See in further detail, §§ 165, 166.
15 For the text of these 35 articles see YBILC (1980), ii, pt 2, p 30. See generally on the work of the ILC on this topic Spinedi and Simma (eds), United Nations Codification of State Responsibility (1987); Allott, Harv ILJ, 29 (1988), pp 1–26. See also § 124, on the consideration given by the ILC to ‘international liability for injurious consequences arising out of acts not prohibited by international law’.
16 For the text of these five articles see Report of the ILC (42nd Session, 1990), para 413.
2 See H Lauterpacht, Collected Papers (vol 1, 1970), pp 133–4 and, for more detailed consideration, Draft Articles on State Responsibility, pt I, Art 18 and Commentary, YBILC (1976), ii, pt 2, pp 87–95. As to certain other temporal aspects of state responsibility, involving the moment when the existence of the breach of an obligation is established and the duration of that breach, see Draft Articles on State Responsibility, pt I, Arts 24–6, YBILC (1978), ii, pt 2, pp 86–98. As to the effect of actus cogens on state responsibility, see Gaja, Hag R, 172 (1981), iii, pp 290–301.
3 See §§ 156 and 157.
4 An international wrong must not be confused with so-called ‘Crimes against the Law of Nations’ (see Harv Research (1935), pp 573–92; Efremoff, RF (Paris), 9 (1932), pp 226 et seq; and, as to crimes against the peace and security of mankind, § 148). These, in the terminology of the criminal law of various states, are such acts of individuals against foreign states as are criminal by that law. They include, in particular, crimes like piracy on the high seas (see § 299) or slave trade (see § 429), which either every state can punish on seizure of the criminals, of whatever nationality they may be, or which every state has by international law a duty to prevent.
4 See § 21; and Draft Articles on State Responsibility, pt I, Art 4 and Commentary, YBILC (1973), ii, pp 184–8.
5 See Jennings, Hag R, 121 (1967), ii, pp 511–14; Draft Articles on State Responsibility, pt II, Art 52 (e) and (f), and Art 3 (YBILC (1985), ii, pt 2, p 25, and Commentary at p 27).
6 See § 157.
7 See § 1, n 6.
8 See § 1, n 9, as to the possibility of instituting an actio popularis.
9 See generally on partially sovereign states, §§ 35, 75, 81. On international responsibility for internationally wrongful acts committed by member states of a federation and by states under protection or suzerainty, McNair, Opinions, i, pp 36–7; Accioly, Hag R, 96 (1959), i, pp 388–91; Harvard Draft (1961), Art 17; Verzil, International Law in Historical Perspective, vii (1973), pp 705–12; Draft Articles on State Responsibility, pt I, Art 7 and Commentary paras (1)–(13), YBILC (1974), ii, pp 27–31, and Art 28 and Commentary paras (4)–(8), ibid (1979), ii, pp 94–9; The Montecatini Prize (1875), Michte, International Arbitrations, ii, p 1460; Davey Claim (1903), RIAA, 9, 467; Pier Dominique & Co Claim (1905), RIAA, 10, pp 139, 156; Brown Claim (1923), RIAA, 6, p 120; Youmans Claim (1926), RIAA, 4, p 110; Mallet Claim (1927), RIAA, 4, p 173; Pellat Claim (1929), RIAA, 5, p 534.
10 With particular reference to federal states, see also Donos, De la Responsabilidad del Estado Federal a raison des actes des etats particuliers (1912), where a number of important cases are discussed. See also Stokes, The Foreign Relations of the Federal State (1931), pp 133–7; Gammons, AJ, 8 (1914), pp 73–80; Cohen, ZV, 8 (1914), pp 134–53; Borchard, § 82; and Annuaire, 18 (1900), pp 255. For a number of awards upon the responsibility of a federal state in regard to the contracts of its member states, see Rastall, §§ 601–71; as to the responsibility of the USA for the repudiated actions of the state of Texas. See generally in this connection, Hay, The Sovereignty and the Rights of the United States of America, ii, p 126; and, for an exhaustive discussion, Annuaire, 18 (1900), pp 255–286.
the wrongdoer has to account for its neglect of an international duty directly to the wronged state or whether the wrongdoer must deal with the injured state through the fully sovereign state (federal, suzerain or protection-exercising state) to which the wrongdoer is subordinate.

Thus in the case of a federal state it may happen that a member state of the federation retains a degree of international personality. If so, it is the member state, and not the federal state, which will normally be internationally responsible for its conduct within the sphere of activity for which it has international personality, unless even in that sphere the member state, notwithstanding its separate international personality, is subject to the control and direction of the federal state, in which case the latter may be held responsible for the member state’s conduct. The position is similar as regards a protected state: it remains internationally responsible for acts committed by it in breach of international obligations incumbent upon it, even though the injured state may have to conduct its relations with the protected state through the protecting state which represents it in its international relations. The latter is not, by virtue solely of its capacity as protecting state, itself directly responsible for the wrongful acts of the protected state; but if the protecting state has control of a field of activity of the protected state, and the internationally wrongful act occurs in that field, the protecting state may be responsible.

Where, on the other hand, a state acts in a matter in respect of which it does not have any international personality, or where it has no international status whatever, it cannot be held internationally responsible for conduct which is in breach of an international obligation. Any international obligation in such a case will be incumbent upon the other state to which it is subordinated. This is the situation in a federal state where any international personality of the member states is wholly subsumed in that of the federal state, as with for example, the member states of the United States of America, all of whose possible international relations are absorbed by the United States as such. Thus an injurious act against France committed by the Government of the State of California in the United States of America would not be an international wrong in the technical sense of the term, but merely an internationally injurious act for which the United States of America must bear such international responsibility as is appropriate. Where the act of such a member state was committed in the exercise of its local governmental capacity, the act may be internationally attributable to the federal state so as to make it internationally responsible for the act: but in other cases the act of the member state would be assimilated to a private act, in relation to which the federal state’s international responsibility is different, and less direct.2

The question, “Whose internationally injurious acts are to be considered state acts so as to give rise to an international wrong?” is considered in §§ 159–167.

§ 148 Individuals as subjects of international wrongs

To the extent to which individuals are subject to international duties – and, consequently, of international law – they may also commit international wrongs.1 This is the case not only with regard to piracy and similar topics.2 In particular, much of the law of war is binding not only upon states but also upon their nationals, whether members of their armed forces or not.3 The Charter annexed to the Agreement of 8 August 1945, for the punishment of the major war criminals of the European Axis provided4 for individual responsibility for war crimes proper and for what it described as crimes against humanity, as well as for crimes against the peace, ie for the crime of aggressive war. In its judgment of 30 September 1946, the Nuremberg International Tribunal set up in conformity with the Charter pronounced its provisions relating to individual responsibility to be declaratory of an inescapable principle of international law. The Tribunal said:

'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. In the opinion of the Tribunal, both these submissions must be rejected… Crimes against international

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2 See generally §§ 161 and 166.


2 See §§ 299–308 as to piracy; see § 429 as to slave trade.


4 Article 6 of the Charter provides that there ‘shall be individual responsibility’ for ‘crimes against peace’, ‘war crimes’, and ‘crimes against humanity’: AJ, 39 (1945), Suppl, p 259, Cnd 6668 (1945). See also the Indictment of 18 October 1945: Cnd 6696 (1945).

As to crimes against humanity, see further § 437. For consideration by the ILC of war crimes and crimes against humanity, see Report of the ILC (41st Session, 1989), §§ 88–204.
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.5

The principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal were affirmed unanimously by the United Nations General Assembly in 1946.6 Since then there has been an increasing trend towards the expansion of individual responsibility directly established under international law.7 Much of the substance of the Nuremberg principles was later included by the International Law Commission in the Draft Code of Offences against the Peace and Security of Mankind, adopted in 1954,8 Article 1 of which stipulated that 'offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished'.

Article 2 enumerated these offences as covering such matters as any act or threat of aggression (paragraphs 1 and 2), preparation of the employment of armed force against another state (paragraph 3), organisation of armed bands for incursion into the territory of another state (paragraph 4), fomenting civil strife or encouraging terrorist activities in another state (paragraphs 5 and 6), violation of a treaty designed to ensure international peace and security by imposing arms or other military restrictions (paragraph 7), annexation of territory (paragraph 8), intervention (paragraph 9), destruction of national, ethnic, racial or religious groups (paragraph 10), inhuman acts against civilians on social, political, racial, religious or cultural grounds (paragraph 11), violation of the laws or customs of war (paragraph 12), and conspiring or attempting to commit any of these offences, or inciting or participating in their commission (paragraph 13).

Individual criminal responsibility under international law has also, for example,9 been affirmed or established in relation to genocide,10 grave breaches

of the 1949 Geneva Conventions (and of the 1977 Protocols to them)11 and apartheid.12

In 198213 the International Law Commission reverted to consideration of the Draft Code of Offences (which later became 'Crimes')14 against the Peace and Security of Mankind, by which the Commission intended the most serious category of international crimes, measured in the light of the extent of the calamity or by its horrific character.15 The Commission still has the subject under active consideration.16 Draft articles provisionally adopted by 1 January 1991 lay down certain general principles such as the non-applicability of statutory limitations (Article 5),17 the entitlement of accused persons to judicial guarantees (Article 6),18 non bis in idem (Article 7),19 non-retroactivity of the Code (Article 8),20 the responsibility of superiors for acts of subordinates (Article 10),21 and the responsibility of individuals notwithstanding their official position, even as Head of State (Article 11).22 They also enumerate certain acts as constituting crimes against the peace and security of mankind, including aggression (Article 12),23 the threat of aggression (Article 13),24 intervention (Article 14),25 colonial and other forms of alien domination (Article 15),26 internal terrorism (Article 16)26c recruitment, use, financing and training of mercenaries (Article 18)26b, and illicit traffic in narcotic drugs (Article X).26c

This evolution of the law relating to the international responsibility of individuals has been affected by proposals for the establishment of an international criminal court with jurisdiction over individuals;27 these proposals are unlikely


7 It is necessary to distinguish an act which as a matter of international law is a crime in international law, and an act which a state is required by international law (usually a treaty) to punish as criminal under national law. It may be noted that Art 7 of the European Convention on Human Rights refers to the commission by individuals of 'crimes committed under national or international law'. The international responsibility of individuals was expressly reaffirmed by the Security Council in relation to grave breaches of the Fourth Geneva Convention 1949, in the context of Iraq's aggression against Kuwait in 1990: SC Res 674 (1990).

8 YBILC (1954), ii, pp 151–2. See § 30, item 19 (f).

9 For a more extensive list of instruments adopted since 1954 and relevant to the possible international criminal responsibility of individuals, see YBILC (1984), ii, pt 2, pp 14–15 (para 50). As regards torture, see generally §§ 440, n 12; and as to terrorism see § 12.2.

10 See § 434.
to secure early international agreement. Until such a court is established, the enforcement of the international criminal responsibility of individuals has to be left to international tribunals set up for particular purposes (such as the Nuremberg and Tokyo tribunals) or to national courts. 28

§ 149 The basis of responsibility

The basis of a state's international responsibility has been a matter of much discussion. 1 It has been said to be essentially delictual and based on fault, requiring either intentional or negligent conduct on the part of the state before a breach by it of an international obligation can be established; or to be strict or objective, 2 conduct and result alone establishing the breach of an obligation.

The patterns of responsibility known in the various national systems of law are not always appropriate for international law. There is probably no single basis of international responsibility, applicable in all circumstances, but rather several, the nature of which depends on the particular obligation in question. 3

Thus, in relation to the acts of private individuals the state's responsibility is based on fault in that it must normally be shown that the state failed to show due diligence in preventing the injury or punishing the offender. 4 Similarly, a need to show fault of varying degrees has been incorporated into treaty provisions. 5 Moreover, as the decision of the International Court of Justice in the Corfu Channel case demonstrated, a state does not necessarily bear absolute responsibility for an injury suffered by a foreign state for the mere reason that the injury occurred on the territory of the former state. The Court said:

'It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosion of which the British warships were victims .... This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.' 6

Generally, considerations of state sovereignty reinforce a certain reluctance to impose strict responsibility upon states for their conduct. Apart from the question of responsibility, the degree of fault attributable to the state may affect the nature and amount of reparation to be made.

The terminology varies. It is often convenient to distinguish between absolute responsibility (where the defendant state is responsible solely and without exception on the basis of injury having resulted from its conduct) and strict responsibility (where the defendant may invoke, as a denial of responsibility, certain very strictly limited defences); since both absolute and strict responsibility depend primarily on the sole fact of injury having occurred, they may both be referred to as involving objective responsibility.

Responsibility (whether absolute, strict or based on fault) involves a liability to make reparation. It is thus a separate question whether liability is limited or unlimited. A combination of absolute responsibility and unlimited liability would impose a particularly heavy burden on a defendant state.

The problem, often, turns on the formulation of the relevant obligation. The formulation of customary rules is often imprecise and a requirement of strict liability in relation to the observance of such rules could impose upon states an unreasonable burden. Where, on the other hand, as with treaties and certain rules of customary international law, the rules are precise, and can take into account whatever exceptions or qualifications are necessary, a requirement of fault may not be needed and strict liability becomes more appropriate. In effect, the necessary element which prevents the rule being applied in a manner which is unreasonably burdensome can either be secured by basing responsibility for breach of the law on fault, or by the rule itself incorporating the necessary qualifications. As international law becomes more refined, and the subject of treaty provisions, the extent to which international responsibility is based on fault may diminish.

1 See § 166.

2 See eg n 12.

3 ICJ Rep (1949), p 18. However, see § 121, n 8, as to the admissibility of circumsstantial evidence for the possible benefit of the injured state. See also Military and Paramilitary Activities Case, ICJ Rep (1986), pp 82–6; and Lemoine, Rev Belge, 16 (1981–82), pp 95–110.

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However, in certain areas responsibility may arise without fault. Either absolute or strict responsibility has been adopted by treaty for some particularly dangerous activities. These include the Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960,\(^8\) the Brussels Convention on the Liability of Operators of Nuclear Ships 1962,\(^9\) the Vienna Convention on Civil Liability for Nuclear Damage 1963,\(^10\) the Convention on International Liability for Damage Caused by Space Objects 1971,\(^11\) the International Convention on Civil Liability for Nuclear damage caused by Nuclear Tests 1963, and the Convention on Civil Liability for Damage caused by Nuclear Test-Restrictions 1972.\(^11\) These conventions provide for liability in cases of nuclear damage caused by nuclear tests.\(^11\)

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11 As to the Nuclear Tests Case brought by Australia and New Zealand against France in 1973, see §§ 125, n 3. See also Ibid, as to the explosion in 1986 of a nuclear reactor at Chernobyl in the USSR.


13 Although calling for more detailed treatment in vol II of this work, it should here be noted that realization of the dangers of nuclear warfare has led to the conclusion of several treaties designed to limit the proliferation and testing of nuclear weapons. These include the Treaty banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water 1963 (TS No 3 (1964)); Treaty for the Prohibition of Nuclear Weapons in Latin America 1967 (Treaty of Tratelloco) (ILM, 6 (1967), p 521), Treaty on the Non-Proliferation of Nuclear Weapons 1968 (TS No 88 (1970)); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof (TS No 13 (1973)).


16 GA Res 2777 (XXVI). Article I provides for a state to be ‘absolutely liable’, but Art II provides in certain respects for state liability ‘only if the damage is due to its fault or the fault of persons for whom it is responsible’. See §§ 142, n 2, as to the Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface 1952, also establishing a system of absolute liability.


18 The unqualified responsibility of states for certain acts of their organs, officials or armed forces (see §§ 159–65) is more a matter of attribution than of responsibility.

19 See §§ 124.

20 See generally Draft Articles on State Responsibility, Arts 29–35 and Commentary, YBILC (1979), ii, pt 2, pp 106–36, and (1980), ii, pt 2, pp 34–62. See also, as to force majeure, distress and necessity as proposed by the ILC, Rainbow Warrior (New Zealand v France) (1990), ILR, 82, pp 500, 551ff.

21 See §§ 127.

22 See §§ 127, n 12. See also §§ 129, n 13ff.

23 See §§ 132.

24 The USA–Iran Claims Tribunal defined force majeure conditions as ‘social and economic forces beyond the power of the State to control through the exercise of due diligence’, and regarded injuries caused by such forces as ‘not attributable to the State for purposes of its responding in damages’; Gould Marketing Inc v Ministry of National Defence of Iran, AJ, 77 (1983), p 893. See also Crook, AJ, 83 (1989), pp 278, 293–5. See also Rainbow Warrior (New Zealand v France) (1990), ILR, 82, p 500, holding force majeure only applicable in circumstances of ‘absolute and material impossibility’, and not where they merely make compliance with obligations more difficult or burdensome (at p 553).

25 As to measures of diplomatic protection before the formal presentation of an international claim, see §§ 158, 410.
having the nationality of the state of which it is put forward, and (b) not having the nationality of the state against whom it is put forward.7

Although the rule thus stated is well-established,8 its application is not always without problems. In the Notteboom case the International Court of Justice held

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2. See § 1, n 6; and see Complaint by Ghana against Portugal (1962), ILR, 35, p 285; Complaint by Portugal against Liberia (1963), ILR, 36, pp 351, 392; and see text at nn 17 and 18. But it cannot be assumed that every multilateral treaty on such a subject that has been negotiated by a state party to it would give any other party a basis for a claim in the absence of some national injury to itself or its nationals. Note also the absolute in international law of any actio popularis: see § 1, n 9.

5. Certain limited exceptions to this rule are sometimes asserted, as the ICJ has recognised: Reparations Case, ICJ Rep (1949), p 174, at p 181. See also Hackworth, iii, p 417; Hyde, ii, pp 1179–81; Borchard, pp 475–8. See § 11. Macrommatic Palestine Concessions (1924), PCIJ, Series A, No 2, p 12. Also see the Chorzów Factory Case (1928), PCIJ, Series A, No 17, at pp 25–29, and the Panevezys–Saldutiskis Railway Case (1939), Series A/B, No 76, at p 17. But see the dissenting opinion in this case of Judge van Slingeland, pointing to the consequences of the adoption of that rule in cases of changes of sovereignty with the result that the new state would be unable to espouse the claims of some of its nationals (at p 35). On this aspect see Art (b) of the Resolution adopted by the International Law Institute in 1965, Annuaire, 51, (1965), ii, p 260. The application of the rule as to the nationality of claims was the central issue in the Notteboom case, ICJ Rep (1955), p 4; see also, in relation to companies and their shareholders, the Barcelona Traction Case, ICJ Rep (1970), p 4. On both these cases, see further §§ 152, 378. As to the relationship between the claim of the state and the claim of its national see also Greece (in behalf of Apostolides v Federal Republic of Germany (1960), ILR, 34, p 219.

But a state is not necessarily entitled to sue in the courts of a foreign state on behalf of its nationals: see Pfizer Inc v Lord et al, ILR, 14 (1975), p 1409.


6. See Exchequer Claim (1931), RIAA, v, p 207. In some cases it may be sufficient for the nationality of the claimant state to have been continuously held until the presentation of the claim rather than until the making of the award.
that a state may not espouse a claim on behalf of a person who has its nationality but has no real and effective link with that state, at least if the claim is against another state with which he does have such a link. In cases of succession on death, and of assignment, a claim will normally be allowed if the continuity of nationality is maintained and disallowed if it is not.

The position is probably broadly the same in respect of insurance policies under which the rights of the insured pass to the insurer by subrogation, although quite apart from any question of continuity of nationality, weight may be given to the consideration that the nature of the insurance transaction involves the risk of loss for which, if it occurs, the insurer is not entitled to subrogation, 12 although quite apart from any question of continuity of nationality, weight may be given to the consideration that the nature of the insurance transaction involves the risk of loss for which, if it occurs, the insurer is not entitled to subrogation. 13

Where a claim is made in respect of property which is beneficially owned by one person, although the nominal title is vested in another, and they are of different nationalities, it will usually be the nationality of the holder of the beneficial interest which will be the determining factor for purposes of an international claim. 14 Where a person possesses more than one nationality special provisions apply. 15 The protection of companies, which by analogy also possess a state's nationality, raises particular problems which are considered elsewhere, 16 together with the associated problems connected with the protection of shareholders.

1 See § 378. See also Flegener Heimer Claim, ILR, 25 (1958–11), p 91, limiting this requirement of an effective link to cases involving a claimant with more than one nationality (at pp 147–50). Where the nationality of a claimant is in issue, official declarations or certificates of the state asserting it has its nationality are not necessarily binding on an international tribunal, which may conduct its own examination of the matter: ibid, pp 98, 109–10.


Perle Claim, ILR, 21 (1954), p 161; First National City Bank Claim, ILR, 26 (1958–II), p 323; Dobozy Claim, ibid, p 345; Batavian National Bank Claim, ibid, p 346; Herman Allen Claim (1959), ILR, 30, p 158; International Harvester Co Claim (1959), ibid, p 153; Eenboden-Fleitzen v Netherlands Claims Commission (Czechoslovakia) (1971), ILR, 73, p 738. As to the inadequacy in this context of an interest held by way of a pledge as security for a debt, see Bano Claim (1959), ILR, 30, p 208. There may be room for a presumption of continuous nationality eg in respect of bonds held by the claimant but previously the subject of active trading in the claimant state's securities market: see Green Claim, ILR, 26 (1958–II), p 341.


See President Mutual Life Insurance Co v Germany (1924), RIAA, 7, p 91; Eagle Star and British Dominions Insurance Co Ltd and Excess Insurance Co Ltd Claims (1931), RIAA, 5, p 139.


See § 151.

See § 152.
by it as only a national of the state in which he is habitually and principally resident or with which he is most closely connected, have contributed significantly to the law relating to the application of the rule as to the nationality of claims to situations of dual nationality. The rules prescribed in those articles (which are probably to be regarded as rules of customary international law) may fall to be applied in the following combinations of circumstances in the context of international claims:

1. A national of the claimant state is also a national of the respondent state with which he is also most closely connected: the rule reflected in Article 4 suggests that the claimant state should not be allowed to present a claim on his behalf, and Article 5 leads to no different conclusion (being strictly irrelevant, since it in terms relates only to the position vis-à-vis third states).3

2. (A) A national of the claimant state is also a national of the respondent state, but this time is more closely connected with the claimant state: again Article 4 suggests that the claimant state should not be able to present a claim, and Article 5 is, strictly speaking, irrelevant. However, the principle underling Article 5, namely that where it is necessary to make a choice between nationalities in cases of double nationality priority should be given to the effective nationality, points to the opposite conclusion. This conflict between the rules reflected in Articles 4 and 5 has often been resolved by allowing the latter to prevail in cases where the effective nationality of the claimant state is clearly established.4

3. A national of the claimant state is also a national of some other state (not the respondent state), with which he is also most closely connected:

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As to diplomatic representations on behalf of a dual national by the state of one nationality to the state of the other, see below, § 410, n 6.

3 See eg Spaulding Claim, ILR, 24 (1957), p 452; Salvenoti State Claim, ibid, p 455; Graniero Claim (1959), ILR, 30, p 451; Di Cicco Claim (1962), ILR, 40, p 48. See eg the statement of principle in the Mergé Claim, ILR, 22 (1955), pp 443, 455 (although on the facts of the case the Italian–US Conciliation Commission found the person in question not to have the effective nationality of the claimant state); Ruspoli Claim, ILR, 24 (1957), p 457; Ganapieni Claim (1959), ILR, 30, p 366; Tavri Claim (1960), ibid, p 371; Efshabani v Bank Tejarat, AJ, 77 (1983), p 646 (on which see Stern, AFDI, 30 (1984), pp 425, 427–40); Iran v United States, Case No A/18 (1984), ILR, 75, p 175 (on which see comment by Feeley, Har ILJ, 26 (1985), pp 208–16); Golpira v Iran (1983), ILR, 72, p 493.

4 Note also the argument adopted by the Iran–US Claims Tribunal to the effect that a situation in which individuals present their own claims to an international tribunal (rather than have their claims presented by their states) is different from that of normal diplomatic protection, so that the Art 4 rule is inapplicable: rather the Tribunal is in a position similar to that of a third state and as such is called upon to apply the ‘effective nationality’ principle: Ephshabani v Bank Tejarat, above.

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Article 4 is not applicable, and the rule reflected in Article 5 suggests that the claim be disallowed since the effective nationality is of a state other than the claimant state.

4 A national of the claimant state is also a national of a state other than the respondent state, but is most closely connected with the claimant state: Article 4 is again not applicable, and this time the rule reflected in Article 5 suggests that the effective nationality of the claimant state should enable the claims to proceed.5

Generally, international tribunals have reached conclusions in conformity with those to which it is suggested that the rules reflected in Articles 4 and 5 of the 1930 Convention lead. Many cases, however, turn on the assessment of evidence as to the individual’s connections with the states in question, and on the prior question whether he did or did not possess more than one nationality. International tribunals will also, of course, be bound by the terms of the treaty governing their activities and decisions.

The priority to be given to the effective (or dominant) nationality has also been acknowledged by national courts for purposes of national law.6

§ 152 Nationality of claims: corporations Although legal persons such as corporations are treated like individuals in that they have a nationality attributed to them,1 the application to them of the nationality of claims rule raises certain difficulties in all but the most straightforward cases: such cases are those in

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5 See eg Versace Claim, ILR, 24 (1957), p 464; Stankovic Claim (1963), ILR, 40, p 153.
1 See § 380, as to the nationality of companies.

See also n 12, on the closely related matter of the protection of shareholders and § 407, as to the expropriation of foreign-owned property, which often raises questions as to the protection of companies and their shareholders. Note that under the Art 29(2)(b) of the Convention for the
which the company is incorporated and has its headquarters in a state of which the great majority of its shareholders are also nationals, in which circumstances the right of that state to present a claim on behalf of the company will be generally acknowledged. Where, however, there is no substantial identity between the nationality of the company and the nationality of its shareholders' questions arise particularly as to the right of the state of the company's nationality to present a claim on behalf of the company, and as to the right of the state of the shareholders' nationality to present a claim on their behalf for losses suffered by them as a result of losses suffered by the company.

The second of these questions came before the International Court of Justice in the Barcelona Traction case,4 in which Belgium sought to protect natural and juristic persons, said to be Belgian nationals and shareholders in the Barcelona Traction, Light and Power Company (a company incorporated in Canada), in respect of damage said to have been wrongfully caused by Spain to that company. The Court rejected Belgium's capacity to present such a claim.5 It held that the right of protection extends to wrongs done to companies which have the nationality of the protecting state on behalf of its nationals who are shareholders in a foreign company which has suffered loss.6

In the Barcelona Traction case the International Court of Justice regarded such decisions as resting upon the terms of the instruments establishing the tribunals, or as having been decided by way of an exception, and as therefore not directly relevant to the general rule of international law regarding the protection of shareholders; similarly, the Court declined to treat as relevant for that purpose state practice and judicial decisions connected with enemy property in time of war or with compensation agreements in respect of nationalised property, considering both to possess a specific character as lex specialis.7

Two situations which, exceptionally, are often regarded as allowing for the protection of the shareholders' interests in a foreign company which has suffered loss are where the company has ceased to exist, and where the company's national state lacks capacity to take action on its behalf. In the Barcelona Traction case the International Court of Justice considered both situations, but found that neither arose on the facts before it.8 The Court refrained from any decision as to the validity of the view that a state may protect its shareholders in cases where the shareholders in the foreign company are also nationals, in which circumstances the right of that state to present a claim on behalf of the company will be generally acknowledged. Where, however, there is no substantial identity between the nationality of the company and the nationality of its shareholders' questions arise particularly as to the right of the state of the company's nationality to present a claim on behalf of the company, and as to the right of the state of the shareholders' nationality to present a claim on their behalf for losses suffered by them as a result of losses suffered by the company.

Settlement of Investment Disputes between States and Nationals of Other States 1965 (see § 407, n 49) disputes between a company and the state in which it is incorporated may nevertheless be arbitrated where the parties have agreed that the company should be treated as a foreign national for purposes of the Convention: and see Liberian Eastern Timber Corp v Government of the Republic of Liberia, IL M. 26 (1987), pp 647, 652-4.

This possibility will not arise, of course, where the criteria for determining the nationality of a company include a substantial shareholding by nationals of the state in which the company is incorporated. As suggested in § 380, however, the better view is that the nationality of a company is determined by its place of incorporation, with the possible addition of the location of its head, or registered, office or its sièges, but not of considerations related to the nationality of its shareholders.


5 ICJ Rep (1970), at pp 37–8. See also the Separate Opinion of Judge Jessup (at pp 199–202) and the Dissenting Opinion of Judge Riphagen (at pp 350–51).

6 At p 46. The Court also said:

In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (séïge social) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another (at p. 42).

7 For a comparative survey of the practice regarding lifting the corporate veil in several European states, see Cohn and Simits, ICLO, 12 (1963), pp 189–225. Several aspects of the lifting of the corporate veil are addressed in Seidl-Hohenveldern, Corporations in and under International Law (1987), pp 5–66.
company suffering damage has the nationality of the state causing the damage.\textsuperscript{14}

The variation in forms of business structure\textsuperscript{15} add to the difficulty of stating the applicable rules with confidence. The interlocking shareholdings which are a feature of so-called multinational companies greatly complicate the application to them of the accepted rules.\textsuperscript{16} Even in relation to a relatively straightforward situation in which shareholders having the nationality of the claimant state have interests in a foreign company which make it a wholly-owned (or virtually so) subsidiary of an enterprise having the nationality of the claimant state\textsuperscript{17} raises questions whether that shareholding interest makes the company effectively the property of that national enterprise, and as such perhaps entitled to protection by the intervention of its national state. Although the Barcelona Traction case would seem to suggest that a state whose nationals hold a substantial interest in a foreign company may nevertheless not present a claim for damage suffered by the company itself, in the Eletronica Sicula case\textsuperscript{18} the United States instituted proceedings against Italy in the International Court of Justice in respect of damage suffered by an Italian company the shares in which were wholly owned by two American companies (one of which was a wholly-owned subsidiary of the other): no question appears to have been raised\textsuperscript{19} as to the lawfulness of such espousal by the United States of its companies' claims.

Shareholders may, furthermore, have their rights directly infringed (as where shares held only by a particular category of owners are expropriated), as opposed to suffering loss indirectly through damage inflicted upon the company. In such cases the shareholder will have an independent ground of complaint which his national state may take up on his behalf.\textsuperscript{20}

Finally, even though states might be disentitled to present an international claim on behalf of their shareholders in a foreign company which has suffered damage, they may seek to pursue the protection of their shareholders' interests through diplomatic channels. This may result in the conclusion of treaties making provision for the protection of such shareholding interests.\textsuperscript{21} Where compensation is paid to a state for distribution by it to its own nationals, it may provide for shareholder interests to participate in the distribution.\textsuperscript{22}

As to the protection by a state of companies having its nationality but with a substantial interest in the company being held by non-nationals,\textsuperscript{23} the Barcelona Traction case would seem to suggest — although it does not directly hold — that as a general rule the national state of such a company may nevertheless protect it. It is, however, unclear to what extent the concept of an effective link might now have a part to play in this context.\textsuperscript{24}


\textsuperscript{15} Note also those forms of business structure which do not constitute legal persons distinct from their constituent participants. Thus in English law, a partnership is not a separate legal entity; the partnership will fall to be protected according to the national interests of the partners. But see Lillian, International Claims: Post-War British Practice (1967), pp 34–6. Similarly, a consortium may not be a separate legal person under the law governing the consortium agreement: see Morrison-Knudsen Pacific Ltd v Ministry of Roads and Transport, AJ, 79 (1985), p 146.

\textsuperscript{16} See Francioni, Imprese multinazionali, protezione diplomatica e responsabilità internazionale (1979). See generally on multinational companies § 380, n 15.

\textsuperscript{17} See eg Raith Claim (1964), ILR, 40, p 260. See also several of the cases cited at n 21, where by treaty claims in respect of losses suffered by foreign subsidiaries have been allowed.

\textsuperscript{18} There will normally be no problem over the national status of a division of a company, or a branch office, which do not have any separate legal existence: see eg Ultrassystem Inc v Islamic Republic of Iran (1983), ILR, 71, p 663.

\textsuperscript{19} ICJ Rep (1989), p 15. For comment see Jeancoals, RG, 94 (1990), pp 701–42. See also Société Anonyme du Charbonnage Frédéric Henri v Germany, AD, 1 (1919–22), No 158.

\textsuperscript{20} But note Judge Oda's Separate Opinion, at pp 83, 88ff.

\textsuperscript{21} See eg Art 1 of the Treaty of Berlin 1922, between the USA and Germany (RIAA, 7, p 13); Art 78.4(b) of the Treaty of Peace with Italy 1947 (on which see Baker & Co, Inc, Claim (1959), ILR, 36, p 511; Gallizio Claim (1962), ILR, 45, p 109); Art 3 of the Convention establishing the UK–Mexican Claims Commission (TS No 11 (1928)), covering inter alia claims against Mexico for damage suffered by British nationals by reason of losses suffered 'by any partnership, company or association in which British subjects or persons under British protection have or had an interest exceeding 50% of the total capital'; and the US–Peru Claims Settlement Agreement 1974 (AJ, 68 (1974), p 983), which included claims of companies organised under US law owning, directly or indirectly, 50 per cent or more of the outstanding stock or property interest in property expropriated by Peru.


\textsuperscript{23} See also, as to the operation of the Franco–Polish Agreement 1946, Re Pioton (1964), ILR, 45, p 111.

\textsuperscript{24} Article 20.2(c) of the Draft Convention on the Responsibility of States for Injuries to Aliens (Sohn and Baxter, AD, 55 (1961), pp 545–84) provides for the presentation of claims in certain circumstances by shareholders; see also Art 9(c) of the Draft Convention on the Protection of Foreign Property 1967, adopted within the framework of the OECD (ILM, 7 (1968), p 117).

\textsuperscript{25} See eg Riley Claim, ILR, 26 (1958–II), p 342; Westhcginghe Air Brake Company Claim (1959), ILR, 36, p 181; Standard Oil Company Claim (1959), ibid, p 176; Petscheck Claim (1959), ibid, p 171; Niagara Shore Corps Claim (1959), ibid, p 198; Ford Motor Company Claim (1959), ILR, 30, p 207; Dayton Claim (1961), ILR, 42, p 158.

\textsuperscript{26} See Chamberlain & Hookham Ltd v Solar Zalderweck, AD, 1 (1919–22), No 249; Société Transports Fluviaux en Orient v Société Impériale Ottoman de Chemins de Fer de Baghdad, AD, 5 (1929–30), No 151; The Interocceanic Railway of Mexico Claim (1951), RIAA, 5, p 178; Agency of Canadian Car and Foundry Co Case (1939), RIAA, 8, p 58; and Parry, BDIL, 5, p 814ff. But compare the I'm Alone Case (1933, 1935) RIAA, 3, p 1695, where the Commissioners, while not denying Canada's capacity to present the claim, declined to award damages to Canada for an unlawful act committed by the USA against property of a Canadian company in which all the shareholders were Canadian, since the company held its property in trust for the benefit of US nationals.

\textsuperscript{27} See Harris, ICLQ, 18 (1969), pp 275–317, considering this question in the light of the Notteboom case.
Irrespective of the position in strict law as to a state's right to present claims on behalf of companies with a substantially foreign shareholding, it may, in deciding whether or not to exercise its right of protection over a company, have regard to the degree of real connection between the company and the state, in particular the extent to which shares in the company are held by its nationals. The states representing the various interests affected may also act together in pursuing claims in respect of damage suffered by a company.

Agreements for settling international claims often include provisions whereby a company, in order to be regarded as a 'national' of the claimant state, must not only be established under its laws but also have a significant proportion of its shareholding held by nationals of that state, or in some other way be effectively controlled from that state. It is debatable to what extent such provisions, particularly in view of their diversity, can be regarded as providing evidence of a rule of customary international law, or as simply reflecting what the negotiating states considered appropriate in the particular circumstances with which they were dealing.

§ 153 Exhaustion of local remedies

It is a recognised rule that, where a state has treated an alien in its territory inconsistently with its international obligations but could nevertheless by subsequent action still secure for the alien the treatment (or its equivalent) required by its obligations, an international tribunal will not entertain a claim put forward on behalf of that person unless he has exhausted the legal remedies available to him in the state concerned.

3 The requirement to exhaust local remedies applies to those cases which involve the protection by a state of its nationals. The rule does not apply where a state causes direct injury to another state, irrespective of whether a local remedy might in fact be available in such circumstances. Even where the substance of the complaint concerns damage to an alien, local remedies probably do not have to be exhausted where the damage has been suffered as the result of conduct by the defendant state which, while not being in breach of its internal law, is directly in breach of its international obligations to another state, whether arising by treaty or customary international law. See Fawcett, BY, 31 (1954), pp 452, 454ff.

A claim which is essentially about the interpretation and application of a treaty, even though arising out of circumstances affecting a private person, does not attract the operation of the local remedies rule. Swiss Confederation v German Federal Republic (No 1), ILR (25 (1958)), pp 33, 42–50 (and see comment by Johnson, BY, 34 (1958), pp 363–8); Greece v United Kingdom, ibid, pp 168, 170; USA-France Air Services Arbitration (1978), ILR, 54, pp 304, 322–5; Ireland v United Kingdom (1978), ILR, 58, pp 190, 263. It is a question of appreciation in each particular case whether the claim is essentially one in which the claimant state is adopting the cause of its national: in the Internahandel case, the ICJ held that Switzerland's claim was of that kind, and so attracted the local remedies rule (ICJ Rep (1959), pp 28–9). See also the Elettronica Sicula Case, ICJ Rep (1989), pp 42–3, as to the difficulty for a state sometimes to establish a direct breach of an international obligation which is distinct from, and independent of, a dispute arising out of an injury suffered by one of its nationals.

It may be that where a state, in a contract with an alien, provides for disputes relating to that contract to be settled exclusively by arbitration, there is no need for the alien to exhaust other remedies: see Schwebel and Wetter, AJ, 60 (1966), pp 484–501.

The Algerian Declaration 1981 providing for the settlement of US–Iran claims (ILM, 20 (1981), p 230) defines a US national, in relation to companies, as a company organised under US law and in which US citizens hold, directly or indirectly, an interest equivalent to at least 50 per cent of its capital stock; Art VII, 1. For application of this provision, see Ultrasystems Inc v Islamic Republic of Iran (1982), ILR, 70, p 118; Flexi–Van Leasing Inc v Islamic Republic of Iran (1982), ibid, p 497 (an important decision, as to evidentiary requirements for establishing the nationality of stock ownership); Ultrasystems Inc v Islamic Republic of Iran (1983), ILR, 71, p 663; RayGo Wagner Equipment Company v Iran Express Terminal Corp (1983), ibid, p 688.

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Further provisions which deal with the position of companies solely by reference to the place of incorporation, see eg Act 78.9(a) of the Treaty of Peace with Italy 1947; Art 3(i)(ii) of the UK–Bulgarian Agreement 1955 (TS No 79 (1955)). See also § 380, n 12, for other treaty definitions of national companies.

1 The rule is essentially concerned with injuries suffered by private persons, whether natural or legal. Where a private company is financed by public capital, or even where a company with a predominantly public character engages in activities iure gestionis, it would not seem that the rule is excluded: YBILC (1977), ii, pt 2, p 46, para (45).

2 As to the possible irrelevance of the local remedies rule if a state causes injury outside its territory to an alien, see Jennings, Hag R, 121 (1967), ii, pp 485–6; Parry, Hag R, 90 (1956), ii, p 688; Meron, BY, 35 (1959), p 98. The ILCl in Art 22 of pt I of its Draft Articles on State Responsibility, provisionally refrained from excluding from the scope of the rule injuries occurring outside the state's territory: YBILC (1977), ii, pt 2, pp 43–4, paras (38)–(40).
there has been no final pronouncement on the part of the highest competent authority within the state, it cannot be said that a valid international claim has arisen. Effective exhaustion of the local remedies requires the alien not only to have recourse to the substantive remedies available to him, but also to avail himself of the procedural facilities at his disposal under the local law. The substance of this rule, usually referred to as the 'local remedies' rule, is frequently included in conventions providing for the jurisdiction of international tribunals. The International Court of Justice has confirmed that the rule is a well-established rule of customary international law.

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5 Various reasons for this rule have been given. These include: (a) an alien resident in a state should, and in many instances has, recourse to local courts before seeking external assistance; (b) the state must be given the opportunity to redress by its own means and within its own legal framework any wrong suffered by an alien before being called to account internationally for its actions; (c) in cases where the international obligation requires a state to achieve a certain result, the definitive failure to achieve that result, and thus the breach of the obligation, is not established until procedures for rectifying an initial failure have been resorted to and have failed; (d) until local remedies have been exhausted, justice has not been definitely denied; (e) the nature and extent of the damage suffered by an alien, and thus the basis for his state's international claim, is not certain until local remedies have been exhausted; (f) there is considerable convenience in local courts conducting the initial inquiries into the matter, and should have the opportunity to do so up to the highest level. The ILC regarded the reason for the existence of the principle of exhaustion of local remedies as being 'to enable the State to avoid the breach of an international obligation by redressing, through a subsequent course of conduct adopted on the initiative of the individuals concerned, the consequences of an initial course of conduct contrary to the requirement of the obligation'; YBILC, p 47, para (48). For consideration by the ILC of the question, which is more of theoretical than practical significance, whether the local remedies rule is a condition for the existence of international responsibility or is merely a procedural condition governing the enforcement of responsibility which has already arisen (with the ILC adopting the former view), see YBILC (1977), ii, p 2, pp 34–42. The underlying rationale of the rule makes it unlikely that recourse to arbitration under the International Convention for the Settlement of Investment Disputes 1965 (see § 407, n 49) should be treated as a local remedy which needs to be exhausted before a claim which could have been referred to such arbitration may be pursued at the international level.

6 'It is the whole system of legal protection, as provided by municipal law, which must have been put to the test': Oostemijck, ILR, 25 (1958–1959), p 276, 304–5; Electronicia Stola Case, IJC Rep (1989), pp 45–6; cf Van Oosterwijk Case (1980), ILR, 61, pp 360, 372–5. The rule requires that the recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the respondent State is alleged to be responsible, even if those remedies may be regarded as of an extraordinary nature; Nielsen v Government of Denmark (1959), ILR, 28, p 210, 227f. But a tribunal may be reluctant to accept remedies of an extraordinary nature as being an available remedy: see the decision of the Human Rights Committee in Pietroria v Uruguay (1981), ILR, 62, pp 246, 252–3; Tett v Uruguay (1982), ILR, 70, p 287, 294. An ex gratia remedy is not among those which have to be exhausted: Greece v Government of Denmark, 25 (1958–1959), p 276, 304–5.

Responsibility of states

§ 154 Bar by lapse of time (extinctive prescription) The principle of extinctive prescription, that is, the bar of claims by lapse of time, is recognised by international law. It has been applied by arbitration tribunals in a number of cases. The

15 The USA-Iran Claims tribunal was given jurisdiction to settle claims notwithstanding non-exhaustion of local remedies: see Amoco-Iran Oil Co v Iran (1982), 1 Iran-US CTR 493; Amoco International Finance Corp v Iran, ILM, 29 (1988), pp 1314, 1326. But the tribunal’s jurisdiction was excluded for claims under contracts specifically providing for disputes thereunder to be within the jurisdiction of Iranian courts: see Art II of the US-Iran Claims Settlement Agreement 1981 (ILR, 20 (1981), p 230, and Stein, AJ, 78 (1984), pp 1–52. See also, for the non-applicability of the rule by virtue of a treaty provision, Uzielli Claim (1963), ILR, 40, p 149.


17 Fosti and Others Case (1982), ILR, 71, pp 366, 380–82; Corigliano Case (1982), ibid, pp 395, 403. Failure to mention local remedies in the course of ‘somewhat desultory diplomatic exchanges’ will not constitute a waiver of the rule by estoppel: Electtronica Sicula Case, ICJ Rep (1989), p 44.


22 In respect of certain particularly serious offences it has been provided that there should be no temporal limitation on the punishment of offenders. See § 148, and §§ 157, 435.

23 See Gentini Case (1903), RIAA, 10, pp 552–5; Williams Case, Moore, International Arbitrations, iv, pp 417–20; Cayaqya Indians Case (1926), RIAA, 6, p 173, 189; Sarapondos v Bulgarian State, Recueil TAM, 7 (1927), p 47; BD, 4 (1927–28), No 173; Cook Case, AD, 4 (1928), No 174; Ambaszatos Arbitration, ILR, 23 (1936), pp 306, 314–17 (on which see Lipstein, ICLQ, 6 (1957), pp 646–7; and Vallas, International Law and the Practitioner (1965), pp 30–32); Lighthouse Arbitration, ILR, 23 (1936), pp 659, 671–2; Rabinov v Secretary-General of the United Nations (1968), ICJ, 43, pp 290, 299–300.

24 The apparent rejection of the principle of extinctive prescription by the Hague Court of Arbitration in the Paris Fund case in 1902 (Scott, Reports of the Hague Court of Arbitration (1916), pp 3–17) had not been generally followed: see remarks in the Gentini case, above.

Application of the principle is flexible and there are no fixed time limits. Delay in the prosecution of a claim once notified to the defendant state is not so likely to prove fatal to the claim as delay in its original notification, as one of the main justifications of the principle is to avoid the embarrassment of the defendant by reason of its inability to obtain evidence in regard to a claim of which it only becomes aware when it is already stale; and a protest at the time of the occurrence of the wrong has been held to prevent time from running against the claim for its redress. Undue delay in presenting a claim, which may lead to it being barred, is to be distinguished from effects of the passage of time on the merits of the claim in cases where the claimant state has, by falling to protest or otherwise, given evidence of acquiescence.

Thus it resembles the laches, or acquiescence, of English equity rather than the statutory limits governing common law claims. See also Rule IX of the UK Government’s Rules Applying to International Claims 1985, cited by Warbrick, ICLQ, 37 (1988), pp 1006, 1028.

Ralston, §§ 688–95. See also the Stemnosoph Case (1903), RIAA, 9, p 385. In the Ambatielos Arbitration it was held that the fact that the claimant state had changed the legal basis of its claim 14 years after initially (and promptly) making diplomatic representations did not constitute undue delay so as to require the claim to be rejected: ILR, 23 (1956), pp 306, 314–17.

Ralston, § 696. Although normally individual claimants are bound by the actions of their governments who take up and put forward their claims against a foreign state, it was held in the case of the Cayaqya Indians Claims before the American–British Claims Arbitration Tribunal in 1926, upon the analogy of the exemption in English-speaking countries of persons under disability from the operation of statutes of limitation, that ‘dependent Indians not free to act except through the appointed agencies of a sovereignty which has a complete and exclusive protectorate over them’ ought not to be prejudiced by the delay on the part of Great Britain in pressing their claim.

For the Award, see AJ, 20 (1926), pp 574–595, AD, 3 (1925–26), No 181. In this case the claim dated from about 1810. It is difficult to see why the principle of this decision should not apply in favour of an individual claimant who, having exhausted any private remedies, duly notified to his own government a claim against a foreign state and asks for help.

Questions of protest and acquiescence are often associated with considerations of preclusion (or estoppel) under national law of rules of estoppel known to commonly used law jurisdictions), and res judicata, on which generally H Lauterpacht, Analogies §§ 87–9 and arbitrament there cited, Development of International Law by the International Court (1958), pp 168–72, and Collected Papers, i, p 1, n 3; McNair, BY, 129 (1924), pp 31–7; Hohlod, Boston U Law Rev, 14 (1934), § 275ff; Friede, ZoV, 3 (1935), pp 517–45; Schwert, Die Entwicklung des Elsterlinienrechts (1957), p 127; Bowett, BY, 33 (1957), pp 176–202; MacGibbon, ICLQ, 7 (1958), pp 468–513; Dominiczek in Recueil d'études de droit international en hommage a Paul Guggenheim (1968), pp 327–65; Martin, Endroit en droit international (1979); Thirlby, BY, 60 (1989), pp 29–49. See also the Natoehoehm Case, ICJ Rep (1955), pp 17–20; Temple of Preah Vihear Case, ICJ Rep (1962), 22ff, 32, and the Separate Opinions of Judges Fitzmaurice (at pp 62–5) and Alfaro (at pp 39–51; Barcelona Traction Case [Jurisdiction], ICJ Rep (1964), pp 248ff; Military and Paramilitary Activities in and against Nicaragua, ICJ Rep (1986), pp 413–15; Electtronica Sicula Case, ICJ Rep (1989), p 44. And see Indo-Pakistan Western Boundary Case (Rami v Kisch) (1968), ILR, 50, p 409ff (Dissenting Opinion of Judge Bebler); De Wilde, Oomi and Versy Cases ("Belgian Vagrancy Cases") (1970), ILR, 56, pp 336, 369ff; Canton of Valais v Canton of Tessin (1970), ICJ Rep, No 114, 119–20; Re Arbitration between Amoco Corp and the Republic of Indonesia, ILM, 23 (1984), pp 351, 380–82. In the El Salvador–Honduras Land, Limon and Maritime Frontier Case the ICJ regarded essential elements of estoppel as including a ‘statement or representation made by one party to another and reliance upon it by that other party to his detriment, or to the advantage of the party making it’: ICJ Rep, 1990, 19–22.

As to cases where the conduct of the injured person precludes a claim on his behalf, see Witenberg, Hag R, 41 (1932), iii, pp 63–9. See also Bases of Discussion, iii, pp 125–35. Statements
§ 155 Reparation as a consequence of international wrongs. Although as international law has developed the sanctions available for breaches of international obligations have become more extensive, the international law has developed the sanctions available for breaches of international law. The Permanent Court of International Justice held that it 'is a principle of international law that the breach of an international engagement' involves an obligation to make reparation in an adequate form,¹ and this principle has been subsequently reaffirmed.

Where a court has jurisdiction to determine a dispute it also, in general, has jurisdiction to determine reparations.² The compulsory jurisdiction of the International Court of Justice, if accepted by a declaration under Article 36 of the Court's statute, includes 'all legal disputes concerning ... the nature and extent of the reparation to be made for the breach of an international obligation'.³

The circumstances of each case are, however, so different that international law cannot prescribe in advance the precise legal consequences which an international engagement⁴ involves. The concept of damage covers both material and non-material damage. For a finding of liability, see also works cited at n 10 and 12.


See also works cited at paras 16–19, and 705 n 35, para 16–19, and 705 (1991), concerning compensation and reparations for which Iraq was held liable as a result of its aggression against Kuwait; and see the Secretary-General's recommendations for giving effect to this part of SC Res 687 (UN Doc S/22559, 2 May 1991). As to the incident involving Israeli nationals abducting Adolf Eichmann from Argentina, see § 119, n 15, para 3, and ILR, 36, pp 5–7.

Although judicial or arbitral decisions awarding a state substantial damages for injuries suffered directly by it rather than through its nationals are not common (see Parry, Hash R, 90 (1956), ii, p 674), but see § 165, n 5, para 3, for the award of damages to New Zealand in the Rainbow Warrior affair), the payment of reparations for such injuries is often negotiated through diplomatic channels. See eg the agreement of 1 December 1966 between the UK and Indonesia for the payment by the latter of compensation for inter alia damage to the British Embassy during its occupation (TS No 34 (1967)); RG, 85 (1991), p 545, for the payment by Cuba to the Bahamas for the sinking by Cuban aircraft of the high seas of a Bahamian vessel, with loss of life, among the crew; ibid, p 562, for the payment of compensation by Israel for an attack in 1967 on the USS Liberty, with loss of life and injury among the crew; and RG, 85 (1981), p 880, for the kind of acts these are depends upon the merits of the case. For perhaps the majority of cases the guiding principle is as laid down in the Chorzów Factory (Indemnity) case, in the following terms:

‘The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that the act must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind,7 or, if this is not possible payment of a sum corresponding to the value which a restitution in kind would bear; the award if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. It is obvious that there must be pecuniary reparation for any material damage,⁸ although there has been great diversity of practice amongst international tribun-
At least a formal apology to the part of the wrongdoer will usually be

payment by Pakistan to the USA for compensation for the sacking of the USA Embassy in Islamabad in 1979. As to the apology and payment of compensation by Iraq to the USA for an attack on the USS Stark in the Persian Gulf in May 1987, see paras 59–63, USS Stark, ZL, 33 (1987), p 121–131.

When a state agrees to make monetary compensation to another state it is not uncommon for it to do so without admission of liability and on an ex gratia basis only: see eg the UK-Mexico Convention 1926, concerning losses suffered during Mexican revolutions, the Agreement between the UK and the Italian Government regarding the Italian Concessions in Libya (1953); and see Goldie, ILCQ, 14 (1965), pp 1199–202, 1231–3. The USA offered an ex gratia payment after the destruction by US naval forces of a civilian Iranian aircraft in 1988 (see § 127, p 42).

A somewhat special situation arises where, after the conclusion of a war, the loser is required to pay to the victor reparations for the losses incurred by the latter in waging war. While such reparations are distinguishable from the payment of damages for an international wrong, there may nevertheless be affinities between them. See generally vol II of this work (7th ed), §§ 259b–260; Brownlie, International Law and the Use of Force by States (1963), pp 133–49; Equalization of Burdens Taxation Case (1968), ILR, 61, p 162; Attorney-General of the United States v NV Bank voor Export en Import van Oost en West, ZL, 74, p 150. See also, as to the Agreement of 10 September 1952 between Israel and the Federal Republic of Germany, Balakins, West German Reparations to Israel (1971), and see RG, 94 (1990), pp 764–5; and as to reparations for the war in Vietnam, Tran van Minh, RG, 81 (1977), pp 1074–1072. After the Argentine invasion of the Falkland Islands in 1982 and related hostilities the UK Government considered, in the question of claiming reparations from Argentina, that it was expedient to do so: Parliamentary Debates (Lords), vol 435, col 223 (21 October 1982); UKML, BY, 53 (1982), p 490. In the Joint UK–Argentina Statement, 19 October 1989, each government undertook not to pursue claims against the other in respect of loss or damage arising from those events. UKML, BY, 60 (1989), p 681. As to reparations payable by Iraq as a result of its aggression against Kuwait, see para 2 above.

‘Compensation’ may be used in a broad generic sense, covering all possible forms of advantage which one state may grant to another: see eg, in relation to most favoured nation clauses, YBILC, 1938, ii, p 21, para 6.

Although pronouncements can be found both in textbooks and in awards to the effect that international law, while requiring compensation to be paid for actual losses suffered (dannen emergens), does not sanction the award of ‘consequential damages’ such as loss of possible business profits (lucrum cessans), a formidable array of awards is in existence which give damages of this nature with reasonable accuracy and not be conjectural or speculative: see Dorner, Die Schadensersatzpflicht im internationalen Verkehr (1953), p 681 and, in particular, Whiteman, Damages in International Law (vol iii, 1943), pp 191–206; Harvard Draft (1961), Art 38; Subbiah, L’Allocation d’intérêts dans la jurisprudence internationale (1972); Gray, Judicial remedies in International Law (1987), pp 29–33. See also the Roman Indemnity Case (1912), Scott, Hague Court Reports (1916), pp 298–323 and, in particular, Whiteman, ‘The scope of the discussion of the interest upon the debt by Strupp, ZV, 6 (1912), pp 353–566; Anzilotti, Rivista, 7 (1913), pp 53–67, and Lapradelle–Polini, ii, p 981; Senser Claim, ILR, 20 (1953), p 240; Lightsbourne Arbitration between France and Greece, ILR, 23 (1956), pp 659, 675–6; Golva Claim, ILR, 30, p 220; Poarch Claim (1962), ILR, 42, pp 189, 192; American Cast Iron Pipe Company Claim (1968), ILR, 40, p 169; Granntee State Machine Co v Iran (1982), ILR, 69, pp 646, 659–60.

Payment of interest may be denied in the light of the provisions of a relevant treaty, or where no clear and express request for interest has been made to the respondent state: see Fatovrchi v Government of the Congo, ILR, 67, pp 319–320 (2 cases involving breaches of a concession), in which damages for both damnum emergens and lucrum cessans were awarded, although at the plaintiff company’s request the latter were only nominal.

The date from which interest is payable has varied greatly. In the Senser Claim, ILR, 62, p 161;臺ismen, Gkoi, 16, 1910, p 26, 14, 1914, p 367; and, in particular, Whiteman, ‘The basis for calculating the compensation due to a платёст’ case’ (1953), p 240, the US International Claims Commission regarded ‘established principles of international law’ as suggesting the use of the rate of interest allowable in the state paying compensation; see also Libyan American Oil Co v Libya (1977), ILR, 62, p 141; Benvenuti and Bank de Vito v Government of the Congo (1980), ILR, 67, pp 345, 379. But see Yicks Technical Systems Inc v Iran, AJ, 80 (1986), p 365, assessing the rate payable by reference to the ‘form of commercial investment in common use in [plaintiff’s] own country’.

Thus in the ‘I’m Alone’ case (1935) the Commissioners considered that the USA ‘ought formally to apologize to [plaintiff] for its conduct’ and to apologize to the US Secretary of War; cf T dem Clain, ILR, 22 (1955), p 312; see also Roth v Government of Canada (1957), RIAA, 3, p 1609. In connection with the release of the USS ‘Pueblo’ which had been seized by the North Korean authorities in 1968, the US Government signed a document ‘solemnly apologis-
necessary. This apology may have to take the form of some ceremonial act, such as a salute to the flag or to the coat of arms of the wronged state, the despatch of a special emissary bearing apologies, and the like. Other forms of reparation may include obtaining from an international tribunal a declaration of the legal position favourable to the wronged state;13 the punishment of the individuals whose acts occasioned the breach of an international obligation; and the adoption of measures to prevent a recurrence of the wrongful acts.14 In the assessment of damages a great difference would be likely to be made between acts of reparation for international wrongs deliberately and maliciously committed, and for those which arise merely from culpable negligence. An interim award of damages by a tribunal is not necessarily to be excluded, pending a final determination of the sum payable, but would be likely to be made only in exceptional circumstances.15

If the delinquent state refuses reparation for the wrong done, the wronged state can, consistently with any existing obligation of pacific settlement and with restraints imposed by international law on the threat or use of force, exercise such means as are necessary to enforce adequate reparation. It may happen that a state, while not denying its liability to pay a sum specified by way of damages, may assert that it has insufficient foreign exchange to make the necessary payments, or that its exchange control regulations restrict the availability of foreign exchange for that purpose. It is difficult in principle to admit either16 ground as a justification in international law for non-payment of damages which a state owes under an international obligation to pay, particularly in the light of the principle that provisions of national law afford no justification for breach of an international obligation.17

§ 156 Penal damages

It is sometimes maintained that, having regard to the sovereignty of states, their responsibility for international wrongs is limited to such reparation for wrongs committed by them as does not exceed the limits of restitution,1 and that damages in excess of those limits (often referred to as penal or punitive damages) are excluded. This view hardly accords either with principle or with practice. Although international tribunals have sometimes held that penal damages cannot be awarded against states,2 in the majority of these decisions the tribunals were guided in this matter by the terms of the arbitration agreement. On the other hand, international tribunals have in numerous cases awarded damages which must, upon analysis, be regarded as penal, particularly in relation to the failure of states to apprehend or effectively to punish persons guilty of criminal acts against aliens.3 The practice of states and tribunals shows other instances of reparation, indistinguishable from punishment, in the form of pecuniary redress unrelated to the damage actually inflicted.4 Acceptance of the possibility of penal damages against states is linked to the developing concept of the criminal responsibility of states.5

§ 157 Criminal responsibility of states

The liability of states is not limited to restitution or to penal damages. Certain internationally wrongful acts attract, by reason of the special importance of the subject matter of the obligation which has been breached, a special and more severe degree of responsibility.1 The state, and those acting on its behalf, bear criminal responsibility2 for such violations of

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1 See eg Kaufmann, Hag R, 54 (1935), iv, pp 466–71, and §§ 150, 151, and 156 of the fourth and preceding editions of this work.
2 See eg the Lusitania case, decided in 1923 by the American-German Mixed Claims Commission: AD, 2 (1923–24), No 113. See also the Award in the case of Portugal v Germany, decided in 1930: AD, 5 (1929–30), No 126.
4 See eg the decision of the Council of the League of 14 December 1925, Off J, 7 (1926), p 172, awarding to Hungary the payment of ten million levas by Greece as reparation for material and moral damage in addition to compensation for damage to movable property. In the I’m Alone case, decided on 5 January 1935, the Commissioners recommended that the US, in addition to formally acknowledging the illegality of its conduct and apologising to the Canadian Government therefore, should pay to Canada the sum of $25,000 ‘as a material amend in respect of the wrong’: RIAA, 3, p 1629, Hyde, AJ, 29 (1935), p 300, addsuces reasons why this case cannot be regarded as a precedent for awarding penal damages against a state in respect of a public claim. See also the Martini case between Italy and Venezuela, decided on 3 May 1950, where the arbitrators held, as part of the award, that certain obligations incurred as the result of a manifestly unjust decision of a Venezuelan court must be expressly declared to be annulled. No payment was ever made in pursuance of that decision, but the tribunal was of the view that as an illegal act had been committed the consequences of that act must be expressly effaced: AD, 5 (1929–30), No 93.
5 See § 157.
6 The ILC was unanimously of this view: YBILC (1976), ii, pt 2, pp 116–17, para 51.
Having, in 1954, adopted a Draft Code of Offences against the Peace and Security of Mankind, the International Law Commission resumed consideration of the topic in 1982, and still has it under active consideration. The topic is, however, related to the international criminal responsibility of individuals rather than of states, although a number of the particular acts giving rise to such international criminal responsibility are likely by their nature to be as much, if not more, state acts as acts committed by individuals in their private capacity (such as the annexation of territory, violation of certain treaty obligations, and other acts referred to as being committed by 'tile authorities of a State').

The Commission's deliberations have tended towards covering in the Draft Code only the international criminal responsibility of individuals, without prejudice to giving consideration later to the criminal responsibility of states, and Draft Article 3 provisionally adopted by the Commission in 1987 provides that the prosecution of individuals for a crime against the peace and security of mankind does not relieve a state of any responsibility under international law for an act or omission attributable to it.

The legal consequences of state conduct being categorised as criminal in international law and giving rise to a special regime of international responsibility different from that applying to other situations involving state responsibility, and in particular the nature of the sanctions which may be taken against such conduct, are not clear. There is no tribunal with appropriate international criminal jurisdiction over states. At the present stage of development the categorisation of conduct as criminal in international law is primarily an indication that the international community regards, with extreme seriousness the conduct in question and that the state responsible for that conduct lays itself open to retributive or coercive action or otherwise more severe legal consequences than would follow in the case of a non-criminal international wrong. Furthermore, it is clear that the criminal responsibility of states is additional to...
and not exclusive of the international criminal liability of the individuals guilty of crimes committed in violation of international law.\(^\text{14}\)

There are no international judicial decisions laying down and applying the principle of criminal responsibility of states. This is largely due to the absence of international tribunals endowed with the requisite jurisdiction. But traditional international law, in permitting war and reprisals as a means of redress against a state deemed guilty of a violation of international law, sanctioned coercive action not necessarily limited to mere compensation for a wrong received. The sanctions of Chapter VII\(^\text{15}\) of the Charter of the United Nations are, in part, of a penal character in relation to what may properly be described as the crime of war.\(^\text{16}\) The universal recognition as part of international law of rules penalising war crimes by individuals responsible for violations of the laws of war\(^\text{17}\) affords another instance of the recognition of criminal responsibility of states, for war criminals are, as a rule, guilty of acts committed not in pursuance of private purposes but on behalf of and as organs of the state.

§ 158 International claims An injured alien will usually first seek redress from the state which has caused him injury;\(^\text{18}\) and if adequate redress is not forthcoming the state of which the alien is a national may seek redress on his behalf.\(^\text{19}\) In such cases, and also in those where a state has caused injury directly to a foreign state, action will in the first place usually take the form of representations and negotiations through the diplomatic channel.\(^\text{20}\) If this does not result in a satisfac-

\(^\text{14}\) For it must be borne in mind that individuals are subjects of international law not merely as beneficiaries of rights. They are also subject to international duties not only in exceptional situations as blockade runners, pirates or war criminals, but also, more generally, in their capacity as organs of the state. The modern tendency to treat individuals as subjects of international law must not be identified with one-sided emphasis upon enjoyment of rights arising from international law. At the same time it is clear that unless the criminal responsibility of states is to be reduced to the vanishing point of law, its enforcement must be placed in the hands of impartial international law. At the same time it is clear that unless the criminal responsibility of states is to be reduced to the vanishing point of law, its enforcement must be placed in the hands of impartial international agencies operating within the ambit of a politically organised international society. See also § 148. For the literature on the establishment of an international criminal court, see § 112, n 43, and § 148, n 27, and in particular, vol II of this work (7th ed) § 257.

\(^\text{15}\) See also Arts 5 and 6.

\(^\text{16}\) Article 6 of the Covenant of the League of Nations was a forerunner of Chapter VII of the Charter, although considerably less far-reaching.

\(^\text{17}\) Article 6 of the Charter annexed to the Agreement of 8 August 1945, for the Punishment of the Major War Criminals provided that among the crimes coming within the jurisdiction of the tribunal there shall be: (a) Crimes against peace. Namely, planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing: AJ, 39 (1945), Supp, p 260, Cmd 6668.

\(^\text{18}\) Volume II of this work (7th ed), § 251.

\(^\text{19}\) See § 153, as to exhaustion of local remedies.

\(^\text{20}\) See § 151, as to nationality of claims.

\(^\text{14}\) For it must be borne in mind that individuals are subjects of international law not merely as beneficiaries of rights. They are also subject to international duties not only in exceptional situations as blockade runners, pirates or war criminals, but also, more generally, in their capacity as organs of the state. The modern tendency to treat individuals as subjects of international law must not be identified with one-sided emphasis upon enjoyment of rights arising from international law. At the same time it is clear that unless the criminal responsibility of states is to be reduced to the vanishing point of law, its enforcement must be placed in the hands of impartial international agencies operating within the ambit of a politically organised international society. See also § 148. For the literature on the establishment of an international criminal court, see § 112, n 43, and § 148, n 27, and in particular, vol II of this work (7th ed) § 257.

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\(^\text{18}\) Volume II of this work (7th ed), § 251.

\(^\text{19}\) See § 153, as to exhaustion of local remedies.

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\(^\text{18}\) Volume II of this work (7th ed), § 251.

\(^\text{19}\) See § 153, as to exhaustion of local remedies.

\(^\text{20}\) See § 151, as to nationality of claims.
those having the nationality of the claimant state, or where there has been an event (such as a civil war or an attack by one state against another) which has given rise to a large number of claims of different kinds, or where claims relate to events which occurred long ago and the individual international adjudication of claims is no longer practicable, it is common for the two states to negotiate a global settlement of all the claims, resulting in the payment to the claimant state of a lump sum by way of compensation.4 It is then for the claimant state to decide whether that sum to individual claimants.5 Such global settlements usually reflect the basic principles of state responsibility, such as the nationality of claims, the responsibility of the state for its acts, and the need for reparation to be made for an international wrong (although in the nature of things the sums paid are unlikely to have been calculated with precise reference to or examination of each of the numerous individual claims covered by the settlement, and in many cases the amount paid represents only a small proportion of the losses suffered). It is usual for such agreements to provide for the payment of the lump sum as compensation to be in full and final settlement of the claims covered by the agreement, and they may also contain a waiver of other claims by the state receiving compensation, or its nationals, against the other state.6 In these ways the rights of nationals may, to an extent dependent on the terms of the agreement, be affected by the action taken by the state whose nationality they possess.

Although in international law a state has a right to submit an international claim against another state in respect of injuries suffered by one of the claimant state’s nationals, it has in international law no duty to do so. The position is generally much the same in the internal law of the various states, although the details vary with the particular national laws concerned.7 In the United Kingdom, the decision whether or not to take up a claim against a foreign state is a matter of policy to be decided by the government, and not a matter of right for the individual claimant concerned.8 In the United States the Supreme Court has upheld the right of the United States Government to negotiate with a foreign government for the settlement of claims of United States nationals.9 Where a state receives from another state a lump sum as compensation in respect of individual claims, it has been held that the claimant state does not, from the point of view of the internal law of that state, receive that sum as a trustee for any individual claimant;10 its distribution is a matter for that state to determine as it wishes in accordance with its own law.

STATE RESPONSIBILITY FOR ACTS OF STATE ORGANS

See the literature quoted at the commencement of §§ 145 Borchard, §§ 75–81 and 127–130 Marinos, La responsabilite degli stati per gli atti dei loro rappresentanti (1914) Strump, Das volkrechtliche Delikt (1920), pp 63–88 Eagleton, State Responsibility in

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6 Several states have established permanent bodies to whom is given the task of distributing lump-sum settlements to individual claimants. See generally Lillich, International Claims: Their Adjudication by National Commissions (1962). In the UK the Foreign Compensation Commission was set up by the Foreign Compensation Act 1950: on the working of the Commission see Moller, Grotius Society, 44 (1958–59), pp 223–42; Martin, ibid, pp 243–63; Drucker, AJ, 49 (1955), pp 477–86; Lillich, ICLQ, 13 (1964), pp 899–24, and International Claims: Post-War British Practice (1967); Magnus, ICLQ, 37 (1988), pp 975–82. In the USA there was set up the International Claims Commission, later known as the Foreign Claims Settlement Commission: see the first-mentioned work by Lillich cited above; Re, Mich Law Rev, 60 (1962), p 101; and AJ, 56 (1962), pp 728–34; Rodé, AJ, 63 (1969), pp 296–304. Although the US Foreign Claims Settlement Commission is required to make its decisions in accordance with the relevant agreement and ‘the applicable principles of international law, justice and equity’, the contribution of decisions of such national bodies to the development of international law is to be assessed with caution.

7 But see eg § 150, n 7, for some exceptions.


§ 159 Responsibility varies with organs concerned

States, being juristic persons, can only act through the institutions and agencies of the state, its officials and employees—commonly referred to collectively as organs of the state. Their acts or omissions when acting officially in their capacity as state organs are acts of the state, and the state bears responsibility for all such acts as involve a breach of the state's international obligations, even though in the consideration of the state the organ is independent, and irrespective of whether it is a superior or subordinate organ. Where a state organ acts in the territory of another state, it is normally the state to which the organ belongs, and not the territorial state, which is responsible for the act.  

1 See Chiessa Claim (1901), RIAA, 15, p 399; Siaserego Claim (1901), ibid, p 401; Sangiunietti Claim (1901), ibid, p 404; Vercelli Claim (1901), ibid, p 406; Roggero Claim (1901), ibid, p 408; Salvador Commercial Company Claim (1902), ibid, p 477; Massey Maritime (1927), RIAA, 4, p 155; Roper Claim (1927), ibid, p 145; Way Claim (1928), ibid, p 391; Finnish Shippingowners Claim (1934), RIAA, 3, p 1479, 1501; Mosse Claim, ILR, 20 (1953), p 217; Schappe Spinning Mill Claim, ILR, 21 (1954), p 141; Ouwos Claim, ILR, 22 (1955), p 312; Re Rizzo and Others (No.3), ibid, p 317; Texaco v Libyan Arab Republic (1975), ILR, 53, p 389, 415–16.

2 Where an entity which, while not part of the formal structure of the state, has nevertheless been empowered by the state to exercise elements of governmental authority, the state may also be responsible for that entity's conduct in that capacity. See Draft Articles on State Responsibility, paras (14)–(18), YBILC (1974), ii, pp 277, 281–2. See also § 166, n 6, as to private individuals exercising governmental authority. As to problems arising in the context of state-controlled groups which do not formally constitute organs of the state, such as a political party in a one-party totalitarian state, see Friedmann, AJ, 50 (1956), pp 492–3. But note that where what is at issue is the general behaviour of a government it may be appropriate for it to be judged not by the lapses of individual officials but by its policy as a government including the degree of sternness with which it treats such lapses, at least where that policy protects it against lapses which are liable to escape its knowledge or control: see Ghana v Portugal (1962), ILR, 35, p 285, 330.

3 The attribution of conduct to a state for purposes of state responsibility is a matter determined by international law, not by the internal law of the state. In large measure this accounts for the extent to which the independence of an organ within the state's internal legal structure does not prevent the state being held responsible for the organ's acts. See YBILC (1973), ii, p 181, para (6), and p 190, para (10). On imputability generally see also Starke, Studies in International Law (1965), pp 51–66.

As to parliaments, see § 163. As to the judiciary, see § 164. See also § 145, as to responsibility for federal states and other territorial governmental bodies.

4 See YBILC (1973), ii, pp 196–7, paras (9)–(15).

5 The mere fact that acts take place within a state's territory is not enough to make that state responsible for them: see § 121 and § 149. But the acts of organs of the foreign state, while not themselves attributable to the territorial state, may provide the occasion for conduct by the territorial state which may engage its international responsibility, as where it fails to comply with a duty to take appropriate preventive, protective or retributive action, or assists the foreign state in the commission of by an internationally wrongful act. See § 145, n 5.

6 Acts of organs of an international organisation committed on a state's territory are similarly not imputable by state to that state by reason only that they have taken place in its territory: Draft Articles on State Responsibility, pt I, Art 72 and Commentary, paras (14)–(18), YBILC (1974), ii, pp 277, 281–2. But see also § 166, n 6, as to private individuals exercising governmental authority. As to problems arising in the context of state-controlled groups which do not formally constitute organs of the state, such as a political party in a one-party totalitarian state, see Friedmann, AJ, 50 (1956), pp 492–3. But note that where what is at issue is the general behaviour of a government it may be appropriate for it to be judged not by the lapses of individual officials but by its policy as a government including the degree of sternness with which it treats such lapses, at least where that policy protects it against lapses which are liable to escape its knowledge or control: see Ghana v Portugal (1962), ILR, 35, p 285, 330.

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8 As to parliaments, see § 163. As to the judiciary, see § 164. See also § 145, as to responsibility for federal states and other territorial governmental bodies.

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11 Acts of organs of an international organisation committed on a state's territory are similarly not imputable by state to that state by reason only that they have taken place in its territory: Draft Articles on State Responsibility, pt I, Art 72 and Commentary, YBILC (1975), ii, p 87.

12 In the Namibian (South West Africa) Legal Consequences case the ICJ took the view that where a state acts in violation of international law it incurs international responsibility where the act occurs in territory under its physical control, even if it has no sovereignty or legitimate title to that territory: ICJ Rep (1971), at p 54.

13 As to the attribution to Germany of the acts of Allied occupation authorities in Germany after the German surrender in 1945, see Hendry and Wood, The Legal Status of Berlin (1987), pp 55, 213; and as to Italy and acts of Allied occupation authorities in Italy in 1944, see Duc de Guise Claim, ILR, 18 (1951), pp 423, 426.

14 As to the situation where an official of one state is placed at the disposal of another, see § 165, n 8. As to the attribution to Germany of the acts of Allied occupation authorities in Germany after the German surrender in 1945, see Hendry and Wood, The Legal Status of Berlin (1987), pp 55, 213; and as to Italy and acts of Allied occupation authorities in Italy in 1944, see Duc de Guise Claim, ILR, 18 (1951), pp 423, 426.


16 See generally as to the position of Heads of State, §§ 445–58. As to a state's responsibility for the acts of a former Head of State when he was its Head, see § 57, n 5.
§ 161 Internationally injurious acts of members of governments. As regards internationally injurious acts of members of a government, a distinction must be made between such acts as are committed in an official capacity, and other acts. Acts of the first kind constitute international wrongs, as stated at § 147. But members of a government can in their private life perform as many internationally injurious acts as private individuals. As they do not personify their states and are, for their private acts, under the jurisdiction of the ordinary courts of justice, there is no reason why their state should bear for internationally injurious acts committed by them in their private life a vicarious responsibility different from that which it has to bear for acts of private persons.

§ 162 Internationally injurious acts of diplomatic envoys. The position of diplomatic envoys as representatives of their home state gives great importance to internationally injurious acts committed by them on the territory of the receiving state. At the same time their diplomatic status excludes the jurisdiction of the receiving state over such acts.1 International law therefore makes the home state in a sense responsible for all acts of an envoy injurious to the state or its subjects on whose territory he resides. But it depends upon the merits of the special case what measures beyond simple recall must be taken to satisfy the wronged state. Thus, for instance, a crime committed by the envoy on the territory of the receiving state may be such as to require that he be punished by his home state; in special circumstances and conditions the home state may be obliged to disown an act of its envoy, to apologise or express its regret for his behaviour, or to pay damages. Such injurious acts as an envoy performs at the command or with the authorisation of his home state, constitute international wrongs for which the home state bears original responsibility, and for which the envoy cannot personally be blamed.

§ 163 Internationally injurious activity of parliaments. As regards the internationally injurious activity of parliaments, it must be kept in mind that, important as may be the part parliaments play in the political life of a nation, they do not represent the state in its international relations with other states. They are nevertheless organs of the state, and if their acts involve injurious international consequences for other states those acts are attributable to the state so as to make it internationally responsible for them.1 In particular, the state bears full international responsibility for such legislative acts of parliaments as are contrary to international law and as have been finally incorporated as part of its municipal

2 See generally Borchard, § 75; Sibert, RG, 48 (1941-45), pp 5-34; Bütge, La Responsabilité internationale des etats et son application en matière d'actes legislatifs (1950). See also § 21; Accoely, Hage, 96 (1959), i, pp 374-5.


2 Courts operating within a state may not always be courts of that state so as to make it responsible for their actions, eg as to Restoration Courts in the Federal Republic of Germany, Re Application No 182/356 (X v German Federal Republic), ILR, 24 (1987), p 401; Re Application No 235/86 (Mr X and Mrs X v German Federal Republic), ILR, 25 (1958-198), pp 190, 205-10. Nor is the Federal Republic of Germany responsible for arrest and imprisonment by the authorities in the Soviet Zone of Germany: Z v Federal Republic of Germany (1966), ILR, 51, p 239, 224ff. Similarly a private law arbitral tribunal is not necessarily a tribunal "of the state" in which it sits and under the law of which it operates: Nordersee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG Co KG (1985) ECR 1095. The Judicial Committee of the Privy Council which sits in London, does so in many cases as the final appellate tribunal of the independent Commonwealth state from which the appeal has come: see § 78, n 15.

3 As to the possibility that a denial of justice may occur as the result of action by a state which makes it impossible to establish an arbitration tribunal as stipulated in a contract between the state and a private party, see Mann, BY, 42 (1967), pp 26-9; Schwebel, International Arbitration: Three Salient Problems (1987), pp 61-143; and see also Petition of Petrol Shipping Corp (1966), ILR, 42, p 173. But note the denial, by a US Court of Appeals, of any right by virtue of international law to a remedy in US courts for non-admitted aliens held in detention: Garcia-Mir v Meece, ILR, 25 (1986), pp 664, 676-9. For rejection of an allegation that an alien’s right of access to the courts had been hindered by the application of rules of domestic law allowing certain documents to be withheld from disclosure, see the Ambatielos Arbitration (1956), RIAA, 12, p 83; ILR, 23 (1956), p 306, and 24 (1957), p 291. See also the Ambatielos Case (Greece v UK), ICJ Rep (1953), p 10, especially the Joint Dissenting Opinion of Judges McNair, Basdevant, Klaesl and Read at pp 31-5.

4 Apart from possibly constituting a denial of justice, delay in affording justice may constitute a breach of a state’s obligations under treaties to provide access to courts within a reasonable time: see eg Art 6 of the European Convention on Human Rights, and Guincho Case (1984), ILR, 78, p 355 (the fact that the delay was due to constitutional changes in the state only allowed in exceptional circumstances as a justification for non-compliance with that obligation). Note also the observation that ‘Human rights . . . include protection against denial of justice’: Barcelona Traction Case, ICJ Rep (1970), pp 3, 47.
or if there occurs an obvious and malicious act of misapplication of the law by the courts which is injurious to a foreign state or its nationals, there will be a 'denial of justice' for which the state is responsible (quite apart from the effect which such circumstances might have for the application of the local remedies rule). The state's responsibility will at least require it to take the necessary action to secure proper conduct on the part of the court, and may extend to the payment of damages for the injury suffered as a result of the denial of justice. The failure adequately to punish a person who has caused injury to an alien has been regarded as constituting a denial of justice to the injured alien, whether the failure is due to action by the courts or, more often, to the government (eg by granting an amnesty or remitting a sentence imposed by a court). Where, however, a court observes its own proper forms of justice and never-

5 The term 'denial of justice' is not one with a precise accepted meaning. It has been applied to unjust action or inaction by the executive branch of government: see Ralston, §§ 115–16. At times, the term is used to cover all international injuries affecting aliens: see eg Hyde, § 281. Such an extended use of the term goes close to depriving it of meaning, and it seems more helpful to restrict its use to circumstances arising out of the administration of justice.


6 See eg the Kennedy Case (1927), RIAA, 4, pp 194, 196–7.

7 In a number of cases international tribunals have held that the non-execution or remission of a sentence on the culprit or the granting of an amnesty constitutes a denial of justice to the injured alien: see eg the Putnam case, the West case, and the Mullens case—all decided in 1927 by the US-Mexican General Claims Commission: AD, 4 (1927–28), Nos 141, 143, 144. See also AD, 7 (1933–34), No 94, where, in the Adams case, the US-Panama Claims Commission awarded damages to the claimant on the ground that the offender had received inadequate punishment. The same Commission awarded damages on account of the denial of justice granted to the offender: Denham Case, AD, 7 (1933–34), No 95. In the Solomon case, decided in 1933 by the US-Panama Claims Commission, damages were awarded to the claimant on the ground that his conviction by a Panamanian court had been due to the fact that the court was unduly influenced by local feeling: AD, 7 (1933–34), No 93. But note the Santa Isabel Claims (1926), RIAA, 4, pp 783, 790, suggesting that there might be circumstances in which an amnesty is not to be regarded as an act of lenience in connection with previous events. See generally Harvard Draft (1961), Art 13: Akehurst, BY, 43 (1968–69), pp 56–61. In the Massey case responsibility was held to arise out of allowing a person accused of killing a national of the claimant state to escape from prison: (1927) RIAA, 4, p 155.

8 For the interesting case of the Costa Rica Packet, decided in 1891, between Holland and Great Britain, see Bles, RI, 28 (1896), pp 452–68; Regelsperger, RG, 4 (1897), pp 735–45; Valery, RG, 5 (1898), pp 57–66; Moore, i, § 148. See also Ullmann, De la Responsabilité de l'état en matière judiciaire (1911); Borchard, § 81; Odken, RI (Geneva), 4 (1926), pp 33–42. The whole correspondence on the subject and the award are printed in Marents, NRG, 2nd series, 23 (1935), pp 48, 715, and 808. See also the Cheevera Case (1931) RIAA, 2, p 1115.

9 When in July 1943 the Supreme Court of Eire gave a judgment affirming jurisdiction over certain Latvian and Estonian vessels of which Soviet Russia claimed to be the owner, the Russian Government, in a communication addressed to the High Commissioner for Eire in London, protested against the judgment as being illegal and placed the responsibility for it on the Government of Eire: Irish Law Times, 75 (1941), p 215.

10 Eg H v United Kingdom (1938), ILR, 75, pp 369, 377–8.

11 See McNair, Treaties, p 346.

See § 159.

§ 165 International injurious acts of administrative officials and members of armed forces

In addition to the international responsibility which a state clearly bears for the official and authorised acts of its administrative officials and members of its armed forces, a state also bears responsibility for internationally injurious acts committed by such persons in the ostensible exercise of their official functions but without that state's command or authorisation, or in excess of their competence according to the internal law of the state, or in mistaken, ill-judged or reckless execution of their official duties. A state's administrative
officials and members of its armed forces are under its disciplinary control, and all acts of such persons in the apparent exercise of their official functions or invoking powers appropriate to their official character are prima facie attributable to the state. It is not always easy in practice to draw a clear distinction between unauthorised acts of officials and acts committed by them in their private capacity and for which the state is not directly responsible. With regard to members of armed forces the state will usually be held responsible for their acts if they have been committed in the line of duty, or in the presence of and under the orders of an official superior.

The kind of acts of administrative officials and members of armed forces which are internationally injurious are such as would constitute international wrongs if committed by the state itself, or with its authorisation. A state will not, however, normally be responsible for the acts of its officials committed while acting as agents for another state or on behalf of an international organisation. Where a person who holds an official administrative or military post commits, in an entirely private capacity unrelated to his official position, an act which injures a foreign national or state, his state has no greater responsibility for that act than it has in the case of an act by a private individual; conversely, a private individual may in certain circumstances be properly regarded as having acted as an agent of the state, which then is responsible for his acts in that capacity.

It must be emphasised that a state bears no responsibility for losses sustained by aliens through legitimate acts of administrative officials and military and naval forces. Individuals who enter foreign territory submit themselves to the law of the land, and their home state has no right to request that they should be treated otherwise than as the law of the land authorises the state to treat its own
subjects, provided, of course, that that law does not violate essential principles of justice, the minimum standards prescribed by international law for the treatment of aliens, or human rights obligations. Therefore, since international law does not prevent a state from expelling aliens, the home state of an expelled alien cannot, as a rule, request the expelling state to pay damages for the losses sustained by him through having to leave the country. Therefore, further, a state need not make any reparation for losses sustained by an alien through legitimate measures taken by administrative officials and military forces in time of war, insurrection, riot, or public calamity, such as a fire, an epidemic outbreak of dangerous disease, and the like; although the manner in which the state exercises its rights in such circumstances may be such as to involve its international responsibility. 17

STATE RESPONSIBILITY FOR ACTS OF PRIVATE PERSONS


12 See § 409. Also to be observed are the obligations prescribed in any applicable bilateral treaty, such as a Treaty of Friendship, Commerce and Navigation.

13 See §§ 431–44.

14 See § 413, as to the right to expel aliens.

15 It is important to note here Art 3 of the Hague Convention concerning the Laws and Customs of War on Land 1907, which stipulates that a state is responsible for all acts committed by its armed forces. The hostilities between the Chinese and Japanese forces round Shanghai in 1932 raised the question as to the responsibility for damage done to aliens by the forces of a state in the territories of another state in circumstances not amounting to war. The British Government informed both parties to the dispute that it must hold each side responsible for any loss to British life and property caused by their respective armed forces (see statement by Sir John Simon on 18 February 1932, Parliamentary Debates (Commons), vol 261, col 1831). On principle it is not irrelevant in such cases to inquire into the legality of the action taken by a state in the territory of another state. See Wright, AJ, 26 (1932), pp 586–90. In February 1936 the US announced that it would attribute to Japan responsibility for damage caused to US nationals or property by Japanese armed forces in China. For criticism of that announcement, see Borchard, AJ, 32 (1938), p 534, n 4. But see H Lauterpacht in Legal Problems in the Far Eastern Conflict (ed Wright, 1941), pp 153–56.


17 See eg the Chevremont Case (1931), RIAA, 2, pp 1115, 1123.

§ 166 State responsibility for acts of private persons

International law imposes the duty upon every state to exercise due diligence to prevent its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other states. But it is in practice impossible for a state to prevent all injurious acts which a private person might commit against a foreign state.

Accordingly, whereas the responsibility of states for official (or ostensively official) acts of administrative officials and members of armed forces is extensive, their responsibility for acts of private persons is limited. Their duty is to exercise due diligence to prevent internationally injurious acts on the part of private persons, and, in case such acts have nevertheless been committed, to procure satisfaction and reparation for the wronged state, as far as possible, by punishing the offenders and compelling them to pay damages where required. 2 Beyond this a state is not responsible for acts of private persons; there is in particular no duty for a state itself to pay damages for such acts if the offenders are not able to do it. If, however, a state has not exercised due diligence it can be made responsible and held liable to pay damages. The standard to be met by the requirement to exercise due diligence varies with the circumstances, which include the status of the aliens whose person or property are endangered.

It may happen that private individuals, although not formally part of the

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1 See § 165.
2 See § 164, n 7, as to the relationship between failure to punish and denial of justice. The failure of a state to apprehend and punish a private person who has injured a foreign national, although itself wrongful, does not amount to condonation or ratification of his acts by the state so as to make his acts attributable to the state: the failure of the state is a distinct matter, for which the state may be held responsible as a breach of its international obligations. See James’ Case (1925), RIAA, 4, p 86ff; YBILC (1975), ii, p 98, para (26).
3 See eg British Property in Spanish Morocco Case (1925), RIAA, 2, pp 636, 709–10; James’ Case (1925), RIAA, 4, p 86ff; Kennedy Case (1927), ibid, p 194; Venable Case (1927), ibid, pp 219, 227–30. And see cases cited at § 165, n 10.
4 This principle has frequently been applied: see eg the cases referred to in the preceding note. See also the question put to, and answer given by, the Commission of Jurists appointed by the Council of the League after the Janina–Corfu affair in 1923: Fifth Question: In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime (siciliet, against foreigners) in its territory? Reply: The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest, and bringing to justice of the criminal. The recognised public character of a foreigner, and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance upon his behalf: See BY (1924), pp 179–81; AJ, 18 (1924), pp 536–44; Charles de Visscher, RI, 3rd series, 5 (1924), pp 389–96; Barros, The Corfu Incident of 1923 (1965). For an example of redress for the death of a consular representative at the hands of a mob, see Stowell, AJ, 18 (1924), pp 768–74. See also the Russian case Re Dobrosolsky and Goukovitch, AD, 4 (1927–28), No 285. As to the measure of damages payable by a state for neglect to punish offenders for injury to foreigners, see Hyde, AJ, 22 (1928), pp 140–42; James’ Case (1925), RIAA, 4, pp 82, 86ff; and Brierly, BY (1928), pp 42–9. See also § 156. See also § 149, the Corfu Channel case, on the question of the responsibility of a state by reference to the mere fact that the wrongful act has occurred on its territory. On the responsibility of Israel for the murder, on 17 September 1948, of Count Bernadotte while acting under the authority of the United Nations see Wright, AJ, 43 (1949), pp 95–104.
5 As to the special protection owed by states to foreign diplomatic personnel and property, see §§ 492–8. See also the Janina–Corfu affair, previous n in this §; the Mullen Case (1927), RIAA, 4, p 173; YBILC (1975), ii, pp 78–9, paras (27)–(31).
machinery of the state, are nevertheless in particular circumstances properly to be regarded as having acted as agents of the state. This may happen, for example, where they have been prompted or encouraged by state organs to act on behalf of the state, or where, in exceptional circumstances and in the absence of normal organs of governmental administration, they have taken it upon themselves to exercise elements of governmental authority. In such cases the state may be held responsible for their acts. It is in each case a question of fact whether the individuals concerned were sufficiently closely associated with the state for their acts to be regarded as acts of the state rather than as the acts of private individuals. The question may in particular arise in relation to the conduct of corporate bodies which, despite possessing a legal personality separate from that of the state, may—particularly if they are state agencies—be considered to be acting as agents for the state so as to make their acts attributable to it.

§ 167 Responsibility for acts of insurgents and rioters

The responsibility of states for acts of rioters is the same as for acts of other private individuals. Their acts cannot be regarded as acts of the state for which it is internationally responsible, nor does it have any duty to repair losses which they may occasion. Its duty is to exercise due diligence to prevent the riot (or at least to prevent it causing damage to foreigners) or immediately crush it, and to punish according to the law of the land, as soon as peace and order are re-established, such rioters as have committed criminal injuries against foreign states.

Individuals who enter foreign territory must take the risk of an outbreak of insurrection or riots no less than the risk of the outbreak of other calamities. When they sustain a loss from acts of insurgents or rioters, they may, if they can, trace their losses to the acts of certain individuals and claim damages from the latter before the courts of justice. Apart from the duty to exercise due diligence the responsibility of a state for acts of private persons injured to foreign subjects requires only that its courts must be accessible to the latter for the purpose of claiming damages from the offenders, and that it punish such of those acts as are criminal.

Where a state establishes procedures whereby its nationals may obtain redress for damage caused by rioters, it must allow foreign nationals to invoke those (or equivalent) procedures. But the state itself is under no international legal duty to pay such damages. Although in a number of cases states have paid damages for losses of this kind, they have done so for political reasons rather than as a legal obligation. In most cases in which damages have been claimed for such losses, the states concerned have refused to comply with the request. As such claims had, during the second half of the 19th century, frequently been made against American states which had repeatedly been the scene of insurrections, several of these states in commercial and similar treaties which they concluded with other states
expressly stipulated7 that they were not responsible for losses sustained by foreign subjects on their territory through acts of insurgents and rioters. In the Case concerning United States Diplomatic and Consular Staff in Teheran,8 which arose out of the acts of rioters and other militants who attacked and occupied United States diplomatic and consular premises in Iran, seizing the occupants and holding them hostage, the International Court of Justice held Iran to be in breach of its international obligations to take steps to protect those premises from the attack9 and, generally, to restore the status quo, but held Iran not responsible for the initial stages of the acts of the militants, who were regarded as persons without official status whose conduct was not imputable to the state; the legal situation was subsequently transformed when the militants became agents of the state10 for whose acts Iran itself was held to be internationally responsible.

As regards an insurrection or rebellion aimed at the overthrow of governmental authority either over the whole state or in a part of it, the position is in principle the same as for rioters. The state is not responsible for the acts of the insurrectionists, but is only obliged to exercise due diligence to prevent, or immediately crush, the insurrection, and to punish those responsible for injury to foreigners.11 But an insurrection, by reason of its scale and the nature of its...
the former rebels become the new government of the state, the acts of their forces or other organs during the insurrection will be acts for which the state, through its new government, can be held responsible;¹⁹ and the state will continue to be responsible for acts of the former government committed at a time when it was the lawful government of the state.²⁰ In the case of an insurrection leading to secession and the creation of a new state, it is that new state which will be responsible for the acts of the former rebels.

END OF PART 1


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