OPPENHEIM'S INTERNATIONAL LAW

NINTH EDITION

Volume I

PEACE

INTRODUCTION AND PART 1

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Contents

Preface to the ninth edition

The last edition of Volume I 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 85 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

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.

Despite 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 benefitted 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

Abbreviations

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) (Fr 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* (Hertslet), vol 1 (for 1812–14), continued up to vol 170 (for 1968)
Bibliotheca Visseriana *Bibliotheca Visseriana Dissertationum Jus Internationale Illustrantium*
Bittner Bittner, *Die Lehre von völkerrechtlichen Urkunden* (1924)
Bluntschli Bluntschli, *Das moderne Völkerrecht der civilisirten 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
Brierly Brierly, *The Law of Nations*, 6th ed (1963)
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, *Lezioni di diritto internazionale* (general part, 1925)
CILJSA *Comparative and International Law Journal of Southern Africa*
CL *Current Law*
CLJ *Cambridge Law Journal*
Clunet *Journal du droit international*
CML Rev *Common Market Law Review*
Colombos Colombos, *The International Law of the Sea*, 6th ed (1967)
Cruchaga Cruchaga-Tocornal, *Nociones de derecho internacional*, 3rd ed, 2 vols (1923–25)

Dicey and Morris Dicey and Morris, *Conflict of Laws*, 11th ed (1987)

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*

Fauchille Fauchille, *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)
Fenwick Fenwick, *International Law*, 3rd ed (1948)
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*
Ga Law Rev *Georgia Law Review*
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 LJ *Georgetown Law Journal*
Germ 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 Annuaire *Grotius Annuaire 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*
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: Flournoy); 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* (Burdick); 2. *Jurisdiction with respect to Crime* (Dickinson); 3. *Treaties* (Garner)
Heffter Heffter, *Das europäische Völkerrecht der Gegenwart*, 8th ed by Geffcken (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)
Holtzendorff Holtzendorff, *Handbuch des Völkerrechts*, 4 vols (1885–89)
Hudson *Cases* Hudson, *Cases and Other Materials on International Law*, 3rd ed (1951)
Hudson, *Legislation* Hudson, *International Legislation*, vols 1–9 (1931–50)
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
ILR International Law Reports (in continuation of AD), vols 16–23 (ed H Lauterpacht) covering 1949 to 1956; vol 24 (eds H and E Lauterpacht) for 1957; vols 25 and 26 (ed E Lauterpacht) for 1958; vols 27–81 (ed E Lauterpacht); vols 82 onwards (eds E Lauterpacht and Greenwood)
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 (1905); 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* (1926)
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)
LOS Convention United Nations Convention on the Law of the Sea 1982
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* (Germ trans from Russian original), 2 vols (1883–86)
Martens, *Causes célèbres* Martens, *Causes célèbres du droit des gens*, 2nd ed, 5 vols (1858–61)
Martens, G F G F Martens, *Précis du droit des gens moderne de l'Europe*, new ed by Vergé, 2 vols (1858)

Martens, R, Martens, N R, Martens, N S, Martens, N R G, Martens, N R G, 2nd series, Martens, N R G, 3rd series These are the abbreviated quotations of the different parts of Martens, *Recueil de Traités*, which are in common use

Mérignhac Mérignhac, *Traité de droit public international*, vol 1 (1905); vol 2 (1907); vol 3 (1912)

MLR *Modern Law Review*

Möller Möller, *International Law in Peace and War* (Eng trans from Danish), vol 1 (1931); vol 2 (1935)

Moore Moore, *A Digest of International Law*, 8 vols (1906)

Moore, *International Arbitrations* Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, 6 vols (1898)

Nat Res Lawyer *Natural Resources Lawyer*

Neth IL Rev *Netherlands International Law Review*

Neth YBIL *Netherlands Year Book of International Law*

Nordisk TA *Nordisk Tidskrift for International Ret. Acta scandinavica juris gentium*

Nys Nys, *Le Droit international*, 2nd ed, 3 vols (1912)

NYULQR *New York University Law Quarterly Review*

NYULR *New York University Law Review*

Ocean Dev & IL *Ocean Development and International Law*

Off J *Official Journal of the League of Nations*

OJ *Official Journal of the European Community*

ÖJZ *Österreichische Juristen Zeitung*

ÖZöR *Österreichische Zeitschrift für öffentliches Recht*

Parry, BDIL Parry, *British Digest of International Law*, vol 2b (1967); vols 5–8 (1965)

Parry, *Nationality and Citizenship* Parry, *Nationality and Citizenship Laws of the Commonwealth and Republic of Ireland* (1957), and vol 2 (1960)

PCIJ Publications of the Permanent Court of International Justice:

- Series A Judgments
- B Advisory opinions
- A/B Cumulative collection of judgments and advisory opinions given since 1931
- C Acts and documents relating to judgments and advisory opinions
- D Collection of texts governing the jurisdiction of the court
- E Annual reports

Perels Perels, *Das internationale öffentliche Seerecht de Gegenwart*, 2nd ed (1903)

Phillimore Phillimore, *Commentaries upon International Law*, 3rd ed, 4 vols (1879–88)

Praag Praag, *Jurisdiction et droit international public* (1915)

Praag, *Supplément* Supplement to the above (1935)

Pradier-Fodéré Pradier-Fodéré, *Traité de droit international public*, 8 vols (1885–1906)

Pufendorf Pufendorf, *De Jure Naturae et Gentium* (1672)

Ralston Ralston, *The Law and Procedure of International Tribunals*, rev ed (1926); supplement (1936)

Ray, *Commentaire* Ray, *Commentaire du Pacte* (1930)

Recueil TAM *Recueil des décisions des tribunaux arbitraux mixtes*

Reddie, *Researches* Reddie, *Researches, Historical and Critical, in Maritime International Law*, 2 vols (1844)

Répertoire Lapradelle et Niboyet, *Répertoire de droit international*. Founded by Darras in 1929

Restatement (Third) American Law Institute, *Restatement of the Law: the Foreign Relations of the United States*, 3rd ed, 2 vols (1987)

Rev Belge *Revue Belge de droit international*

RG *Revue générale de droit international public*

RI *Revue de droit international et de législation comparée*

RIAA *United Nations Reports of International Arbitral Awards*

RIF *Revue internationale française du droit des gens*

RI (Geneva) *Revue de droit international, de sciences diplomatiques, politiques et sociales*

RI (Paris) *Revue de droit international*

Rivier Rivier, *Principes du droit des gens*, 2 vols (1896)

Rivista *Rivista di diritto internazionale*

Rousseau Rousseau, *Principes généraux du droit international public*, vol 1 (1944). The same author's *Droit International Public*, 2nd ed, 5 vols (1970–83), is referred to in full where necessary

Satow Satow, *A Guide to Diplomatic Practice*, 5th ed by Gore-Booth (1979)

SAYBIL *South African Year Book of International Law*

Scand SL *Scandinavian Studies in Law*

Scelle Scelle, *Précis de droit des gens*, vol 1 (1932); vol 2 (1934)

Schücking und Wehberg Schücking und Wehberg, *Die Satzung des Völkerbundes*, 2nd ed (1924)

Schwarzenberger Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol 1, 3rd ed (1957); vol 2 (1968); vol 3 (1976); vol 4 (1986)

Scott, *Cases* Scott, *Cases on International Law* (1922)

Sibert Sibert, *Traité de droit international public*, 2 vols (1951)

Sirey *Recueil général des lois et des arrêts* (founded by Sirey)

Smith Smith, *Great Britain and the Law of Nations, a Selection of Documents*, vol 1 (1932); vol 2 (1935)

Spiropoulos Spiropoulos, *Traité théorique et pratique de droit international public* (1933)

Stan JIS *Stanford Journal of International Studies*

Stowell Stowell, *International Law. A Restatement of Principles in Conformity with Actual Practice* (1931)

Strupp, *Éléments* Strupp, *Éléments du droit international public, universel, européen et américain*, 2nd ed, 3 vols (1930)

Strupp, *Wört.* *Wörterbuch des Völkerrechts und der Diplomatie* (ed Strupp, begun by Hatschek), 3 vols (1924–29)

Strupp-Schlochauer, *Wört.* *Wörterbuch des Völkerrechts*, 3 vols (1960–62)

Suarez Suarez, *Tratado de Derecho internacional público*, 2 vols (1916)

Syr JIL & Com *Syracuse Journal of International Law and Commerce*

Temperley Temperley, *History of the Peace Conference of Paris*, 6 vols (1920–24)

Testa Testa, *Le droit public international maritime* (Fr trans by Boutiron from Portuguese) (1886)

TIAS US Treaties and other International Acts

Toynbee, *Survey* Toynbee, *Survey of International Affairs*

Travers Travers, *Le droit pénal international*, 5 vols (1920–22)

TS *United Kingdom Treaty Series*, vol 1 (1892), and one or more volumes every year

Twiss Twiss, *The Law of Nations, etc*, 2 vols, 2nd ed, vol 1. *Peace* (1884); vol 2. *War* (1875)

UK Contemporary Practice E Lauterpacht, *Contemporary Practice of the United Kingdom in the Field of International Law*, pts for 1956–62

UKMIL United Kingdom Materials on International Law (in BY)

UN Juridical YB *United Nations Juridical Year Book*

UN Repertoire *Repertoire of the Practice of the Security Council 1946–1951* (1954), with Supplements for 1952–55, (1957) 1956–58 (1959), 1959–63 (1965), 1964–65 (1968), 1966–68 (1971), 1969–71 (1976), 1972–74 (1979) and 1975–80 (1987)

UNTS *United Nations Treaty Series*

UNYB *United Nations Year Book*

US Digest *Digest of United States Practice in International Law*, published in annual vols, 1973 onwards

UST US Treaties and other International Agreements

USTS US Treaty Series

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)
Walker, *History* Walker, *A History of the Law of Nations*, vol 1 (1899)
Walker, *Science* Walker, *The Science of International Law* (1893)
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*
YBECHR *Year Book of the European Convention on Human Rights*
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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YBECHR *Year Book of the European Convention on Human Rights*
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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Introduction

Foundation and development of international law

Chapter 1

Foundation of international law

THE NATURE OF INTERNATIONAL LAW

H Lauterpacht, *The Function of Law*, pp 399–438; Hag R, 62 (1937), iv, pp 100–28; and *Collected Papers*, vol 1 (1970), pp 9–50 Praag, §§ 1–3 Krabbe, *The Modern Idea of the State* (1917) (Eng trans, 1921), pp 233–62 Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp 102–274; *Allgemeine Staatslehre* (1925), pp 119–32; *Law and Peace in International Relations* (1942), pp 3–82; *General Theory of Law and State* (1945), pp 328–54; and *Principles of International Law* (1952), pp 3–44, 196–201 Verdross, pp 1–42 and 92–6; *Die Einheit des rechtlichen Weltbildes* (1923), pp 36–135, and in ZI, 29 (1921), pp 65–91 Spiropoulos, *Théorie générale du droit international* (1930), pp 1–83 Walz, *Das Wesen des Völkerrechts und Kritik der Völkerrechtsleugner* (1930) Blühdorn, *Einführung in das angewandte Völkerrecht* (1934), pp 1–106 Schiffer, *Die Lehre vom Primat des Völkerrechts in der neueren Literatur* (1937) Ziccardi, *La costituzione dell' ordinamento internazionale* (1943), pp 19–157 Brierley, *The Outlook for International Law* (1944); and *The Basis of Obligation in International Law* (1958) Sperduti, *La fonte suprema dell' ordinamento internazionale* (1946) Constantantopoulos, *Verbindlichkeit und Konstruktion des positiven Völkerrechts* (1948) Giuliano, *La communità internazionale e il diritto* (1950) Ago, *Scienza giuridica e il diritto internazionale* (1950) Corbett, *Law and Society in International Relations* (1951), pp 36–53 Scott, RI (Paris), 1 (1927), pp 637–57 Foulke, Col Law Rev, 19 (1919), pp 429–66 Salvioli, *Rivista*, 3rd series, i (1921–22), pp 20–80 Cavaglieri, *ibid*, pp 289–314, 479–506 Brierly, Hag R, 23 (1928), iii, pp 467–549; and 58 (1936), iv, pp 5–34 Bruns, ZöV, 1 (1929), pp 1–56 Spiropoulos, RI (Paris), 3 (1929), pp 97–130 Heydte, ZöR, 11 (1931), pp 526–46 Redslob, RI, 3rd series, 14 (1933), pp 488–513, 615–33 Salvioli, Hag R, 46 (1933), iv, pp 5–17 Schindler, *ibid*, pp 233–322 Strupp, *ibid*, 47 (1934), i, pp 263–300 Rundstein, RI, 3rd series, 12 (1931), pp 491–512, 669–89 Le Fur, Hag R, 54 (1935), iv, pp 5–193 Corbett, *University of Toronto Law Journal*, 1 (1) (1935), pp 3–16 Jones, BY, 16 (1935), pp 5–19 Wengler, ZöR, 16 (1936), pp 322–92 Goodhart, *Grotius Society*, 22 (1936), pp 31–44 Scrimali, ZöR, 21 (1941), pp 190–216 Hurst, *Grotius Society*, 30 (1944), pp 119–27 Glanville Williams, BY, 22 (1945), pp 146–63 Kelsen, OZöR, 1 (1946), pp 20–83 Paradisi, *Comunicazioni e studi*, 3 (1950), pp 55–78 Campbell, *Grotius Society*, 35 (1950), pp 113–32 Quadri, Hag R, 80 (1952), i, pp 585–630 Ago, Hag R, 90 (1956), ii, pp 857–94; and AJ, 51 (1957), pp 691–733 Suy, RG, 64 (1960), pp 762–70 Hart, *The Concept of Law* (1961), ch 10 Schwarzenberger, *Power Politics* (3rd ed, 1964) Ziccardi, *Il diritto internazionale odierno – nozione e commento* (1964) Friedmann, *An Introduction to World Politics* (1968) Deutsch, *The Analysis of International Relations* (1968) Deutsch, Kelsen and Fried in *The Relevance of International Law* (eds Deutsch and Hoffman, 1968), pp 57–83, 85–92, 93–132 Friedmann, Hag R, 127 (1969), ii, pp 47–130 de Visscher, *Théories et réalities en droit international public* (4th ed, 1970) Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), pp 196–363 Tunkin, Hag

R, 147 (1975), iv, pp 1, 9–110 P Reuter, *Droit international public* (5th ed, 1976) Mosler, Hag R, 140 (1974), iv, pp 17–79; and ZöV, 36 (1976), pp 6–47 Gonidec, *Relations internationales* (2nd ed, 1977) Braillard, *Théories des relations internationales* (1977) Wengler, Hag R, 158 (1977), v, pp 9–86 Barile, Hag R, 161 (1978), iii, pp 9, 23–47 Watson, YB of World Affairs, 34 (1980), pp 265–85 Sahovic, Hag R, 199 (1986), iv, pp 171–232 Cassese, *International Law in a Divided World* (1986), pp 9–125 Carty, *The Decay of International Law?* (1986) DeLupis, *The Concept of International Law* (1987) Franck, AJ, 82 (1988), pp 705–59 Allott, *Eunomia* (1991) See also works cited at § 3, n 9, § 3, n 13 and § 4, n 1.

§ 1 Concept of international law International law is the body of rules which are legally[1] 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.[2] 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 systematised 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.[3]

That part of international law that is binding on all states, as is far 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.[4] *General* international law is that which is binding upon a great many states. General international law, such as provisions of certain treaties which are widely, but not universally, binding and which establish rules appropriate for universal application, has a tendency to become universal international law.[5]

One can also distinguish between those rules of international law which, even

[1] In contradistinction to mere usages (ie practices which, although perhaps widely adopted, are not adopted with any sense of their being legally binding), to morality (see § 17), and sometimes to international comity (see § 17).

[2] See § 7.

[3] For the history of international law see the 8th ed of this vol §§ 37*b*–59. In addition to the works there cited, see (a) as to the history of international law in general, Nussbaum, *A Concise History of the Law of Nations* (rev ed, 1954); Herrero, *Historia del Derecho de Gentes* (1954); Sereni, *Diritto internazionale*, pt I (1956); Reibstein, *Eine Gesichte seiner Ideen in Lehre und Praxis*, (vol i, 1957–58) and (vol ii, 1963); Strupp, *Wört*, vol 3, pp 680–760; (b) as to the development of international law before the time of Grotius, Simmonds, *Grotius Society*, 43 (1957), pp 143–57; Guggenheim in *Symbolae Verzijl* (1958), pp 177–89; Ehrlich, Hag R, 105 (1962), i, pp 177–259; Verosta, Hag R, 113 (1964), iii, pp 491–613; van der Molen, *Alberico Gentili and the Development of International Law* (2nd rev ed, 1968); Connelly, YB of World Affairs (1978), pp 303–19; Ago, BY, 53 (1982), pp 213–32; (c) as to the development of international law by Grotius and in the 17th and 18th centuries, Herrero, Hag R, 81 (1952), ii, pp 313–46; Alexandrowicz, *Introduction to the History of the Law of Nations in the East Indies* (1967); Dumbauld, *The Life and Legal Writings of Hugo Grotius* (1969); Ago, Hag R, 182 (1983), iv, pp 375–98; Schiedermair, *ibid*, pp 399–416; Janis, AJ, 78 (1984), pp 405–18; Dufour, Haggenmacher and Toman, *Grotius et l'ordre juridique international* (1985).

[4] See § 23 as to the scope of the application of the rules of international law.

[5] See § 583, n 3. See Rie, *Grotius Society*, 36 (1950), pp 209–28, as to the Congress of Vienna and the origins of the notion of 'public law of Europe'.

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.[6] Rights and obligations *erga omnes* may even be created by the actions of a limited number of states.[7] 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 state),[8] and that the *actio popularis* 'is not known to international law as it stands at present'.[9] 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

[6] *Barcelona Traction Case* (Second Phase), ICJ Rep (1970), p 32. See generally on rights and obligations *erga omnes*, YBILC (1976), pt 2, p 99; Weil, RG, 86 (1982), pp 30–33; Frowein in *Völkerrecht als Rechtsordnung (Festschrift für H Mosler)* (eds Bernhardt, Geck, Jaenicke and Steinberger, 1983), pp 241–62; Thirlway, BY, 60 (1989), pp 92–102. See also n 9; and § 146.

Similar questions may arise in relation to some general multilateral treaties, where *any* party may in some circumstances claim to be injured by a breach of the treaty by any other party, even if that breach does not directly affect the claimant party's own (including its nationals') material interests. See §§ 150, at n 17, and 436, n 12, as to human rights treaties. See generally on responsibility arising out of breaches of multilateral treaties, Sachariew, Neth IL Rev, 35 (1988), pp 273–89.

[7] *Reparations for Injuries Case*, ICJ Rep (1949), p 185; *Namibia Case*, ICJ Rep (1971), p 56. See also §§ 626–7, as to the extent to which states may by treaty (such as the UN Charter) give rise to obligations applicable also to third states. And see § 583, n 8.

[8] *South West Africa Cases (Ethiopia and Liberia v South Africa)* (Second Phase), ICJ Rep (1966), at pp 32–3.

[9] *Ibid*, p 47. See also the Dissenting Opinion of Judge De Castro in the *Nuclear Tests Case*, ICJ Rep (1974), pp 386–7; and *Ireland v United Kingdom* (1978), ILR, 58, pp 190, 291–2. See generally Schwelb, Israel YB on Human Rights, 2 (1972), pp 46–56; Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), p 326; Jenks in *Ius et Societas* (ed Wilner, 1979), pp 151–8; Brownlie, *Principles of Public International Law* (4th ed, 1990), pp 466–73; Gray, *Judicial Remedies in International Law* (1987), pp 211–15; Thirlway, BY, 60 (1989), pp 92–102. See also n 6 and § 157 (as to the possibility that state conduct which is categorised as criminal may justify countermeasures by any other state). See also *Klass Case* (1978), ILR, 58, pp 423, 443, allowing proceedings for breach of the European Convention on Human Rights even though a law had not been implemented against the applicant, so long as he was directly affected by its existence; see also *Aumeeruddy-Cziffra v Mauritius* (1981), ILR, 62, pp 285, 293.

distinguish it from private international law.[10] Whereas the former governs the relations 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:[11] in other terms, public international law arises from the juxtaposition of states, private international law from the juxtaposition of legal

[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).

On the relation of public and private international law see Siotto-Pintor, *L'Egypte contemporaine*, 26 (1935), pp 237–67; Scelle, i, pp 42–9; Rundstein, RI, 3rd series, 17 (1936), pp 314–49; Starke, LQR, 42 (1936), pp 395–401; Niederer, *Ann Suisse*, 5 (1948), pp 63–82; Kopelmanas in *Etudes Georges Scelle* (vol ii, 1950), pp 753–804; Stevenson, Col Law Rev, 52 (1952), pp 561–88; Strupp–Schlochauer, *Wort* (1962), vol II, p 129 (entry by Makarov); Hambro, Hag R, 105 (1962), i, pp 1–66; Wortley, *ibid.*, 85 (1954), i, pp 245–338; Unger, *Grotius Society*, 43 (1957), pp 87–108; Carswell, ICLQ, 8 (1959), pp 268–88; Fitzmaurice, Hag R, 92 (1957), ii, pp 218–22; Hambro, *Varia Juris Gentium: Liber Amicorum for J P A François* (1959), pp 132–9; Starke, *Studies in International Law* (1965), pp 21–30; Collier, *Conflict of Laws* (1987), pp 359–68.

For a survey of the decisions of the PCIJ on questions of private international law see Hammarskjöld, *Revue 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 51–84; Hambro, *loc cit* in Hag R, above.

As to the operation of rules of private international law in the activities of international organisations, see Jenks, *The Common Law of Mankind* (1958), pp 201–4, and *The Proper Law of International Organisations* (1962), pp 133–251; Seyersted, Hag R, 122 (1967), iii, pp 433–611; Akehurst, *The Law Governing Employment in International Organisations* (1967), pp 107–9.

[11] To be distinguished from rules of private international law are those agreements reached between the states having as their aim the unification of certain substantive rules of their respective internal legal systems, eg as to trade marks, bills of exchange and carriage of goods and persons by air; these agreements may often include provisions dealing with private international law as well as with unification of private law. Leading examples in this field are the Brussels Convention of 1924 relating to the Carriage of Goods by Sea (amended by the Brussels Protocol of 1968, and again at Hamburg in 1978), widely known as 'The Hague Rules' because they were originally drafted in that city; the Warsaw Convention of 1929 on Carriage by Air and the Berne Copyright Convention 1886 (both subsequently amended several times); and various Conventions relating to the international sale of goods concluded at The Hague in 1964, New York in 1974 and Vienna in 1980. Note also the steps taken by the European Economic Community in the matter of harmonisation of laws, especially by means of Directives under Art 100 of the Treaty establishing the EEC; and also various conventions concluded within the Council of Europe.

See generally on unification Matteucci, Hag R, 91 (1957), i, pp 387–441; David, *The International 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, *Internationales einheitsrecht* (1975); F A Mann, LQR, 99 (1983), 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 *Revue 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 (UNCITRAL). 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 standardise the treatment accorded within the states parties to them, and to that extent involve a measure of unification or harmonisation of law.

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.[12] 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.[13] 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[14] or the extent of the state's jurisdiction.[15]

§ 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 permissible. 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 recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character';[1] 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.[2] The

[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 1951 (TS No 65 (1955)). See Review of the Multilateral Treaty-Making Process (UN Legislative Series, ST/LEG/SERIES B/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 Bustamente Code (LNTS, 86, p 111), now binding on a number of Central and South American states; conventions signed in Geneva in 1923 and 1928, and in New York in 1958, concerning arbitration awards; conventions signed in Geneva in 1930 and 1931 concerning bills of exchange and cheques; conventions signed in Brussels in 1968 by members of the European Economic Community on the mutual recognition of judgments and of companies (see § 143, n 5); and conventions on a number of subjects concluded at Inter-American Specialised Conferences on Private International Law held in 1975, 1979, 1985 and 1989 (ILM, 14 (1975), p 325, *ibid*, 18 (1979), p 1211, *ibid*, 24 (1985), p 459 and *ibid*, 29 (1990), p 62). See generally Kosters and Bellemans, *Les Conventions de la Haye sur le droit international privé* (1921); Nolde, Hag R, 55 (1936), i, pp 303–427; Plaisant, *Les Règles de conflit de lois dans les traités* (1946); Jenks, *The Common Law of Mankind* (1958), pp 51–4; van Hoogstraten, Hag R, 122 (1967), iii, pp 343–424.

[13] See the *Guardianship of Infants Case* ICJ Rep (1958), p 55.

[14] See § 407.

[15] See § 136ff.

[1] See § 642, n 2.

[2] See von der Heydte, ZV, 16 (1932), p 461ff; Verdross, AJ, 31 (1937), pp 571–7, and *ibid*, 60 (1966), pp 55–63; Schwarzenberger, *Current Legal Problems*, 18 (1965), pp 191–214, and *International Law and Order* (1971), pp 27–56; Virally, *Ann Français*, 12 (1966), pp 5–29; Abi-Saab, Suy, Murty and Schwarzenberger in *The Concept of Jus Cogens in International Law* (1967), Carnegie Endowment Conference, 1966; Schwelb, AJ, 61 (1967), pp 946–75; Mosler,

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.[3] 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.[4] 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,[5] 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[1] and Pufendorf[2] had already answered the question in the

Ann Suisse, 25 (1968), pp 9–40; Morelli, *Rivista*, 51 (1968), pp 108–17; Marek in *Receuil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 426–59; Monaco, Hag R, 125 (1968), iii, pp 202–12; Nisot, *Rev Belge* (1968), pp 1–8; Barberis, ZöV, 30 (1970), pp 19–45; Paul, OZöR, 21 (1971), pp 19–49; Schweitzer, *Archiv des Völkerrecht*, 15 (1971), pp 197–223; Lachs, Hag R, 169 (1980), iv, pp 201–11; Barberis, ZöV, 30 (1970), pp 19–45; P de Visscher, Hag R, 136 (1972), ii, pp 102–11; Tunkin, *ibid*, 147 (1975), iv, pp 85–94; Crawford, BY, 48 (1976–77), pp 146–8; Gomez-Robledo, Hag R, 172 (1981), iii, pp 17–208; Alexidze, *ibid*, pp 227–63; Weil, RG, 86 (1982), at pp 19–29, and AJ, 77 (1983), at pp 423–30; Munch in *Völkerrecht als Rechtsordnung (Festschrift für H Mosler)* (eds Bernhardt, Geck, Jaenicke and Steinberger, 1983), pp 617–28; Christensen, AJ, 81 (1987), pp 93–101; Hannikainen, *Peremptory Norms (ius cogens) in International Law: Historical Development, Criteria, Present Status* (1988); Dupuy, RG, 93 (1989), pp 588–97; F A Mann, *Further Studies in International Law* (1990), pp 84–102. See also, as to the operation of rules of *ius cogens* in the law of treaties, § 642, n 2.

3 Draft Arts on the Law of Treaties (1966), commentary on Art 50, YBILC (1966), ii, pp 247–9. See also *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 100–1.

4 YBILC (1966), ii, pp 247–9; 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).

5 See Draft Arts on State Responsibility, Art 29.2, and commentary, paras (21)–(22), YBILC (1979), ii, pp 109, 114–15.

1 *De Cive*, xiv, 4.

2 *De Jure Naturae et Gentium*, ii, c iii, § 22.

negative. During the 19th century Austin[3] 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'.[4] Definitions drawn up primarily in terms of the internal (or municipal)[5] law of states may be unnecessarily restrictive when applied to rules obtaining in other kinds of community. Although the characteristics of municipal law provide 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 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 treatise[7] 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] Rules for the

3 *Lectures on Jurisprudence*, vi.

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*.

6 See, as to the dangers of the insistence on the specific character of international law, H Lauterpacht, *The Function of Law*, pp 403–7. See also Jennings, ICLQ, 13 (1964), pp 385–97. On the dissimilarities between international and municipal law see Brierly, *The Basis of Obligation in International Law* (1958), pp 250–64.

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'.

For a discussion of international law and the structure of the international community see, in addition to many of the works cited in the bibliography preceding § 17, Therre, *La Psychologie individuelle et collective dans l'efficacité du droit international public* (1946); Schwarzenberger, YB of World Affairs (1947), pp 159–77; and *International Law and Order* (1971), especially chs 2, 3 and 5; McDougal, Hag R, 82 (1953), i, pp 137–258; Stone, *Legal Controls of International Conflict* (1954), and Hag R, 89 (1956), i, pp 65–175; Corbett, Hag R, 85 (1954), i, pp 473–540, *Morals, Law and Power in International Relations* (1956), and *From International Law to World Law* (1969); Fitzmaurice, MLR, 19 (1956), pp 1–13; Jessup, *The Use of International Law* (1959), ch 1; Röling, *International Law in an Expanded World* (1960); Hart, *The Concept of Law* (1961), ch 10; Kaplan and Katzenbach, *The Political Foundations of International Law* (1961); Manning, *The Nature of International Society* (1962); Quadri, Hag R, 113 (1964), ii, pp 245–318; Friedmann, *The Changing Structure of International Law* (1964), *International Law in a Changing Society* (1971) and *De l'Éfficacité des institutions internationales* (1970); Tunkin, *Droit international public: problèmes théoriques* (1965), and Hag R, 147 (1975), iv, pp 19–206; Coplin, *The Functions of International Law* (1966); Landheer, *On the Sociology of International Law and International Society* (1967); Rabl, *Die Völkerrechtsgrundlagen der modernen Friedensord-*

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[10] and intervention[11] – 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[12] 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 peace-keeping 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.[13] They also serve to demonstrate that enforcement of the

nung (2 vols, 1967, 1969); Scheinman and Wilkinson (eds), *International Law and Political Crisis* (1968); Jenks, *A New World of Law?* (1969), pp 219–67; Falk, *Legal Order in a Violent World* (1970), *The Status of Law in International Society* (1970), and (as ed, with Black) *The Future of the International Legal Order* (vol I, 1969); Monaco, Hag R, 125 (1968), iii, pp 99–130; Burton, *Systems, States, Diplomacy and Rules* (1968); Bozeman, *The Future of Law in a Multicultural World* (1971); Deutsch and Hoffman (eds), *The Relevance of International Law* (1971); Pinto, *Le Droit des relations internationales* (1972); Gottlieb in *The Future of the International Legal Order*, vol 4 (eds Falk and Black, 1972), pp 331–83; P de Visscher, Hag R, 136 (1972), ii, pp 7–43; Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), pp 196–329; Mosler, Hag R, 140 (1974), iv, pp 17–44, and in ZöV, 36 (1976), pp 6–49; Luard, *Types of International Society* (1976); Parkinson, *The Philosophy of International Relations* (1977); Onuf, AJ, 73 (1979), pp 244–66; De Vree, Neth IL Rev, 26 (1979), pp 46–59; Reuter and Combacau, *Institutions et relations internationales* (1980); Barberis, Hag R, 179 (1983), i, pp 170–80; Boyle, *World Politics and International Law* (1985); Movchan, in *International Law and the International System* (ed Butler, 1987), pp 123–34; van Dijk, Germ YBIL, 30 (1987), pp 9–35; Tesón, Yale JIL, 15 (1990), pp 84–120. See also works cited at n 13, and § 4, n 1. For references to earlier works see 8th ed of this vol, p 11, n 2.

10 See § 129(3).

11 See § 128.

12 Article 24. The Security Council's role is not exclusive, and the General Assembly also has competence in matters of international peace and security. See *Certain Expenses of the United Nations*, ICJ Rep (1962), at p 163.

13 As to the sanctions of international law, particularly those under the UN Charter, see Husserl in *University of Chicago Law Review*, 12 (1945), pp 115–39; Hsu Mo, *Grotius Society*, 35 (1949), pp 4–15; Cavaré, Hag R, 80 (1952), i, pp 195–288; Fitzmaurice, MLR, 19 (1956), pp 1–13, and *Annuaire: Livre du Centenaire* (1973), pp 297–304; Kunz, AJ, 54 (1960), pp 324–47; Barkun, *Law Without Sanctions* (1968); Monaco, Hag R, 125 (1968), iii, pp 313–32; P de Visscher, *ibid*, 136 (1972), ii, pp 137–202; Fawcett, *Grotian Society Papers* (ed Alexandrowicz, 1970), pp 83–9; Leben, *Les Sanctions privatives de droit ou de qualité dans les organisations internationales spécialisées* (1979); Ferencz, *Enforcing International Law* (2 vols, 1983); Fukatsu in *The Structure and Process of International Law* (eds MacDonald and Johnston, 1983), pp 1187–205; Osieke, Neth ILR, 31 (1984), pp 183–98; Cassese, *International Law in a Divided World* (1986), pp 215–50. See also works cited at n 9, and § 4, n 1.

The functions of the Security Council and of the United Nations generally as an agency for settling disputes and for maintaining international peace and security and the relevant provisions of the Charter are discussed in detail in pt I of vol II of this work (7th ed), §§ 25*b*–*ge*. See also Bowett, *United Nations Forces* (1964); Higgins, *United Nations Peacekeeping 1946–67* (3 vols, 1969, 1970, 1980); Gutteridge, *The United Nations in a Changing World* (1969), ch III; Karaosmanoglu, *Les Actions militaires coercitives et non-coercitives des Nations Unies* (1970); Manin, *L'Organisation des Nations Unies et le maintien de la paix* (1971); Pfeifenberger, *Die Vereinten Nationen: Ihre politischen Organe in Sicherheitsfragen* (1971); Saksena, *The United*

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[14] – 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,[15] while recourse to so-called law-making treaties,[16] and certain aspects of the activities of international organisations,[17] may be pointers in the direction of an emergent

Nations and Collective Security (1974); Arntz, *Der Begriff der Friedensbedrohung, in Satzung und Praxis der Vereinten Nationen* (1975); Reuter and Combacau, *Institutions et relations internationales* (1980), ch VIII.

Note also the development in recent years of the criminal responsibility of individuals for certain acts contrary to international law: see §§ 148, 435, and vol II of this work (7th ed), § 52*b*.

On the enforcement of international judicial decisions see Art 94 of the UN Charter; Jenks, *The Prospect of International Adjudication* (1964), pp 663–726; Anand, *Studies in International Adjudication* (1964), pp 250–86; Reismann, AJ, 63 (1969), pp 4–27; Oellers-Frahm, ZöV, 36 (1976), pp 654–79.

14 Thus compulsory disputes settlement provisions in some treaties depend on the consent of states expressed by their becoming parties to the treaty. The 'compulsory' jurisdiction of the ICJ, under Art 36.2 of its Statute, depends on voluntary declarations in advance by the States concerned. On this so-called 'optional clause' see vol II of this work (7th ed), pp 58–65 and Jenks, *The Prospects of International Adjudication* (1964), pp 547–603; Merrills, BY, 50 (1979), pp 87–116.

Even where a state has made such a declaration accepting the Court's jurisdiction, circumstances may lead it, when another state refers a dispute with it to the Court in reliance on that declaration, to refuse to accept the Court's jurisdiction. See eg *Fisheries Jurisdiction Cases*, ICJ Rep (1973), pp 3, 49, and (1974), pp 3, 175; *Nuclear Tests Cases*, ICJ Rep (1973), pp 99, 135, and (1974), pp 253, 457; *United States Diplomatic and Consular Staff in Teheran Case*, ICJ Rep (1980), p 3; *Military and Paramilitary Activities Case*, ICJ Rep (1984), p 169, and (1986), p 14. On the situation arising from the non-appearance of the defendant state in such cases see Guyomet, *Le Défaut des parties à un differend devant les juridictions internationales* (1960); Eisemann, AFDI, 19 (1973), pp 351–75; Rosenne in *Il processo internazionale*, xiv *Communicazioni et studi, Studi in onore di Gaetano Morelli* (1975); Stuyt, RG, 82 (1978), pp 401–33; Fitzmaurice, BY, 51 (1980), pp 89–122; Sinclair, ICLQ, 30 (1981), pp 338–47; Mosler in *Festschrift Schlochauer* (1981), pp 439–56; Mangoldt in *Festschrift für H Mosler* (1983), pp 503–28; Bowett, Hag R, 180 (1983), ii, pp 204–21; Elkind, *Non-appearance before the International Court of Justice* (1984), and ICLQ, 37 (1988), pp 674–81; Thirlway, *Non-appearance before the International Court of Justice* (1985); Highet, AJ, 81 (1989), pp 237–54.

Examples of defendant states failing to participate in arbitration proceedings to which they had previously agreed by contract include *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* (1973), ILR, 53, p 297; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic* (1975–1977), ILR, 53, p 389; *Libyan American Oil Company v Government of the Libyan Arab Republic* (1977), ILR, 62, p 140.

15 See n 13. See also § 145ff, as to the law of state responsibility, which allows for the redress of international wrongs suffered by one state at the hands of another. See also generally, Fisher, *Improving Compliance with International Law* (1981).

16 See § 11, n 9, and § 583.

17 See § 16.

legislative process or at least an international analogue thereof.[18] 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,[19] 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.[20]

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.[21] 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 that 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.[22] 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.[23]

Furthermore international law may now properly be regarded as a complete system.[24] By this is meant not that there is always a clear and specific legal rule

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 Hag R, 92 (1957), ii, pp 49–59; H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 359–67; Waldock, Hag R, 106 (1962), ii, pp 161–9. The older 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 rules 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 where, it 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 the political motivation which may lead a state at a particular time, or in particular circumstances, to choose judicial settlement (*Border and Transborder Armed Actions*, ICJ Rep (1988), p 91).

24 See H Lauterpacht, *The Function of Law*, pp 51–135, *Development of International Law by the International Court* (1958), pp 165–7, in *Symbolae Verzijl* (1958), pp 196–221, and in *Collected Papers*, vol I (1970), pp 94–8; Siorat, *Le Problème des lacunes en droit international* (1959); Stone, BY, 35 (1959), pp 124–61; Salmon, *Rev Belge* (1967), pp 440–58; Higgins, ICLQ, 17 (1968), pp 58–84; Thirlway, BY, 60 (1989), pp 76–84. But note the critical view taken of the completeness of international law by Carty, *The Decay of International Law?* (1986).

readily applicable to every international situation, but that every international situation is capable of being determined *as a matter of law*,[25] 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 *non liquet*,[26] ie to invoke the absence of clear legal rules applicable to a dispute as a reason for declining to give judgment (unless the *compromis* 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.[27]

§ 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.[1] 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.[2] They further recognise this law by requiring their officials, courts, and nationals, 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

25 Thus although in the *Barcelona Traction* case (Second Phase) the ICJ, noted that 'International law may not, in some fields, provide specific rules in particular cases', it nevertheless proceeded to decide the case before it, arising in one of those fields, as a matter of law (ICJ Rep (1970), p 38). See also *Oil Fields of Texas Inc v Iran* (1982), ILR, 69, at pp 581 and 594: '[the] circumstances do not fall clearly within well developed and discussed doctrines of law. The controlling rules have therefore to be derived from principles of international law applicable in analogous circumstances or from general principles of law. The development of international law has always been a process of applying such established legal principles to circumstances not previously encountered' (p 581).

26 Article 12 of the ILC Draft Articles on Arbitral Procedure provides that 'the tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied' (YBILC, (1958), ii, p 8). In *Desgranges v ILO* the impermissibility for a judicial tribunal to pronounce a *non liquet* because of the silence or obscurity of the law was regarded as a 'fundamental tenet of all legal systems': ILR, 20 (1953), pp 523, 530.

27 *Fisheries Jurisdiction Case*, ICJ Rep (1974), p 9; reaffirmed in the *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 24–5.

1 See Henkin, Hag R, 114 (1965), i, pp 167–276, and *How Nations Behave: Law and Foreign Policy* (2nd ed, 1979); Fenwick, *Foreign Policy and International Law* (1968); Tunkin, *Theory of International Law* (1974), pp 273–302; Lachs, Hag R, 169 (1980), iv, pp 253–61; Brownlie, BY, 52 (1981), pp 1–8; Perkins, *The Prudent Peace: Law as Foreign Policy* (1981); Hoyt, *Law and Force in American Foreign Policy* (1985); Reisman and Willard (eds), *International Incidents* (1988). See also the following five-volume series examining the impact of international law on international crises: Bowie, *Suez 1956* (1974); Ehrlich, *Cyprus 1958–67* (1974); Chayes, *The Cuban Missile Crisis* (1974); Abi-Saab, *The United Nations Operation in the Congo 1960–64* (1978); Fisher, *Points of Choice* (1978). On the continued significance of international law even in times of stress see Jenks, *Law, Freedom and Welfare* (1963), pp 50–70. See also works cited at § 3, nn 9 and 13.

2 It is not inconsistent with this affirmation that states may differ as to precisely what rules that law prescribes.

concerning Friendly Relations and Cooperation among States:[3] 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.[1] 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 thereupon 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.[2] The admittance includes the duty to submit to all the rules in

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

[1] See Brierly, Hag R, 23 (1928), iii, reprinted in *The Basis of Obligation in International Law* (1958), pp 1–67; Fitzmaurice, Hag R, 92 (1957), ii, pp 36–47; Hart, *The Concept of Law* (1961), ch 10.

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

It may be noted that in Marxist 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'.

[2] See Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), pp 237–45. The matter is also discussed in many of the works cited in n 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.

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 true rules of a universal international law: the influence of these states on the evolution of international law is likely to be significant.[3] They have for example made a notable contribution to the demand for a codification of the principles of friendly relations and cooperation among states,[4] and for the establishment of a new international economic order,[5] and their new-found (or reacquired)[6] 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[7] and in such bodies

[3] Jennings, BY, 34 (1958), pp 350–4; Bos, *Varia Juris Gentium: Liber Amicorum for J P A François* (1959), pp 62–72; Rölling, *International Law in an Expanded World* (1960); Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961); Castaneda, *International Organisation*, 15 (1961), pp 38–48; Anand, AJ, 56 (1962), pp 383–406, and ICLQ, 15 (1966), pp 55–75, and *New States in International Law* (1972); Sinha, ICLQ, 14 (1965), pp 121–31, and *New Nations and the Law of Nations* (1967); O'Brien (ed), *The New Nations in International Law and Diplomacy* (1965); Falk, Hag R, 118 (1966), ii, pp 7–103; Green, Can YBIL, 5 (1967), pp 118–41; Doherty, AJ, 62 (1968), pp 335–64; Fatouros in *The Future of the International Legal Order*, vol 1 (eds Falk and Black, 1969), pp 317–71; Bokor-Szegö, *New States and International Law* (1970); Yakemtchouk, *L'Afrique en droit international* (1971); Anand (ed), *Asian States and the Development of International Law* (1972); Elias, *Africa and the Development of International Law* (1972), and *New Horizons in International Law* (1980), pp 21–34; McWhinney, *The International Court of Justice and the Western Tradition of International Law* (1987), ch 1. See also § 23, on the universality of international law. On the influence on international law of non-Christian and non-European cultures and civilisations see also § 22, n 3 and n 10.

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 essentially 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 contend for the existence of particular rules in a form which reflects their requirements).

[4] See § 105.

[5] See § 106.

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

[7] 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.[1] 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 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

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 § 103.

2 See the *Mavrommatis Palestine Concessions Case* (1924), PCIJ, Series A, No 2, p 12, line 10.

1 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 states 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 438–60, 64 (1948), pp 97–119, and *Collected Papers*, I (1970), pp 136–50. See also n 2 on p 19 of the 8th ed of this vol for an extensive bibliography of the earlier discussion.

2 See generally § 375. In *Globocnik-Vojka v Republic of Austria* ILR, 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'.

International Court of Justice,[3] states may confer upon them the right of direct access to international tribunals.[4] 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 treaty provisions regarding human rights and fundamental freedoms also apply directly to individuals, who may in certain circumstances institute proceedings before an international tribunal to secure the observation to 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.[8] Similarly, offences against the peace and security of mankind are offences for which the responsible individuals are punishable.[9] 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 rights 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

3 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), § 25*a*.

4 See § 375, n 2, which refers also to the right of individuals to submit petitions to international tribunals; and § 407, n 49.

5 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 an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national courts': (1928) PCIJ, Series B, No 15, p 17. See for comment thereon H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 173–6.

6 See § 19, sect (3).

7 See § 431ff. See also § 399 as to refugees.

8 See § 148.

9 See §§ 148, n 8, and 435.

10 See § 19.

11 *Collected Papers*, p 78.

12 See § 49; and note particularly § 49, n 4 as to so-called 'national liberation movements'.

13 See § 99ff.

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.[14]

The possibility that inter-governmental organisations may possess international legal personality is now accepted.[15] 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. In affirming the international personality of the United Nations[16] 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'.[17] Such new subjects of international law, the Court explained, need not necessarily be states or possess the rights and obligations of statehood. For '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'.[18] Furthermore, as the International Court stated in a later

[14] See § 84, n 17. See also § 85, n 29, as to the concept of 'peoples'. 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 tribes.

[15] See Jenks, BY, 22 (1945), pp 267–75, and *The Prospects of International Adjudication* (1964), pp 185–224; H Lauterpacht, *International Law and Human Rights* (1950), pp 12–26, and *Collected Papers*, (vol I, 1970), pp 137–41; Morelli, Hag R, 89 (1956), i, pp 557–83; Bastid in *Festschrift für Spiropoulos* (1957), pp 35–42; Broches, Hag R, 98 (1959), iii, pp 316–38; Dupuy, Hag R, 100 (1960), ii, pp 529–61; Pescatore, Hag R, 103 (1961), ii, pp 27–52; Weissberg, *The International Status of the United Nations* (1961); Seyersted, *Objective International Personality of Intergovernmental Organisations* (1963); El Erian, YBILC (1963), ii, pp 179–84, and *ibid* (1967), ii, pp 137–8; O'Connell, RG, 67 (1963), pp 24–35; Seyersted, *Nordisk TA*, 34 (1964), pp 46–61, Indian JIL, 4 (1964), pp 1–74, and *Acta Scandinavica*, 34 (1964), pp 3–112; Quadri, Hag R, 113 (1964), iii, pp 423–33; Bishop, Hag R, 115 (1965), ii, pp 261–8; UN Secretariat's *Study of Practice* (1967), reproduced in YBILC (1967), ii, pp 207–22, 299–302; Whiteman, *Digest*, 13 (1968), pp 10–28; Ginter, *Die Völkerrechtliche Verantwortlicheit internationaler Organisationen gegenüber Drittstaaten*; Mosler, Hag R, 140 (1974), iv, pp 50–53, 66–7; Tunkin, *Theory of International Law* (1974), pp 357–65, and Hag R, 147 (1975), iv, pp 198–206; Bowett, *The Law of International Institutions* (4th ed, 1982), ch 11; Barberis, Hag R, 179 (1983), i, pp 213–38; Seidl-Hohenveldern, *Corporations in and under International Law* (1987), pp 69–108. See also § 596, as to the treaty-making capacity of international organisations generally, and also with particular reference to the capacities and competences of the EEC in matters of external relations.

[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 international claims as affirmed 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 is not limited to matters of private law), the capacity to conclude 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 note also certain powers vested in the UN under the Treaty of Peace with Italy 1947 in relation to Trieste (§ 96, n 5)); certain powers in relation to West New Guinea (West Irian) under GA Res 1752 (XVII) (1962), UNYB (1962), pp 124–7; and the powers of the UN Council for Namibia (§ 88, n 20).

[17] ICJ Rep (1949), p 178.

[18] *Ibid*. As international personality is not limited to states, the latter are bound to fulfil 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 the ICJ held that the UN was entitled to bring a claim also against a non-member state although in the same case the Court held that the basis of the claim by the UN is a breach of a duty due to it. For, once the Court found that the UN was endowed by the Charter with international personality not only in relation to its members but *erga omnes* (*ibid*, p 185), it followed that all states – whether members of the UN or not – owed it duties as prescribed by general international law. *Sed quaere*. See Fitzmaurice, BY, 29 (1952), p 21. Note also the observations of the Federal German Constitutional Court on the non-statal character of the European Community: *Application of Frau Kloppenburg* [1988] 3 CMLR 1, 18.

While the Court has thus held the UN vested with certain attributes of international personality *erga omnes*, there is a question whether such a conclusion should also follow in relation to an organisation of a less primary and universal character, and thus whether non-members of such a more limited organisation are under any obligation to recognise its international personality.

case,[19] 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 intended to establish for the organisation a legal personality in international law separate from that of the member states. The constitution of an 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.[20] 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.[21] The international personality of international organisations is

[19] Advisory Opinion on the *Interpretation of the WHO–Egypt Agreement*, ICJ Rep (1980), p 73, at pp 89–90.

[20] It is legitimate to deduce from the unanimous finding of the Court in the *Reparation for Injuries* case that international personality is a necessary attribute of any public international organisation which possesses a personality distinct from its members and whose rights and duties, in the light of its constitution and practice, are such that they cannot be effective without the attribution of international personality to the organisation in question: ICJ Rep (1949), pp 178, 180.

[21] The question was much discussed in the context of the question whether the member states of the International Tin Council were liable for the debts of the Council, which question was answered in the negative by the English courts, on the ground that in English law (by virtue of an Order in Council and not by virtue directly of the relevant treaty provision) the Council had a separate legal capacity to conclude contracts and that therefore only the Council, and not its member states, could be held liable on its contracts: *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523 (House of Lords). See for a somewhat similar distinction between an international organisation and its member states, *Confédération Française Democratique du Travail v European Communities*, YBECHR (1978), p 530. The Tin Council litigation was extensive, and involved several distinct issues: for the decision of the Court of Appeal on the main issues, affirmed by the House of Lords, see the same parties, [1988] 3 WLR 1033. See also, on other aspects of the litigation, the decisions of the Court of Appeal in *Maclaine Watson & Co Ltd v International Tin Council* [1988] 3 WLR 1169; and *In re International Tin Council* [1988] 3 WLR 1159. For comment on the various stages of the litigation see Eisemann, AFDI, 31 (1985), pp 730–46; Sands, Neth IL Rev, 34 (1987), pp 367–91; Herdegen, ZöV, 47 (1987), pp 537–57, and Neth IL Rev, 35 (1988), pp 135–44; Cheyne, ICLQ, 36 (1987), pp 931–5, 38 (1989), pp 417–24, and 39 (1990), pp 945–52; Kullman, Germ YBIL, 30 (1987), pp 205–23; Seidl-Hohenveldern, *ibid*, 32 (1989), pp 43–54; Greenwood, BY, 60 (1989), pp 461–75, 477–9; Lewis, *State and Diplomatic Immunity* (3rd ed, 1990), pp 166–81. See also *Westland Helicopters Ltd and*

manifest in various areas of international law, such as the law of treaties,[22] international claims,[23] privileges and immunities,[24] and maritime flags.[25] 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.[26]

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.[27]

Arab Organisation for Industrialization et al (1982–5), ILR, 80, p 596, and *Arab Organisation for Industrialization v Westland Helicopters Ltd* (1987), *ibid*, p 622..

See also, as to the recognition in English law of the legal personality of an international entity of which the UK was not a member and which was not established in the UK, but which was created a corporate body in a foreign state recognised by the UK, *Arab Monetary Fund v Hashim (No 3)* [1991] 2 WLR 729; and, generally on this point, UKMIL, BY, 49 (1978), pp 346–8; Seidl-Hohenveldern, *Corporations in and under International Law* (1987), pp 100–104. See also *Bumper Development Corp. v Commissioner of Police of the Metropolis, The Times*, 14 February 1991. These various cases leave open the question whether legal personality will be recognised in English law if it flows solely from customary international law (the position of a foreign state suggests that it might be recognised) or from incorporation under the laws of a territorial entity not recognised as a state (as to which see § 56, nn 27–32). As to the history of the personality of international organisations in English law, see Marston, ICLQ, 40 (1991), pp 403–24.

22 See § 596.

23 See § 145, n 2.

24 See § 465, n 2, and p 1071.

25 See § 289.

The first General Assembly approved the emblem of the UN for its official seal, and recommended that legislation should be passed by members to prevent its use for commercial purposes by means of trade marks or commercial labels as well as the use of the official seal and of the name of the UN, and of abbreviations of that name through the use of initial letters: Res 92 (I) (1946). See also UN Juridical YB (1965), p 221; *ibid* (1970), pp 168–9; *ibid* (1973), pp 136–8; *ibid* (1976), pp 176–7; and *ibid* (1977), pp 188–91. In Res 167 (II) (1947) the General Assembly adopted a UN flag, and pursuant to the Assembly's request the Secretary-General later that year promulgated a Flag Code which provided: (a) that the flag of the UN shall not be subordinate to any other flag; (b) that it shall be flown from all buildings, offices and official residences designated as such by the UN; (c) that it shall be used by any unit acting on behalf of the UN such as the Military Staff Committee. See Fawcett, ILQ, 3 (1950), p 279. By a Resolution of the Security Council adopted in 1950 the forces operating in Korea were given the name and the flag of the UN. See Baxter, BY, 29 (1952), pp 332–7. The UN flag was also used by eg the UN Security Force in West New Guinea (West Irian) (see paragraph 7(b) of the Secretary-General's General Directive, UN Juridical YB (1964), p 36), the UN force in the Congo (UNTS, 414, p 229, para 26), and the UN force in Cyprus (*ibid*, 492, p 57, para 20). As to the use of the UN flag in trust territories see GA Res 325 (IV) (1949).

26 See Art 65 of the Statute of the ICJ, and Art 96.2 of the Charter of the UN. A list of the organs and agencies authorised to request advisory opinions is given in the annual vols of the YB of the ICJ.

27 The creation of the European Communities has thus involved, at a regional level, a notable concession of sovereign powers by member states and a degree of supranationality for the Communities. The transfer of sovereign powers from the member states to the Communities and the pooling of sovereignty involved in membership of the Communities are, however, limited by the ultimate possibility of withdrawal from the Communities: so long as that possibility remains, 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 covered by the European Communities: 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 Treaties. See Report on European Political Cooperation, agreed by the Foreign Ministers of the European Communities on 13 October 1981 (Cmnd 8424); and Art 30 (Title III) of the Single European Act 1986 (ECT No 12 (1986); ILM, 25 (1986), p 503). And see van der Meersch, Hag R, 148 (1975), v, pp 1–433; Charpentier, AFDI, 25 (1979), pp 753–78; Perrakis, AFDI, 34 (1988), pp 807–22; and *Crotty v An Taoiseach* [1987] 2 CMLR 666, on which see O'Connor, AFDI, 33 (1987), pp 762–73, and Lang, CML Rev, 24 (1987), pp 709–18.

The so-called 'supranationality' of the European Communities has been much discussed, particularly in the context of the direct applicability and supremacy of Community law, as to which see § 19, nn 81, 88–9, respectively. The development of its international competences has owed much to decisions of the European Court of Justice in the context of the respective treaty-making powers of the Communities and their member states. The European Court has held that the 'Community constitutes a new legal order of international law': *van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

28 See generally Lador-Lederer, *International Non-Governmental Organisations* (1963); White, *International Non-Governmental Organisations: Their Purposes, Methods and Accomplishments* (1968); H Lauterpacht, *Collected Papers* (vol 1, 1970), p 140, n 8; Benvenuti, Ital YBIL, 4 (1978–79), pp 84–102; Brownlie, *Principles of Public of International Law* (4th ed, 1990), pp 68–9; Schermers, *International Institutional Law* (2nd ed, 1980), pp 15–18, 107–11.

29 See eg n 31.

30 See eg the Appendix to the Final Act of the Third UN Conference on the Law of the Sea 1982, listing non-governmental organisations among the observers participating in the Conference.

31 Such arrangements have been made pursuant to the Council's Res 1296 (XLIV) (1968), superseding the criteria for consultative arrangements set out in Res 288B (X) (1950). By Res 3 (II) (1946) the Council established a Standing Committee on NGOs, with 19 members (Res 1981/50 (1981)) elected for a term of four years (Res 70 (ORG-75) (1975)). A list of NGOs in consultative status with the Council is to be found in the annual volumes of the UNYB, eg 36 (1982), pp 1243–51. Such NGOs may send observers to public meetings of the Council and its commissions, with certain rights to submit views in writing and in some cases orally. Representatives of NGOs attending meetings pursuant to these arrangements are entitled to no privileges and immunities, although s 11 of the Headquarters Agreement with the USA provides for their freedom of access to the Headquarters district.

32 TS No 41 (1991). See also the Explanatory Report prepared by the Committee which drew up the draft Convention and Wiederkehr, AFDI, 33 (1987), pp 749–61.

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[28] (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[29] or international conferences.[30] 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'.[31] A European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations was concluded on 24 April 1986.[32]

The difficulty of drawing sharp lines between different categories of organisa-

tions is illustrated by a further intermediate class between inter-governmental organisations and purely private international organisations.[33] This comprises companies and consortia which, while their structure is essentially that of private law 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.[34]

SOURCES OF INTERNATIONAL LAW

H Lauterpacht, *Analogies (passim)*, *The Function of Law*, pp 51–135, *Collected Papers* (vol 1, 1970), pp 51–98, and in Hag R, 62 (1937), iv, pp 149–87 Spiropoulos, *Théorie générale du droit international* (1930), pp 83–114 Cavaglieri, *Rivista*, 14 (1921), pp 149–87, 289–314, 479–506 Blühdorn, *Die Einführung in das angewandte Völkerrecht* (1934) pp 112–85 Korte, *Grundfragen der völkerrechtlichen Rechtsfähigkeit* (1934), pp 56–102 Borchard, *Recueil d'Études for Gény*, 3 (1934), pp 328–61 Finch, *The Sources of Modern International Law* (1937) (translation from Hag R, 53 (1935), iii, pp 535–627) Redslob, *Les Principes du droit des gens moderne* (1937), pp 9–20, 29–47 Ziccardi, *La costituzione dell' ordinamento internazionale* (1943), pp 161–449 Sørensen, *Les sources de droit international* (1946) and Hag R, 101 (1960), iii, pp 16–108 Kelsen, *Principles of International Law* (1952), pp 301–66 Oppenheim, ZI, 25 (1915), pp 1–13 Perassi, *Rivista*, 2nd series, 6 (1917), pp 195–223, 285–314 Sherman, AJ, 15 (1921), pp 349–60 Reeves, *ibid*, pp 361–74 Corbett, BY, 6 (1925), pp 20–30 Mulder, RI, 3rd series, 7 (1926), pp 555–76 Brierly, Hag R, 23 (1928), iii, pp 478–88, and 58 (1936), iv, pp 69–81 Verdross, *ibid*, 30 (1929), v, pp 275–305 Bourquin, *ibid*, 35 (1931), pp 48–80 Métall, ZöR (1931), pp 416–28 Heydte, ZV, 16 (1931–32), pp 461–78 Hostie, Hag R, 40 (1932), ii, pp 476–87 Morelli, *Rivista*, 24 (1932), pp 388–404, 483–406 Gihl, *Nordisk TA*, 3 (1932), pp 38–64 Castberg, Hag R, 43 (1933), i, pp 313–81 Strupp, *ibid*, 47 (1934), i, pp 301–88 Le Fur, *ibid*, 55 (1935), iv, pp 192–213 Kaufmann, *ibid*, 55 (1935), iv, pp 491–524 Gardiner, JCI, 3rd series, 17 (1935), pp 251–9 Wengler, ZöR, 16 (1936), pp 333–92 Basdevant, Hag R, 58 (1936), iv, pp 497–522 Kopelmanas, RI, 3rd series, 18 (1937), pp 88–143; BY, 18 (1937), pp 127–51; and RI (Paris), 21 (1938), pp 101–50 Maranini, *Annuario di diritto internazionale*, 2 (1939), pp 141–71 Blühdorn, OZöR, 1 (1946), pp 136–71 Fitzmaurice in *Symbolae Verzijl* (1958), pp 153–76 Guggenheim, Hag R, 94 (1958), ii, pp 5–81 Jenks, *Common Law of Mankind* (1958), pp 89–123; and *A New World of Law?* (1969), pp 123–218 Waldock, Hag R, 106 (1962), ii, pp 39–103 Quadri, Hag R, 113 (1964), iii, pp 319–72 Rosenne, *The Law and Practice of the International Court* (vol 2, 1965), pp 603–16 Parry, *Sources and Evidence of International Law* (1965) Bishop, Hag R, 115 (1965), ii, pp 214–50 Jennings, Hag R, 121 (1967), ii, pp 329–45 Marek (ed), *Les Sources du droit international* (1967) Verzijl, *International Law in Historical Perspective* (vol 1, 1968), pp 1–89 Friedmann, Hag R, 127 (1969), ii, pp 131–72 Elias, *Transnational Law in a Changing Society* (1972), pp 34–69 P de Visscher, Hag R, 136 (1972), ii, pp 59–133 Thirlway, *International Customary Law and Codification* (1972), pp 31–45 Verdross, *Die Quellen des universellen Völkerrechts* (1973) Mosler, Hag R, 140 (1974), iv, pp 83–169 Tunkin, *Theory of International Law* (1974), pp 91–203; and Hag R, 147 (1975), iv, pp 111–52 Strebel, ZöV, 36 (1976), pp 301–43 Kearney in *The Future of the International Court of Justice*, vol II (ed Gross, 1976), pp 610–723 Jennings, *Ann Suisse* 37 (1981), pp 59–88 van Hoof, *Rethinking the Sources of International Law* (1983) *Restatement (Third)*, i, pp 16–39 Cassese, *International Law in a Divided World* (1986), pp 169–99 DeLupis, *Concept of International Law* (1987) Henkin, Hag R, 216 (1989), iv, pp 45–66 See also works cited at §§ 10, n 1 (as to customary international law), § 12, n 1 (as to general principles of law), § 15, n 1 (as to equity), and § 16, n 1 (as to role of international organisations).

[33] See Friedmann, *The Changing Structure of International Law* (1964), pp 181–4, 213–31; Seidl-Hohenveldern, *Corporations in and under International Law* (1987), pp 109–22. On the status of international associations and especially on the Belgian Law of 25 October 1919, granting to them a special status see Normandin in *Répertoire*, ii, pp 104–32. See also Bastid and others in *Annuaire*, 43 (1) (1950), pp 547–630, and 43 (2), pp 335–69. The Institute of International Law adopted in 1950 a resolution containing the project of a convention for the granting of international status to private international associations. The convention provides in particular for the treatment, in various respects, of such associations in a manner not less favourable than other non-profit-making associations within the territory of the contracting parties.

[34] See Ijalaye, *The Extension of Corporate Personality in International Law* (1978); 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.

§ 8 Meaning of 'source' There is much discussion of the meaning to be attributed to such terms as 'source', 'cause', 'basis' and 'evidence' of international law.[1] 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,[2] 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 the rules 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.

[1] On the different meanings of these terms see Corbett, BY, 6 (1925), pp 20–30; Fitzmaurice in *Symbolae Verzijl* (1958), p 153; Parry, *The Sources and Evidences of International Law* (1965).

[2] See § 5.

§ 9 The sources of international law It is the practice of states which demonstrates 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:[1]
>
> 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.[2] 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.[3]

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,[4] 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.[5] 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

[1] The ICJ in applying international law must also apply any special rules in the *compromis* 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 Thirlway, BY, 60 (1989), pp 143–57.

[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 Pacific Settlement of Disputes 1928–1948*, p 116ff. See also Art 11 of the ILC Draft on Arbitral Procedure (YBILC, (1958), ii, p 8), providing for the application of Art 38.1 of the Statute of the ICJ in the absence of other agreement between the parties to a dispute as to the law to be applied by the tribunal. See also the *Mavina and Naulilaa Cases*, AD, 4 (1927–28), No 317.

[4] But note Ago's theory of custom as largely 'spontaneous' law, expressed in Hag R, 90 (1956), ii, pp 855–952, and AJ, 51 (1957), pp 691–733; and see Ziccardi, *Comunicazione e studi*, 10 (1960), pp 189–257. And for critical comment see Kunz, AJ, 52 (1958), pp 85–91.

[5] See on the significance of consent in international law, Schwarzenberger, Hag R, 87 (1955), i, pp 262–89; and generally § 5.

by an act of 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),[6] states are not free to ignore the prescriptions of *ius cogens*.[7] 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 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.[8] This was said[9] 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.[1] For this reason, although an international court is

[6] See eg *Assessment of Aliens for War Taxation Case* (1965), ILR, 43, pp 3, 8, holding that a treaty prevails over customary law, both as *lex posterior* and *lex specialis*.

[7] See § 2 and below § 594.

[8] See generally as to this source § 12.

[9] For discussion of this point see 8th ed of this vol, pp 106–7. 'Naturalist' is the appellation given to those writers who deny that there is any positive international law as the outcome of custom or treaties, and who maintain that all international law is only part of the law of nature. 'Positivists', on the other hand, are those writers who not only defend the existence of a positive international law, but consider it more important than the natural law of nations, the very existence of which some positivists deny. See generally on these two approaches to international law, *ibid*, §§ 55, 56; and Midgley, *The Natural Law Tradition and the Theory of International Relations* (1975); Bos, Neth IL Rev, 29 (1982), pp 3–31.

[1] See Gianni, *La Coutume en droit international* (1931); Gouet, *La Coutume en droit constitutionnel interne et en droit constitutionnel international* (1932); Küntzel, *Ungeschriebenes Völkerrecht* (1935); Haemmerlé, *La Coutume en droit des gens d'après la jurisprudence de la Cour Permanente de Justice Internationale* (1936); Balladore Pallieri, *Rivista*, 20 (1928), pp 338–74; Ziccardi, *La costituzione dell' ordinamento internazionale* (1943), pp 317–70; Bourquin,, Hag R, 35 (1931), pp 61–75; Séfériadès, RG, 43 (1936), pp 129–96; Kopelmanas, BY, 18 (1937), pp 127–51; Rousseau, pp 815–88; Guggenheim in *Etudes Georges Scelle* (vol 1, 1950), pp 275–84; Kunz, AJ, 47 (1953), pp 662–9; Barile, *Comunicazione e studi*, 5 (1953), pp 141–229, *Rivista*, 37 (1954), pp 168–202, and Hag R, 161 (1978), iii, pp 48–64; Ch de Visscher, RG, 59 (1955), pp 353–69; MacGibbon, BY, 33 (1957), pp 115–45; Fitzmaurice, Hag R, 92 (1957), ii, pp 95–116; Tunkin, Hag R, 95 (1958), iii, pp 8–49; Ziccardi, *Comunicazione e studi*, 10 (1960), pp 187–257; Wolfke, *Custom in Present International Law* (1964); Jenks, *The Prospects of International Adjudication* (1964), pp 225–65; Duisberg, *Jahrbuch für Internationales Recht*, 12 (1965), pp 140–57; Holloway, *Modern Trends in Treaty Law* (1967), pp 545–651; Verdross, ZöV, 29 (1969), pp 635–53; Skubiszewski, ZöV, 31 (1971), pp 810–54; d'Amato, *The Concept of Custom in International Law* (1971); Thirlway, *International Customary Law and Codification* (1972); Akehurst, BY, 47 (1974–75), pp 1–54; Bernhard, ZöV, 36 (1976), pp 50–75; Bleckmann, *ibid*, pp 374–405, and *ibid*, 37 (1977), pp 504–28, and in *Völkerrecht als Rechtsordnung (Festschrift für H*

bound in the first instance to consider any applicable treaty provisions binding upon the parties,[2] 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,[3] 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.[4]

Article 38 of the Statute of the International Court refers, somewhat curiously at first sight, to 'international custom, as evidence of a general practice accepted as law': one might think that it is rather the general practice accepted as law which provides the evidence for the existence of an international custom.[5] 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.[6] The

Mosler) (eds Bernhardt, Geck, Jaenicke and Steinberger, 1983), pp 89–110; Manin, RG, 80 (1976), pp 7–54; Arechaga, Hag R, 159 (1978), i, pp 9–34; Weil, AJ 77 (1983), pp 433–9; Bin Cheng in *The Structure and Process of International Law*, eds Macdonald and Johnston (1983), pp 513–54; Villiger, *Customary International Law and Treaties* (1985); Haggenmacher, RG, 90 (1986), pp 5–126; D'Amato, AJ, 8 (1987), pp 101–5; Kirgis, *ibid*, pp 146–51; Morrison, *ibid*, pp 160–2; reports (by Mendelson) to the ILA on customary international law, *Report* (63rd Conference, 1988), pp 935–59; Danilenko, Germ YBIL, 31 (1988), pp 9–47; Dupuy, RG, 93 (1989), pp 569–97.

2 It is in this forensic sense that Art 38(1) may be said to establish a hierarchy of sources of international law; and see *The Netherlands (PTT) and the Post Office (London) v Nedlloyd* (1977), ILR, 74, p 212. On the hierarchy of sources of international law in general, see H Lauterpacht, *Collected Papers*, vol 1 (1970), pp 86–9; Akehurst, BY, 47 (1974–75), pp 273–85; Bos, Neth IL Rev, 25 (1978), pp 334–44.

3 And 'whose function,' as the revised Statute lays down in Art 38, 'is to decide in accordance with international law such disputes as are submitted to it'.

4 See H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 368–93, and Beckett, Hag R, 39 (1932), i, pp 135–272, and *ibid*, 50 (1934), iv, pp 193–305. See also § 13. See Wilson, *The International Law Standard in Treaties of the United States* (1953), for an instructive exposition of incorporation in treaties, of rules and principles of international law.

5 But since the practice in question is followed by states because it is believed by them to be already legally obligatory, the source of the obligation must precede the custom to which the practice gives rise: in this sense the custom may correctly be regarded as the *evidence* of the practice accepted as law, not its source.

6 See Parry, ICLQ, 6 (1957), pp 657–69, and *Grotius Society*, 44 (1958–59), pp 145–86; Mosler, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 460–89; Rovine, AJ, 67 (1973), pp 314–19; Green, ICLQ, 29 (1980), pp 187–205; Bothe and Ress in *International Law in Comparative Perspective* (ed Butler, 1980), pp 49–66; Ferrari Bravo, Hag R, 192 (1985), iii, pp 233–330; Marston, in *Perestroika and International Law* (eds Carty and Danilenko, 1990), pp 27–47.

Unlike in the case of treaties, it is not necessary for the creation of international custom that there should be on the part of the acting organs of the state an intention to incur mutually binding obligations; it is enough if the conduct in question, as in the case of decisions of municipal courts on matters of international law, is dictated by a sense of legal obligation in the sphere of international law. For the same reason uniform municipal legislation constitutes in a substantial sense evidence of international custom (see, to the same effect, Gianni, *La Coutume en droit*

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.[7]

The terms of Article 38(1)(b) also make it clear that there are two essential elements of custom,[8] 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.[9] 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. ...'[10]

The Court declined to acknowledge, in the case before it, the existence of a

international (1931), p 129). The same applies to other manifestations of the views of competent state organs on questions of international law in so far as they partake of an undoubted degree of uniformity, eg governmental instructions, state papers, etc. The difference between custom and evidence of custom is not in practice as clear-cut as may appear at first sight.

7 This follows the example set in the USA by the publication of Digests prepared by Wharton, Moore, Hackworth and Whiteman, and since 1973 the annual volumes of *Digest of United States Practice in International Law* published by the Department of State. See Parry, *British Practice in International Law*; Kiss, *Répertoire Français de Droit International Public*; Ago and Toscano, *La Prassi Italiana di Diritto Internazionale (1861–1887)* (2 vols, 1970), with further 4 vols (1979–80) covering the period 1887–1918; Guggenheim, *Répertoire suisse de droit international 1914–1939* (4 vols, 1975). See also McNair, *International Law Opinions* (3 vols, 1956), and Parry, *Law Officers' Opinions to the Foreign Office 1793–1860* (97 vols) and *ibid, 1861–1939* (microfilm, 6 reels). Several international legal periodicals contain regular surveys of state practice in matters affecting international law. Article 24 of the Statute of the ILC required the Commission to 'consider ways and means for making the evidence of customary international law more readily available': and see YBILC (1950), ii, pp 367–74. The Council of Europe set up a Committee of Experts on the publication of national digests of state practice in the field of public international law and in 1964 the Committee of Ministers adopted Resolution 64(10) recommending to governments of member states that they publish such digests: for the text of the resolution see ICLQ, 14 (1965), pp 649–50. By Res 68(17) the Committee of Ministers in 1968 adopted a Model Plan for the classification of documents concerning state practice. Several members of the Council of Europe have either begun, or announced that they would begin, work on digests of their state practice. See Maryan Green, ICLQ, 19 (1970), pp 118–24.

8 As to the proof of custom before international tribunals see Jenks, *The Prospects of International Adjudication* (1964), pp 225–65.

9 The distinction between custom and usage in international law is not always referred to in the sense suggested in the text. See, for instance, Hall, § 139, where he says, 'this *custom* has since hardened into a definite *usage*'. See generally as to international comity, § 17.

10 ICJ Rep (1950), at pp 276, 277.

custom as claimed by Colombia.[11] 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,[12] stressed that in order for state practice to constitute the necessary *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 *opinio juris sive necessitatis*. The States concerned[13] must therefore feel that they are conforming 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.'[14]

This subjective element may be deduced from various sources, including the conclusion of bilateral or multilateral treaties,[15] attitudes to resolutions of the United Nations General Assembly and other international meetings,[16] and statements by state representatives.[17]

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11 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 so much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various 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 Morocco* case, see ICJ Rep (1952), p 200.

12 As to the development of customary rules from treaties, see § 11.

13 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 109.

14 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 negativing 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 (1960), at pp 42–3. See also the judgment of the PCIJ in the *Lotus* case, Series A, No 10: 'Even if the rarity 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).

15 See § 11, n 12.

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 *opinio juris* on its part (see eg *Government of Kuwait v American Independent Oil Co* (1982), ILR, 66, pp 518, 606–7).

16 *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 99–101; and see § 16.

17 *Ibid*, pp 100–1.

In the *Military and Paramilitary Activities* case[18] the International Court of Justice said that the state practice which was necessary in order to establish a rule of customary international law did not have to be in rigorous conformity with the rule. 'In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.'[19] In addition to considering the conduct of states, the court in ascertaining the content of an alleged rule of customary international law, may consider multilateral conventions which 'may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.'[20]

For purposes of Article 38 of the Statute of the International Court of Justice, a practice must be general in order to constitute an international custom; and it would seem implicit that its acceptance as law must similarly be that of the international community generally – although in certain fields it is the practice and attitude of states directly concerned in that field which may be of most importance.[21] Thus a practice does not have to be either observed or accepted as law, tacitly or expressly, by every state.[22]

It is for this reason that established rules of customary international law are binding on a new[23] or existing state notwithstanding that it may dissent from some particular rule (although express dissent by a state in the formative stages of a potential rule of customary law may prevent it ever becoming established, at least as against the dissenting state).[24]

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18 ICJ Rep (1986), p 14. See generally § 129, n 4. On those aspects of this judgment relating to the nature of customary international law, see Meron, AJ, 81 (1987), pp 348–70; Akehurst, Indian JIL, 27 (1987), pp 357–69; Czaplinski, ICLQ, 38 (1989), pp 151–66.

19 ICJ Rep (1986), at p 98.

As regards state practice which is *prima facie* incompatible with a recognised rule, the Court noted that if 'a State acts in [such] a way ..., but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'. The Court later added that the significance for the Court of state conduct prima facie inconsistent with a given principle lies in the nature of the ground offered as justification: if states rely on such conduct as reflecting a novel right or an unprecedented exception to an established principle, that might, if shared in principle by other states, tend towards a modification of customary international law, but if (as in the particular instance before the Court) that conduct is not justified by reference to a new right of intervention or a new exception, that state practice does not undermine established principle: *ibid*, pp 108–9.

20 *Libya–Malta Continental Shelf Case*, ICJ Rep (1985), at p 29. See also the *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 97; Baxter, BY, 41 (1965–66), pp 275–300, and Hag R, 129 (1970), i, pp 31–74; and § 11.

21 See the *Anglo–Norwegian Fisheries Case*, ICJ Rep (1951), p 139; for comment see Fitzmaurice, BY, 30 (1953), pp 31–2. The requirement of generality for a rule of customary international law was referred to by the ICJ in the *North Sea Continental Shelf* cases, ICJ Rep (1969), , at pp 41–2.

22 As to the emphasis sometimes placed in Marxist theory on the need for consent to rules of international law, see § 104, n 5. This emphasis on consent has led to a strong preference for treaties over customary law: see Triska and Slusser, *The Theory, Law and Policy of Soviet Treaties* (1962), pt I. See also § 23, n 22, on the Marxist, and particularly Soviet Russian, approach to international law in general; and § 104, n 6, on as to 'peaceful coexistence'.

23 See § 5, at n 2.

24 See discussion of the 'persistent objector' by Stein, Harv ILJ, 26 (1985), pp 457–82; Charney,

A practice which is not general, but limited to a number of states (even to two only)[25] and accepted as law by them, may still constitute a customary rule of law, but 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 observations by the International Court of Justice in the *Asylum*[26] and *United States Nationals in Morocco*[27] cases, emphasising the need for the consent of the parties.[28] However, where the Court is faced with the need to apply a general rule of customary international law, reflecting a general practice, the mere fact that the parties to a dispute are in agreement as to the existence of such a rule is not sufficient.[29]

As usages have a tendency to become custom, the question presents itself: at what stage does a usage turn into a custom? This question is one of fact, not of theory. All that theory can say is this: Wherever and as soon as a line of international conduct frequently adopted by states is considered by states generally 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 fairly rapidly, as for example in relation to the continental shelf,[30] and perhaps the exclusive economic zone;[31] this may occur particularly where the new rule has its origin in, or is soon reflected in, a multilateral treaty of appropriately general application.[32] 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

BY, 56 (1985), pp 1–24; and on the effect of acquiescence, see MacGibbon, BY, 31 (1954), at pp 150–51, and *ibid*, 33 (1957), pp 115–45.

A further complication may arise where other states acquiesce in the dissenting state's dissent. These questions were raised in the *Anglo–Norwegian Fisheries Case*, ICJ Rep (1951), p 116, where Norway's persistent opposition to any alleged ten-mile rule for bays was held to prevent such a rule (if it existed) being applied against Norway (at p 131). On this aspect of the case see Fitzmaurice, BY, 30 (1953), pp 24–6. See also § 579 as to acquiescence and the effect of protests in general.

25 *Rights of Passage Case*, ICJ Rep (1960), at pp 39–40. See also Dominicé, *Ann Suisse*, 19 (1962), pp 71–101; D'Amato, AJ, 63 (1969), pp 211–23.

26 ICJ Rep (1950), at p 276 (quoted at n 10 of this section).

27 ICJ Rep (1952), at p 200.

28 See Fitzmaurice, BY, 30 (1953), pp 68–9.

29 *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 97–8.

30 See § 314ff; and H Lauterpacht, BY, 27 (1950), pp 376–433, especially pp 393–8. See also the passage from the judgment of the ICJ in the *North Sea Continental Shelf* cases quoted at p 35.

31 See § 328ff; and see *Rego Sanles v Ministère Public* (1979), ILR, 74, p 141. As to the crystallisation as customary law of certain concepts relating to fishery rights in the years immediately following the failure of the 1960 Law of the Sea Conference to reach agreement on the extent of fishery rights, see the *Fisheries Jurisdiction Case*, ICJ Rep (1974), at p 23.

32 See p 33.

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,[33] 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.

§ 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.[1]

Treaties are, however, a formal source of international law in only a somewhat special sense.[2] 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.[3]

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.[4] Despite this pre-eminence the Charter remains a 'multilateral treaty, albeit a treaty having certain

33 See § 16.

1 See § 584. See also Finch in Hag R, 53 (1935), iii, pp 588–604.

2 See Fitzmaurice in *Symbolae Verzijl* (1958), p 158, for a rejection of treaties as a formal source of international law in any sense. On treaties as a source of international law see Starke, *Studies in International Law* (1965), pp 81–90; Barberis, AFDI, 30 (1984), pp 239, 240–7.

3 See de Visscher, RG, 58 (1955), pp 353–69. 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 BFSP (170 vols, covering the period from 1812 to 1968).

4 Charter of the UN Art 103.

special characteristics',[5] and accordingly the principles and rules applicable in general to the interpretation of treaties apply also to the Charter.[6]

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 *rules expressly recognised* by the contesting States'.[7] Some treaties, however, may appear to have a wider effect, and to lay down rules of a general character[8] applicable to the international community generally. Such treaties are often for convenience referred to as law-making treaties.[9] Strictly speaking they are, however, normally not 'law-making' except in the narrow sense in which all treaties are law-making for the parties to them. There is in the international community at 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.[10] Exceptionally, however, as the International Court of Justice has recog-

[5] *Certain Expenses of the United Nations*, ICJ Rep (1962), at p 157.

[6] Article 5 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.

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

[8] As to the principle *pacta tertiis nec nocent nec prosunt*, see § 626.

[9] See § 583. On recent developments in the international law-making process generally, see Gotlieb, Hag R, 170 (1981), pp 131–55.

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 rules of future conduct for the parties in a way similar to that in which a private contract lays 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.

See, on the use of the term 'international legislation', McNair, Iowa Law Rev, 19 (1933–34), pp 177–89; Hudson, *Legislation*, v, p viii. See also Brierly, *Problems of Peace*, 5th series (1930), pp 205–29; McNair, BY, 11 (1930), pp 110, 112–16; Gihl, *International Legislation* (1937); Starke, BY, 23 (1946), pp 341–6; Engel, AJ, 44 (1950), pp 737–9; Jenks, BY, 29 (1952), pp 107–10 and *A New World of Law?* (1969), pp 175–86; Kelsen, *Principles of International Law* (1952), p 321ff; Ch de Visscher, RG, 59 (1955), at p 359ff; Lachs, Hag R, 92 (1957), ii, pp 236–333; Schwarzenberger, *Frontiers of International Law* (1962), pp 288–96; Shihata, *Revue Egyptienne de droit international*, 22 (1966), pp 51–90; Singh, Malaya Law Rev, 12 (1970), pp 277–97, *ibid*, 13 (1971), pp 178–92, and *ibid*, 14 (1972), pp 1–60; Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), pp 262–75; Morgenstern, BY, 49 (1978), pp 101–17; Jennings, *Ius et Societas* (ed Wilner, 1979), pp 159–68; Lachs, in *Völkerrecht als Rechtsordnung (Festschrift Mosler)* (eds Bernhardt *et al*, 1983), pp 493–502; and on the concept of legislation in general, Akzin, Iowa Law Rev, 21 (1936), pp 713–50. It is of interest to note that Scelle, who seems to attach importance to the distinction between law-making and other treaties, admits in effect that practically all treaties are 'law-making': *La Théorie juridique de la révision des traités* (1936), p 41. See also § 16, as to the 'law-making' powers of international organisations; and § 24ff, as to codification of international law.

[10] 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.[12] 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,[13] will also have 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.[14]

One must also distinguish between the treaty which creates new rules which become accepted as custom, and the treaty which codifies or otherwise reflects in its terms existing customary law.[15] Although this latter kind of treaty can

[11] See §1, n 7.

[12] 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 *Nottebohm Case*, ICJ Rep (1955), pp 22–3; *Lagos v Baggianini*, ILR, 22 (1955), pp 533, 536–7; *Lauritzen et al v Government of Chile*, ILR, 23 (1956), pp 708, 715–16, 729–30; of *The State (Duggan) v Tapley*, ILR, 18 (1951), No 109; *Italian National Re-Extradition Case* (1970), ILR, 70, pp 374, 376–7. See generally Baxter, BY, 41 (1965–66), pp 275–300, and Hag R, 129 (1970), i, pp 31–104; Doehring, ZöV, 36 (1976), pp 77–95; Jennings in *Ius et Societas* (ed Wilner, 1979), pp 159–68; Weil, AJ, 77 (1983), at pp 438–40.

Even an unratified treaty may have some value in this respect: see *Re Lechin*, AD, 16 (1949), No 1; but cf *Re Cámpora*, ILR, 24 (1957), p 518, and n 14 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 nevertheless become 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), § 69a); 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), p 14, see Meron, AJ, 81 (1987), pp 348–70.

[13] For a discussion of the influence of the Third UN Conference on the law of the sea on customary international law, see Jennings, ILA Report (57th Conference, 1976), pp 622–32; de Lacharrière, RG, 84 (1980), pp 216, 241–50; Schweisfurth, ZöV, 43 (1983), pp 566–84; Caminas and Molitor, AJ, 79 (1985), pp 871–90; Bernhardt, Hag R, 205 (1987), v, pp 247–330.

[14] Such a treaty may accordingly have an effect on customary international law even if unratified. See generally Sohn in *Realism in Law-Making* (eds Bos and Siblesz, 1986), pp 231–46, and, with particular reference to the impact of unratified codification conventions, Sinclair, *ibid*, pp 211–29.

A Convention, not in force for the forum state but adopted within the framework of an international organisation of wide membership, may be evidence of international public policy and as such to be taken into account: *Nigerian Objets d'Art Export Case* (1972), ILR, 73, p 226.

[15] See Arechaga, BY, 58 (1987), pp 32–8.

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 side by side,[16] 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[17] and in the *Military and Paramilitary Activities* case.[18] 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.[19] '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'.[20] 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.[21] 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 passed into the general *corpus* 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 Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.'[22]

For its attainment the Court referred to certain conditions which would have to be satisfied:

> 'It would in the first place be necessary that the provisions concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law ... With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.'[23]

The Court found the number of ratifications 'though respectable, hardly sufficient'. As regards the time element the Court noted the short period since the Convention entered into force, and added:

> 'Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'[24]

The Court found the state practice to have been insufficient to satisfy this requirement.

In the *Military and Paramilitary Activities* case[25] the Court had to consider whether, given that the United States' reservation to its acceptance of the Court's jurisdiction effectively excluded disputes relating to certain multilateral treaties whose terms would otherwise have been relevant, it still had jurisdiction over the dispute insofar as it involved claims based on rules of customary international law incorporated or reflected in those treaties. In holding that it did have jurisdiction in respect of claims based on those rules,[26] the Court affirmed the legally separate existence of the customary rules and their treaty counterparts.

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16 *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 14, 94. See generally on treaties declaratory of customary international law, Villiger, *Customary International Law and Treaties* (1985), pp 237–88.

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, 70, p 388; the *Golder Case* (1975), ILR, 57, at pp 213–14; *Young Loan Arbitration* (1980), ILR, 59, at p 529.

On 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 McDade, ICLQ, 35 (1986), pp 499–511.

17 ICJ Rep (1969), p 3. See Monconduit, AFDI, 15 (1969), pp 213–44; d'Amato, AJ, 64 (1970), pp 892–902; Onuf, AJ, 65 (1971), pp 774–82; Nelson, MLR, 35 (1972), pp 52–6. See generally on this case § 324. Somewhat similar issues concerning the interplay between a treaty and customary international law arose in the *UK–France Continental Shelf Arbitration* (1977–78), ILR, 54, p 8, although in that case both states were parties to the 1958 Convention. The Court of Arbitration considered it appropriate to take account of developments in customary law in dealing with the case, but rejected an argument that those developments had in effect rendered the Convention obsolete.

18 ICJ Rep (1986), p 14.

19 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* (1959), ILR, 28, p 170.

20 ICJ Rep (1969), at p 37.

21 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, 54, p 6.

22 ICJ Rep (1969), at p 41; and see Lord Wilberforce, *Il Congresso del Partido* [1981] 2 All ER 1064, 1069.

23 ICJ Rep (1969), at pp 41–2.

24 *Ibid*, at p 43.

25 ICJ Rep (1986), p 14.

26 *Ibid*, pp 93–7. But note the separate opinion of Judge Sir Robert Jennings, dissenting on this point.

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 not 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 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 because the treaty had merely codified the custom, or caused it to "crystallize", or because it 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 invoked, 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 "supervenes" 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 applicability of the rules flowing from the nature of its source, and differences as regards methods of interpretation and application.

§ 12 General principles of law Although custom and treaties are in practice the principal sources of international law, they cannot be regarded as its only sources. The legal principles which find a place in all or most of the various national systems of law naturally commend themselves to states for application in the international legal system, as being almost necessarily inherent in any legal system within the experience of states. Thus Article 38(1)(c) of the Statute of the International Court of Justice authorises it to apply, in addition to treaties and custom, 'the general principles of law recognised by civilised nations'. The meaning of that phrase has been the subject of much discussion.[1] The intention is

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

[1] Volume II of this work (7th ed), p 69, n 1. See also Grapin, *Valeur internationale des principes généraux du droit* (1934); Korte, *Grundfragen der völkerrechtlichen Rechtsfähigkeit* (1934), pp 70–84; Blühdorn, *Die Einführung in das angewandte Völkerrecht* (1934), pp 142–57; Cegla, *Die Bedeurung der allgemeinen Rechtsgrundsätze*, etc (1936); Ziccardi, *La costituzione dell'ordinamento internationale* (1943), pp 399–412; Stuyt, *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction* (1946); Gutteridge, *Comparative Law* (2nd ed, 1949), ch v; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953); Petraschek, *Archiv für Rechts-und Sozialphilosophie*, 28 (1935), pp 61–88; Heydte, ZöR, 11 (1931), pp 526–46; Verdross, Hag R, 52 (1935), ii, pp 195–250, and RG, 45 (1938), pp 44–52; Cosentini, RI (Geneva), 13 (1935), pp 102–18; Kopelmanas, RG, 43 (1936), pp 285–308, and 45 (1938), pp 44–52; Scheuner, Hag R, 68 (1939), ii, pp 128–66; Giuliano, *Rivista*, 33 (1941), pp 69–121; Cheng, *Current Legal Problems*, 4 (1951), pp 35–53; Gutteridge, *Grotius Society*, 38 (1952), pp 125–34; Pau, *Comunicazione e studi*, 6 (1954), pp 99–178; Green, *Current Legal Problems*, 8 (1955), pp 162–84; Sereni, *Principi generali di diritto e processo internazionale* (1955); Schlesinger, AJ, 51 (1957), pp 734–53; Mann, BY, 33 (1957), pp 20–51; H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 158–72; Friedmann, AJ, 57 (1963), pp 279–99, and *The Changing Structure of International Law* (1964), pp 188–221; Jenks, *The Prospects of International Adjudication* (1964), pp 266–315; Favre, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 366–90; Verdross, *ibid*, pp 521–30; Virally, *ibid*, pp 531–56; Herczegh, *General Principles of Law and the International Legal Order* (1969); Akehurst, ICLQ, 25 (1976), pp 801, 813–25; Vitanyi, RG, 86 (1982), pp 48–116.

As to the effect of Art 38(1)(c) on the controversy between the positivist and naturalist schools, see § 9, n 9. For the view that that provision includes and covers, even if it is not identical with, the principles of natural law, see Fitzmaurice, Hag R, 92 (1957), ii, p 56, n 1. There has been a tendency to minimise the significance of that Article (see eg Strupp, *Éléments*, Ch II, § 9). See, on the other hand, Verdross, *Gesellschaft, Staat und Recht. Festschrift für Kelsen* (1931), p 362, who is inclined to regard Art 38 (1)(c) as the basic hypothesis of international law.

[2] See H Lauterpacht, *Analogies, passim*; Blühdorn, *op cit* above, pp 142–46; Laun, *Der Wandel der Ideen Staat und Völk* (1933), pp 70–85; Knubben, ZöV, 16 (1931–32), pp 146–59, 300–13; Ripert, Hag R, 44 (1933), ii, pp 500–660; Scheuner, Hag R, 68 (1939), ii, pp 99–199. See also 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 Tunkin, Hag R, 95 (1958), iii, pp 23–6, In the *Barcelona Traction* case the ICJ emphasised that when international law needed to refer to institutions of municipal law, it was to generally accepted rules of municipal legal systems which recognised the institution that reference was made; ICJ Rep, 1970, at pp 33–4, 37. See also Munch, ZöV, 36 (1976), pp 347–72, as to the reference to the 'principles of international law, as they result from the usages 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, ZöV, 36 (1976), pp 168–87.

[3] 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.

[4] Note the observations of Judge McNair in the *South-West Africa Case*, ICJ Rep (1950), at p 148, and of Judge Fitzmaurice in the *Barcelona Traction Case* (Second Phase), ICJ Rep (1970), at pp 66–7, 71–2.

[5] See *Chorzów Factory Case*, PCIJ, Series A, No 17, p 29 (reparation for breach of an engagement); *German Interests in Polish Upper Silesia*, PCIJ, Series A, No 6, p 20 (litispendency); *Interpretation of the Greco–Turkish Agreement*, PCIJ, Series B, No 16 (action by individual members of corporate bodies); *Chorzów Factory Case*: Jurisdiction, PCIJ, Series A, No 9, p 31; *Jurisdiction of the Courts of Danzig*, PCIJ, Series B, No 15, p 27 (a person cannot plead his own wrong). *Interpretation of the Treaty of Lausanne*, PCIJ, Series B, No 12, p 32 (*nemo judex in sua causa*: on which see also Cheng, *General Principles of Law* (1953), pp 279–89; Fitzmaurice, BY, 35 (1959), pp 225–9; and Schwarzenberger, *Anglo-Am Law Rev*, 1 (1972), pp 482–98). It is probable that these 'general principles of law' include the 'elementary considerations of human-

to authorise the Court to apply the general principles of municipal jurisprudence,[2] insofar as they are applicable to relations of states.

In thus opening the way for the operation as international law of general principles of municipal jurisprudence, it must be noted that such principles are in the municipal sphere applied against a background of national laws and procedures. Unless there is some sufficient counterpart to them in the international sphere, or sufficient allowance is made for them in abstracting the principles from the various municipal rules,[3] the operation of the principles as a source of particular rules of international law will be distorted.[4]

The Court has seldom found occasion to apply 'general principles of law',[5]

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, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.'[6] The significance of this principle touches every aspect of international law.[7]

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 recognise the existence of a third source of international law independent of custom or treaty. This was in fact the practice of international arbitration before the establishment of the Court;[8] 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 law[9] 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),[11] and certain transactions of states (particularly in their dealings with private corporations) on essentially private law matters.[12]

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 existence of minefields in her waters.

Note also the reliance by the Court on 'fundamental general principles of humanitarian law' in the *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 113–15, 129–30. See also the *Corfu Channel Case*, ICJ Rep (1949), at p 18, on circumstantial evidence as being admitted in all systems of law. See Grapin, *Valeur internationale das principas généraux du droit* (1934), pp 49–168; Hudson, *The Permanent Court of International Justice*, 1920–42 (1943), pp 610–12; Rousseau, pp 890–930; Guggenheim, pp 139–47; H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 158–72; Blondel, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 201–36.

On the principle *pacta sunt servanda*, see Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953),, pp 112–14, and § 584. On *res judicata*, see Cheng, *op cit*, pp 336–72. On equality between the parties to litigation (often expressed in the maxim *audiatur et altera pars*), see Cheng, *op cit*, pp 290–8. On the principle *nullum crimen sine lege praevia*, see YBILC (1976), ii, pp 90–91. See also § 55, as to *ex iniuria ius non oritur*; § 15, as to equity; and § 124, as to abuse of right (including the maxim, *sic utere tuo ut alienum non laedas*). 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 as to international public policy, see Jenks, *The Prospects of International Adjudication* (1964), pp 428–546.

6 In the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the UN (see § 105) this principle was elaborated as follows:

'*The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter*

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.'

7 On the principle of good faith generally, see Fitzmaurice, BY, 30 (1953), 53–4, and BY 35 (1959), pp 207–16; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp 105–60; Schwarzenberger, Hag R, 87 (1955), i, pp 290–326; Zoller, *La Bonne Foi en droit international public* (1977); *Nuclear Tests Case*, ICJ Rep (1974), at p 268; Stuyt, Neth IL Rev, 28 (1981), pp 54–8; Thirlway, BY, 60 (1989), pp 7–29; Rosenne, *Developments in the Law of Treaties* 1945–1988 (1989), pp 135–79; and note the ICJ's emphasis on the principle of good faith being one of the basic principles governing the creation and performance of legal obligations but not in itself a source of obligation where none would otherwise exist (*Border and Transborder Armed Actions Case*, ICJ Rep (1988), p 105).

8 For a survey of that practice see H Lauterpacht, *Analogies*, pp 60–67; Verdross, *Die Einheit des rechtlichen Weltbildes* (1923), pp 120–24, and *Verfassung*, pp 57–9; Simpson and Fox, *International Arbitration* (1959), pp 132–7; H Lauterpacht, *The Function of Law*, pp 115–18.

9 See eg *Administrative Decision No 11* by Judge Parker, Mixed Claims Commission between the United States and Germany, November 1923: AD, 2 (1923–24), No 205; *Goldenberg & Sons v Germany*, Special Arbitral Tribunal between Roumania and Germany, 27 September 1928: AD, 4 (1927–28), No 369; *Lena Goldfields Arbitration*, 2 September 1930: AD, 5 (1929–30), No 1.

10 See eg *Sarropoulos v Bulgarian State*, AD 4 (1927–28), No 173 (as to prescription), and the *Raibl Claim* (1964), ILR 40, at p 282 (as to the nature of 'loss'). See also *Petroleum Development Ltd v Sheikh of Abu Dhabi*, ILR 18 (1951), No 37, in which Lord Asquith (at p 149), in a case between a private company and Abu Dhabi, a British protected State, referred to 'the application of principles rooted in the good sense and common practice of the generality of civilised nations – a sort of "modern law of nature"'.

For a study of general principles of law applied by the Conciliation Commissions established under the Peace Treaty with Italy 1947, see Seidl-Hohenveldern, AJ, 53 (1959), pp 853–72. As to resort to general principles of law by the Court of Justice of the European Communities, and their ascertainment through a comparative study of the laws of the member states, see Bredima, YB of World Affairs, 32 (1978), pp 320–33; Akehurst, BY, 52 (1981), pp 29–51.

11 *Desgranges v ILO*, ILR, 20 (1953), pp 523, 529; *Administrative Tribunal of ILO Case*, ICJ Rep (1956), at pp 85–6; *Re Waghorn*, ILR, 24 (1957), pp 748, 751; *Chadsey v UPU (No 1)* (1968), ILR, 43, pp 448, 451 ('general principles of international civil service law'). See also Bastid, Hag R, 92 (1957), ii, pp 478–87; Jenks, *The Proper Law of International Organisations* (1962), pp 51–62.

12 Disputes between states and private corporations (often multinational corporations) often turn on what is the appropriate law applicable to the substance (as opposed to the *lex arbitrationis*), in the absence of a choice of law clause in the contract, or on the interpretation of such a clause where there is one, against the background of the national law of the state concerned. The choice of law clause might itself invoke general principles of law, or those principles might be applied by tribunals as providing the appropriate legal basis for the award. For discussion of the issues arising in this context see Jessup, *Transnational Law* (1956), pp 1–16; McNair, BY, 33 (1957), pp 1–19; F A Mann, BY, 33 (1957), pp 20–51, AJ, 54 (1960), pp 572–91, BY 42 (1967), pp 1–37, and *Rev Belge*, 11 (1975), pp 562–7; Verdross in *Varia Juris Gentium* (1959), pp 355–62; Jennings, BY, 37 (1961), pp 156–82; Hyde, Hag R, 105 (1962), i, pp 271, 288–331; Weil, Hag R, 12 (1969), iii, pp 95–240; Goldschmidt, Hag R, 136 (1972), ii, pp 203, 233–61 (and, generally, on transactions between states and public entities, and private firms, pp 203–330); Geiger, ICLQ, 23 (1974), pp 73, 80ff; UN Juridical YB, 1976, pp 159–76, esp. 160–1; Luzzatto, Hag R, 157 (1977), iv, pp 9, 87–100; Verhoeven, Rev Belge, 14 (1978–79), pp 209–30; Wengler, *ibid*, pp 415–24; Kuusi, *The Host State and the Transnational Corporation* (1979); Giardina, Ital YBIL, 5 (1980–81), pp 147–70; Delaume, AJ, 75 (1981), pp 784–819, especially pp 796–809; Greenwood, BY, 53 (1982), pp 27–81; Barberis, Hag R, 179 (1983), i, pp 189–206; Lalive, Hag R, 181 (1983), iii, pp 9–284; Redfern, BY, 55 (1984), pp 65–110, and Redfern and Hunter, *International Commercial Arbitration* (1986), esp. ch 2; Sacerdoti, Ital YBIL, 7 (1986–87), pp 26–49; Gray,

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,[13] 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).

Judicial Remedies in International Law (1987), pp 188–93; Bowett, BY, 59 (1988), pp 49, 50–9; Crook, AJ, 83 (1989), pp 278, 292ff; Paasivirta, BY, 60 (1989), pp 315–50.

See generally on transactions between states (and public entities) and foreign private parties, Böckstiegel, *Der Staat als Vertragspartner Auslandischer Privatunternehmen* (1971); Seidl-Hohenveldern, Lalive and van Hecke, *Rev Belge*, 11 (1975), pp 567–84; Sacerdoti, *I contratti tra stati e stranieri nel diritto internazionale* (1972); Bettems, *Les Contrats entre Etats. et personnes privées étrangères* (1988); Rigaux, Hag R, 213 (1989), i, pp 9, 207–37. See also § 408, n 14.

Cases in which these issues have fallen for decision include *Petroleum Development Ltd v Sheikh of Abu Dhabi*, ILR, 18 (1951), No 37, at p 149; *Ruler of Qatar v International Marine Oil Co Ltd*, ILR, 20 (1953), p 534; *Saudi Arabia v Arabian American Oil Company*, ILR 27 (1958), pp 117, 153–7, 165–72; *Sapphire International Petroleum Ltd v National Iranian Oil Co* (1963), ILR, 35, pp 136, 168–76, 182–3 (on which, and generally, see Lalive, ICLQ, 13 (1964), pp 987–1021); *BP Exploration Co (Libya) Ltd v Government of the Libyan Arab Republic* (1973–74), ILR, 53, p 297; *Texaco Overseas Petroleum Co v Government of the Libyan Arab Republic* (1975–77), ILR, 53, p 389; *Libyan American Oil Co v Government of the Libyan Arab Republic* (1977), ILR, 62, pp 140, 173–6; *Re Revere Copper and Brass Inc and Overseas Private Investment Corpn* (1978), ILR, 56, pp 258, 271ff; *AGIP Spa v Government of the Popular Republic of the Congo* (1979), ILR, 67, pp 319, 338; *Government of Kuwait v American Independent Oil Co* (1982), ILR, 66, pp 518, 559–62 (on which see Burdeau, AFDI, 28 (1982), pp 454–70); *SPP (Middle East) Ltd v Arab Republic of Egypt* (1983), ILM, 22 (1983), pp 752, 768–71 (reversed on grounds not relevant in the present context: ILM, 23 (1984), p 1048); *Mobil Oil Iran Inc v Islamic Republic of Iran*, AJ, 82 (1988), p 136.

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 332. 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 of 1971 relating to the International Telecommunications Satellite Organisation and under Art 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] See eg *Re Sharma*, ILR, 24 (1957), p 757; *Levis and Levis and Veerman v Federal Republic of Germany* (1959), ILR, 28, p 587; *Bengston v Federal Republic of Germany* (1959), ILR, 28, pp 554–60; the *Eichmann Case* (1961–62), ILR, 36, pp 5, 289–91.

§ 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,[1] the Court shall apply judicial decisions as a subsidiary means for the determination of rules of law. Since judges do not in principle make law but apply existing law, their role is inevitably secondary since the law they propound has some antecedent source.[2] 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.[3]

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,[4] has, in the interests of judicial consistency, referred to them with increasing frequency.[5] 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[6] (although the weight to be attached to

[1] See n 4 below.

[2] On judicial 'legislation' and innovation see Jennings, Kentucky LJ, 26 (1938), pp 112–27; H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 155–223; Fitzmaurice, *Cambridge Essays in International Law* (1965), pp 24–47; Anand, *Studies in International Adjudication* (1969), pp 167–87; McWhinney, *The World Court and the Contemporary International Law-Making Process* (1979).

[3] For the view that judicial decisions are more than mere evidence of law, and approach the character of a formal source, see Fitzmaurice in *Symbolae Verzijl* (1958), pp 153–76.

[4] Article 59 of the Statute of the ICJ, and for a discussion on this, see vol II of this work (7th ed), § 25*ae*, pp 62, 63. In rejecting Malta's application to intervene in the *Tunisia–Libya Continental Shelf* case, the Court emphasised that no conclusions or inferences could legitimately be drawn from its findings or reasoning in the case between Tunisia and Libya with respect to states not parties to that case: ICJ Rep (1981), at p 20. See also Jennings, BY, 55 (1984), at pp 47–8, especially n 124, on the question of binding precedent.

[5] For a survey of the practice of the Court in this matter, see H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 3–23, and BY, 12 (1931), p 60; PCIJ, Series E, No 3, pp 217, 218; No 4, pp 292, 293; No 6, p 300; AD (1925–26), No 329; AD (1927–28), No 355; Beckett, Hag R, 39 (1932), i, p 138; Barberis, ZöV, 31 (1971), pp 641–70; Röben, Germ YBIL, 32 (1989), pp 382–407. On the authority in national courts of the decisions of international tribunal see p 55.

[6] See H Lauterpacht, BY, 10 (1929), pp 65–95, for a detailed discussion; Finch, Hag R, 53 (1935), iii, pp 605–27. See also De Louter, i, pp 56, 57; Westlake, *Collected Papers*, p 83; Rivier, i, p 35; Triepel, *Völkerrecht und Landesrecht* (1899), pp 28–32, 99–101, 127; Anzilotti, *La teoria generale della responsabilità dello Stato nel diritto internazionale* (1902), pp 30 *et seq*; Scheuner, Hag R, 68 (1939), ii, pp 99–199; Pau, *Comunicazioni e studi*, 6 (1954), pp 97–178; Falk, *The Role*

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,[7] 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.[8]

§ 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'.[1] The Court has so far found no

of Domestic Courts in the International Legal Order (1964). On the interpretation of municipal law by the PCIJ, see Jenks, BY, 19 (1938), pp 67–103, and *The Prospects of International Adjudication* (1964), pp 547–603; and see p 83.

7 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, 340, 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.

8 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 Hambro (later Hambro and Rovine), *The Case Law of the International Court* (8 vols 1952–1976) (a repertoire 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*, *Rivista di diritto internationale*, *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; Pergler, *Judicial Interpretation of International Law in the United States* (1928); Hyde, BY, 18 (1937), pp 1–16. See also Challine, *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; 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 as to other states members of the Commonwealth, see Parry, *Commonwealth International Law Cases*, as to Italy see Capotorti, Sperduti and Ziccardi, *La guirisprudenza italiana in materia internationale (1st series, 1861–90)* (1973).

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 R, 151 (1976), pp 212–36.

occasion to rely on this particular source which indicates its present potential.[2] In pleadings before international tribunals the disputants still fortify their arguments by reference to writings of international jurists, but with the growth of international judicial activity and of the practice of states evidenced by widely accessible records and reports, it is natural that reliance on the authority of writers as evidence of international law should tend to diminish.[3] For it is as evidence of the law and not as a law-creating factor that the usefulness of teachings of writers has been occasionally admitted in judicial pronouncements.[4] But inasmuch as a source of law is conceived as a factor influencing the judge in rendering his decision, the work of writers may continue to play a part in proportion to its intrinsic scientific value,[5] its impartiality and its determination to scrutinise critically the practice of states by reference to legal principle.

§ 15 Equity Equity as a general notion is perhaps well enough understood. It is, however, a term which, in the context of the sources of international law, does not always bear a uniform meaning.[1] Considerations of equity form part of the underlying moral basis for rules of law. In this sense equity may be regarded as a

2 See H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 23–5.

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

4 See *R v Keyn* (1876), 2 Ex Div 63, 202; *West Rand Central Gold Mining Co v R* (1905), 2 KB 391, 401; *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, 174–5. 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 writers 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).

5 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.

1 In some national legal systems (such as the English) 'equity' bears a very specialised meaning, which is not normally imported into that term in international law. The meaning of 'equity' in a national 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.

On the concept of equity in international law generally, see Jenks, *The Proper Law of International Organisations* (1962), pp 102–14, and *The Prospects of International Adjudication* (1964), pp 316–427; Degan, *L'Equité et le droit international* (1970); Ch de Visscher, *De l'Equité dans le réglement arbitral ou judiciaire des litiges de droit international public* (1972); Schwarzenberger, YB of World Affairs, 26 (1972), pp 346–69; Akehurst, ICLQ, 25 (1976), pp 801–25; Reuter, *Rev Belge*, 15 (1980), pp 165–96; Green in *International Law in Comparative Perspective* (ed Butler, 1980), pp 139, 143–9; Goldie, *Hague Academy Workshop* (1982), pp 335, 337–47; Jennings, *Ann Suisse*, 42 (1986), pp 27–38; Thirlway, BY, 60 (1989), pp 49–62; E Lauterpacht, *Aspects of the Administration of International Justice* (1991), pp 117–52. For a comparative study of equity, see Newman (ed), *Equity in the World's Legal Systems* (1973). In the *Tunisia–Libya Continental Shelf* case the ICJ referred to equity as a legal concept being 'a direct emanation of the idea of justice': ICJ Rep (1982), at p 60.

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[2] the parties were free to present and develop their case with reliance on principles of equity.[3] Similarly, a rule of law, if not actually embodying equitable principles, 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.[4]

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,[5] 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.[6] The International Court of Justice has not yet given any judgment on the basis of Article 38(2).[7]

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[2] To the same effect, see Hudson, *Permanent Court* (1943), p 617: 'This long and continuous association of equity with the 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 Meuse Case* (1937), PCIJ, Series A/B, No 70, at p 76. In the *Burkina 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.

[3] (1968), ILR, 50, p 2.

[4] See *North Sea Continental Shelf Cases*, ICJ Rep (1969), at p 48. On the consideration given to equitable principles in this case, and in the *UK–France Continental Shelf Arbitration* (1977–78), Cmnd 7438, ILR, 54, p 6, see Blecher, AJ, 73 (1979), pp 60–88. See also the *Tunisia–Libya Continental Shelf Case*, ICJ Rep (1982), at pp 58–60, and generally Nelson, AJ, 84 (1990), pp 837–58, and §§ 324–6.

[5] In the *Ottoman Empire Lighthouses 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.

[6] 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 as the amount to be paid cannot be based on any specific rule of law 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.

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* (1958), 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, iii, p 1819; the *Pugh Claim* (1933), *ibid* p 1441; Art 8 of the Franco-Swiss Règlement concerning imports into Switzerland from the Free Zones, *ibid*, p 1474; and see also the *Tinoco 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.[8] 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 International organisations 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 perhaps the most significant change 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.[1]

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[8] Eg *Norwegian Shipowners' Claims* (1922), RIAA, i, at pp 330–31 ('law and equity'); *Cayuga Indians Claim*, RIAA, vi, pp 173, 179–84 ('international law and equity'); *Georges Pinson Case*, AD, 4 (1927–28), No 318 ('principles of equity'); *Ruler of Qatar v International Marine Oil Co Ltd*, ILR, 20 (1953), p 534 ('principles of justice, equity and good conscience', in a contract between a State and a private company); *NV Philips Gloeilampenfabrieken v German Federal Republic*, ILR, 25 (1958–I), p 503 ('general principles of international law and of justice and equity'); and other cases cited in H Lauterpacht, *Analogies*, pp 60–7. See also vol II of this work (7th ed), p 24, n 5.

[1] See Jenks, *Grotius Society*, 37 (1951), pp 23–49, *Common Law of Mankind* (1958), pp 182–92, and *A New World of Law?* (1969), pp 186–214; Tammes, Hag R, 94 (1958), ii, pp 265–359; Sørensen, Hag R, 101 (1960), iii, pp 91–108; Waldock, Hag R, 106 (1962), ii, pp 96–103; Kerley, *AS Proceedings* (1962), pp 99–105; Higgins, *Development of International Law through the Political Organs of the United Nations* (1963); Saba, Hag R, 111 (1964), i, pp 607–86; Lachs, *Mélanges offerts à Henri Rolin* (1964), pp 157–70; various contributors in *AS Proceedings* (1965), pp 1–212; Detter, *Law-Making by International Organisations* (1965); Skubiszewski, BY, 41 (1965–66), pp 198–74, and *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 508–20; Bastid, *ibid*, pp 132–45; Yemin, *Legislative Powers in the United Nations and Specialised Agencies* (1969); Falk, *The Status of Law in International Society* (1970), pp 174–84; Thirlway, *International Customary Law and Codification* (1972), pp 61–79; Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), pp 268–75; Alexandrowicz, *The Law-making Functions of the Specialised Agencies of the United Nations* (1973); Frowein, ZöV, 36 (1976), pp 147–67; Bokor Szegö, *The Role of the United Nations in International Legislation* (1978); Thierry, Hag R, 167 (1980), ii, pp 385, 432–44; Tunkin in *International Law and the International Legal System* (ed Butler, 1987), pp 5–19; Higgins, *ibid*, pp 21–30; Lukashuk, *ibid*, pp 31–45; DeLupis, *ibid*, pp 47–105; Sloan, BY, 58 (1987), pp 39–142, especially 46–105.

Much of the above literature, while concerned with the general issue, deals also *inter alia* with the effect of resolutions of the UN General Assembly, as the most influential political organ of any international organisation for the general development of international law, given its almost worldwide composition and the wide scope of its legitimate concerns. Works dealing more specifically with the legal effect of General Assembly resolutions include: Sloan, BY, 25 (1948), pp 1–33; Johnson, BY, 32 (1955–56), pp 97–122; Virally, AFDI 2 (1956), pp 66–96; Fitzmaurice, BY, 34 (1958), pp 2–7; Malintoppi, *La raccomandazioni internazionali* (1958); Bindschedler, Hag R, 108 (1963), i, pp 344–74; Skubiszewski, *AS Proceedings* (1964), pp 153–62; Lande, *ibid*, pp 162–70; Bishop, Hag R, 115 (1965), ii, pp 241–5; Detter, *Law-Making by International Organisations* (1965); Skubiszewski, BY, 41 (1965–66), pp 242–8; Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966); Tunkin, Hag

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 dispose of the questions arising for decision, 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

R, 119 (1966), iii, pp 32–7; Verdross, ZöV, 26 (1966), pp 690–96; Falk, AJ, 60 (1966), pp 782–91; McWhinney, Can YBIL, 5 (1967), pp 80–83; Bastid, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 132–45; Basak, *Decisions of the United Nations Organs in the Judgments and Opinions of the International Court of Justice* (1969); Bleicher, AJ, 63 (1969), pp 444–78; Castañeda, Hag R, 129 (1970), i, pp 211–331, and *Legal Effects of United Nations Resolutions* (1969); Onuf, AJ, 64 (1970), pp 349–55; Arrangio-Ruiz, Hag R, 137 (1972), iii, pp 431–628; Conforti, Hag R, 142 (1974), i, pp 209–88; Schwebel, *AS Proceedings*, 1979, pp 301–9; Osakwe, *ibid*, pp 310–24; Garibaldi, *ibid*, pp 324–7; Schwebel, in *Realism in Lawmaking* (eds Bos and Siblesz, 1986), pp 203–10; Dmitrieva and Lukashuk, Indian JIL, 28 (1988), pp 236–48; Frowein, ZöV, 49 (1989), pp 778–90.

The legal effect of resolutions adopted by the UN General Assembly is a matter on which there are divergent views. It is clear that the Assembly is not invested with legislative powers, and that normally General Assembly resolutions have no more legal force than is implicit in the word 'recommendation'. It is equally clear that it is an over-simplification to deny to all General Assembly resolutions any legally binding effect. The ICJ has rejected the argument that the General Assembly's powers are merely hortatory and can never go further than making recommendations. It has held that in certain cases the Assembly's decisions have 'dispositive force and effect': this is so, for example, in relation to the suspension of rights and privileges of membership, expulsion of members, budgetary questions, and the organisation of peacekeeping forces. See *Certain Expenses of the United Nations*, ICJ Rep (1962), pp 162–3; *Namibia (South West Africa) Legal Consequences Case*, ICJ Rep (1971), p 50. The termination of the Trusteeship Agreement for Northern Cameroons by GA Res 1608 (XV) (1961) was held to have 'definitive legal effect' (*Case concerning the Northern Cameroons*, ICJ Rep (1963), at p 32); similarly the General Assembly's termination of the Mandate for South West Africa was held to be legally effective (see § 88).

Although General Assembly resolutions are generally not legally binding, they are not without legal significance. They may help to create new rules of customary international law or to establish an existing rule of customary international law, by providing evidence of state practice; they may constitute an authoritative interpretation of a provision of the Charter; they may constitute an estoppel for states voting in favour of them, and possibly even for states which abstain; they may authorise action which would otherwise be unlawful (see the separate opinion of Judge Lauterpacht in the *South West Africa (Voting Procedure) Case*, ICJ Rep (1955), at p 115); they may, at least as between states concurring in them, constitute a simplified form of agreement between those states; and they may bind those who act under the authority of the Assembly (see UN Juridical YB (1973), p 145, para 2 of item 8).

community within the framework provided by international organisations will acquire the character of a separate source of law.

Meanwhile, it is as well to mark several features of the way in which international organisations now affect the sources of international law.[2] First, international organisations are themselves international persons. They can in their own right give rise to practices which may in time acquire the character of customary law or contribute to its development,[3] there being nothing in Article 38 of the Statute of the International Court of Justice to restrict international custom to the practice of states only. However, the international personality of international organisations is normally limited, and this in turn imposes limits upon the areas of international law which their practices can directly affect.

Secondly, international organisations have developed legal rules to regulate the internal affairs of the organisation. They relate to such matters as staff regulations, budgetary regulations, rules of procedure for the various organs, and rules relating to the execution of tasks assigned to the organisation, including the creation of new bodies operating within the framework of the organisation. In all these cases the organisation's rules are addressed *within* the organisation and are more in the nature of executive or administrative acts than anything approaching law-making in a broad sense, although obviously they can closely affect the legal position of states. What is perhaps most remarkable about this internal law of the organisation is that it is nearly always made by majority decisions, and that in the absence of express powers the organisation may have implied powers to make such internal laws as are necessary for the proper performance of the functions for which the organisation was set up.[4]

Thirdly, states have begun to develop special techniques and procedures whereby international organisations may adopt instruments which are legally binding upon all or some of the member states. A clear example is afforded by regulations made under the Treaty establishing the European Economic Community 1957 (the EEC Treaty), which are binding in their entirety and directly applicable in all member states.[5] Instruments adopted in some other international organisations are, however, less clearly legislative, and although they can often be classified in terms of traditional rules and practices relating to multilateral treaties, the distinctive features of, for example, conventions adopted within the framework of the International Labour Organisation, or the air safety standards adopted within the framework of the International Civil Aviation Organisation, almost constitute differences in kind rather than of degree.

Fourthly, international organisations constitute a forum for collective action

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 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.

4 *Effect of Awards of Compensation made by the UN Administrative Tribunal Case*, ICJ Rep (1954), at pp 56–7. See also the *Reparations for Injuries Case*, ICJ Rep (1949), at pp 178–9, 182.

5 UNTS, 298, p 3; see Art 189. See also § 19, n 81ff.

by states, in some respects approaching the position of permanent international conferences.[6] 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.[7] 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,[8] its force as an authoritative interpretation of some other legal instrument (particularly the organisation's own constitutional instrument),[9] 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.[10] Furthermore, resolutions adopted unanimously, being a matter of consensual agreement, are sometimes regarded as equivalent to treaties concluded in simplified form.[11] 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).[12]

Furthermore, the legal significance of a resolution may also be considered in relation to the development of customary international law, in particular

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.

8 See eg Art 23 and Annex XI of the Treaty of Peace with Italy 1947 (TS No 50 (1948)). See also Marston, ICLQ, 18 (1969), p 9.

9 In this respect see eg as 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 ICJ in the *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 99–100.

10 See §§ 574–5.

11 See eg Kelsen, *Principles of International Law* (1956), p 366.

12 See § 585, n 5.

whether it is declaratory of existing law or a contribution to the creation of new law.[13] As declaratory 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[14] 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[15] to which the resolution relates but also the legal force (if any) which the resolution has under the treaty establishing the organisation,[16] 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)[17] 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.[18]

13 See Skubiszewski, BY, 46 (1972–73), pp 353, 358–62, for some examples of resolutions of the UN General Assembly being treated as evidence of customary law.

14 In the case of a resolution adopted with less than a unanimous affirmative vote, particularly if states directly affected by the resolution have voted against it or have abstained, it will be difficult to establish solely on the basis of the resolution that the necessary *opinio juris* exists. The same may be true in respect of a state which, although voting in favour of a resolution, accompanies its vote with a declaration that it does not regard the resolution as a formulation of law but as a statement of political intention, at least if repeated on subsequent occasions when a similar text is adopted: see the *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 107.

15 It is necessary to distinguish between the vote of a state and its actual practice in the matter: it is not unknown for a state to vote in one sense, but in fact to behave in a contrary sense. Furthermore, resolutions will often relate to matters on which many of the states voting upon them will have had no occasion to adopt any practice, as, to take an example, in relation to outer space. In such a case the vote of a state is no more than an expression of its view as to the law, rather than a contribution by it to state practice in the matter. To the extent that nevertheless a resolution largely adopted in such circumstances becomes accepted as setting out the law, the process approaches that of legislation. In some situations, it may be noted, even though a state has itself followed no practice, the situation may concern a matter in which all states have a direct interest by virtue of their membership of the international community: these matters will tend to be those which affect the very basis of that community, such as the use of force, and fundamental human rights such as the prohibition of slavery and of genocide.

16 Since in adopting a resolution states were voting for a resolution having the effects prescribed in the law of the organisation, it cannot be presumed that they would have voted in the same way had they been voting for an instrument laying down a legally binding rule. Many of the affirmative votes for a resolution may have been given because of the non-binding character of the resolution, rather than because it was thought to reflect or establish a binding legal rule.

17 Note also the opinion of the ICJ that if a proposition is proposed for inclusion in a resolution but is not in the event adopted, this does not mean that the contrary of that proposition is to be regarded as having been adopted: see Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Rep (1971), p 36.

18 *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 99–100, para 188 (regarding the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations): see also p 107, para 203. The

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,[19] 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,[20] the work of the Commission, even where it does not result in a treaty but particularly so if it does, is itself an authoritative influence on the development of the law 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*, *Staatengunst*).[1] 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 *Libyan American Oil Co v Government of Libya* (1977), ILR, 62, pp 140, 187–9; *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 Arrangio-Ruiz, Hag R, 137 (1972), iii, pp 431–628; the matter is also covered in many of the works cited at n 1.

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

20 Thus members of the Commission usually have very close connections with the governments of the states of 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.

1 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) (as 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 it '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] 1 KB 470, and AD 4 (1927–28), No 10 and Note; *Walkerville 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.[2] 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'.[3] It is probable that many a present rule of international comity will in future become one of international law.[4]

Not to be confused with the rules of comity are the rules of morality,[5] which

Harwood and Cooper v Wilkinson (1929), *ibid*, p 392 (and see on these cases Webber, NYU LQ Rev, 7 (1929–30), pp 674–82, and Marjorie Owen, Can Bar Rev, 8 (1930), pp 413–19); *Regazzoni v K G Sethia (1944) Ltd* [1958] AC 301; *British Nylon Spinners Ltd v ICI Ltd* [1953] 1 Ch 19; *Application of Chase Manhattan Bank* (1962), ILR, 34, p 43.

(2) as equivalent to private international law, eg Phillimore, iv, § 1.

(3) to quote the *New English Dictionary* (Murray): 'Apparently misused for the company of nations mutually practising international comity (in some instances erroneous association with L. *comes*, "companion", is to be suspected)';

(4) as equivalent to international law: see above in the text.

2 See § 505.

3 See eg Brett LJ in *The Parlement Belge* (1880), LR 5 PD 197, 214, 217, who refers to the rules concerning the jurisdictional immunities of foreign ambassadors and sovereigns as being the consequence of 'international comity'; *The Luigi* (1916) (DC) 230 Fed 495. In *Russian Socialist Federated Soviet Republic v Cibrario* (1923), 235 NY 255, 139 NE 259, the Court said: 'Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others.... Rules of comity are a portion of the law that they [the courts] enforce.' See also *Buck v AG* [1965] 1 Ch 745, 770. For a judicial decision holding comity to be something more than mere courtesy while less than a legal obligation, see *Sison v The Board of Accountancy and Ferguson*, ILR, 18 (1951), No 7; and see *Dallal v Bank Mellat* [1986] QB 441, 461–2. See also the definition by Gray J in *Hilton v Guyot* (1895), 159 US 113, 163–4, as 'neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other', and by Donaldson LJ in *Buttes Gas and Oil Company v Hammer* [1981] QB 223, 256, as 'a standard of international behaviour which can be epitomised as "do as you would be done by"'.

4 The matter is discussed in Dimitch, *La Courtoisie internationale et le droit des gens* (1930); Walz, *Das Wesen des Völkerrechts und Kritik der Völkerrechtsleugner* (1930), pp 229–37; Jordan, *Répertoire*, v, pp 324–30; Rousseau, pp 8–11; H Lauterpacht, CLJ, 9 (1947), pp 330–32, and *Collected Papers*, i (1970), pp 43–6; Akehurst, BY, 46 (1972–73), pp 145, 212–16; F A Mann, *Foreign Affairs in English Courts* (1986), pp 134–49; Paul, Harv ILJ, 32 (1991), pp 1–79. On some historical origins of the term see Paradisi, Hag R, 78 (1951), i, pp 329–77.

5 Rules of morality differ from rules of law in that the former apply to conscience only and are not enforced by any external authority. This distinction between rules of law and morality is, however, by no means generally recognised. See, for instance, Heilborn, *Grundbegriffe des Völkerrechts* (1912), pp 3–10. And see Vinogradoff, Mich Law Rev 23 (1924), pp 1–8 and pp 138–153.

On international morality see Schwarzenberger, *Power Politics* (2nd ed, 1951), pp 218–31; Ornstein, *Macht, Moral und Recht* (1946), and Keeton and Schwarzenberger, *Making International Law Work* (2nd ed, 1946), pp 49–69; Falk, *Law, Morality and War in the Contemporary World* (1963); Stumpf, *Morality and the Law* (1966); Jenks, *A New World of Law?* (1969), pp 291–300.

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 as 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.

RELATION BETWEEN INTERNATIONAL AND MUNICIPAL LAW

Picciotto, *The Relation of International Law to the Law of England and the United States* (1915) Wenzel, *Juristische Grundprobleme* (1920), pp 359–421, 444–59 Wright, *The Enforcement of International Law through Municipal Law in the United States* (1916), AJ, 11 (1917), pp 1–21, and 17 (1923), pp 234–44 Verdross, *Die völkerrechtliche Kriegshandlung und der Strafanspruch der Staaten* (1920), pp 34–43, and Hag R, 16 (1927), i, pp 262–75, and 30 (1929), v, pp 301–11 Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp 102–241, *General Theory of Law and State* (1945), pp 363–80, Hag R, 14 (1926), iv, pp 231–36, *Principles of International Law* (1952), pp 190–6, 401–50, ZöR, 4 (1924), pp 207–22, and RG, 43 (1936), pp 5–49 Kosters, *Bibliotheca Visseriana* (vol iv, 1925), pp 261–73, and *Bulletin de l'Institut Intermédiare International*, i (1923), pp 1–31 Walz, *Die Abänderung völkerrechtsgemässen Landesrechts* (1927), and *Völkerrecht und staatliches Recht* (1933) (a comprehensive treatise) Strisower, ZöR, 4 (1924), pp 272–98 Spiropoulos, *Théorie général du droit international* (1930), pp 71–83 Gentile, *Nuovi studi de diritto* (vol ii, 1929), pp 326–52 Monaco, *L'ordinamento internazionale in rapporti all' ordinamento statuale* (1932) Masters, *International Law in National Courts* (1932) (a useful study) Grassetti, *Diritto interno e diritto internazionale nell' ordinamento guiridico anglo-americano* (1934) Chailley, *Le problème de la nature juridique des traités internationaux* (1932), pp 283–327 Laun, *Der Wandel der Ideen Staat und Völk* (1933), pp 3–62 Potter, AJ 19 (1925), pp 315–26 Baumgarten, ZöV, 2 (1) (1930), pp 305–34 Mirkine-Guetzévitch, Hag R, 38 (1931), iv, pp 311–25 Blondeau, RI (Paris), 9 (1932), pp 579–616 Dickinson, AJ (1932), pp 239–60, and Hag R, 40 (1932), ii, pp 328–49 Sprout, AJ, 26 (1932), pp 280–95 Redslob, *Théorie du droit*, vii (1932–33), pp 151–71 Salvioli,

As to the application in former times of rules of morality to states regarded as outside the international community, see text at § 22, n 7.

[6] Thus in the *Genocide* case the ICJ referred to genocide as 'contrary to moral law and to the spirit and aims of the United Nations': ICJ Rep (1951), p 23.

[7] ICJ Rep (1966), p 34.

Hag R, 46 (1933), iv, pp 30–37 Decencière-Ferrandière, RG, 40 (1933), pp 45–70 Svoboda, ZöR, 14 (1934), pp 487–531 Strupp, Hag R, 47 (1934), i, pp 389–418 Kaufmann, *ibid*, 54 (1935), iv, 436–61 Guggenheim, *Théorie du droit*, ix (1935), pp 90–100 Balladore Pallieri, *Rivista*, 27 (1935), pp 24–82 Chiron, *ibid*, 30 (1938), pp 3–55 Lauterpacht, *Grotius Society*, 25 (1939), pp 51–88, and Hag R, 62 (1937), iv, pp 129–148 Ténékidès, *Friedenwarte*, 41 (1941), pp 1–23 Holdsworth, Minn Law Rev, 26 (1942), pp 141–52 McNair, *Grotius Society*, 30 (1944), pp 11–21 Morgenstern, BY, 27 (1950), pp 42–92 Preuss, *AS Proceedings*, 1951, pp 82–100 Dickinson, U Pa Law Rev, 101 (1952), pp 26–56, and *ibid*, 104 (1956), pp 451–93 Verdross, RI, 32 (1954), pp 219–30 Sperduti, *Rivista*, 37 (1954), pp 82–91, and *ibid*, 41 (1958), pp 188–98 Morelli, Hag R, 89 (1956), i, pp 479–98 Barile, *Rivista*, 39 (1956), pp 449–507, and *ibid*, 40 (1958), pp 26–109 Fitzmaurice, Hag R, 92 (1957), ii, pp 68–90 Mosler, Hag R, 91 (1957), i, pp 625–709 Rousseau, Hag R, 93 (1958), i, pp 464–74 Kelsen, ZöV, 19 (1958), pp 234–48, *Principles of International Law* (2nd ed, 1966), pp 290–4, 551–88, and *Pure Theory of Law* (1967), pp 328–44 Jessup, *The Use of International Law* (1959), Ch III Sørensen, Hag R, 107 (1960), iii, pp 109–26 O'Connell, Geo LJ, 48 (1960), pp 431–485 Marek (ed), *Droit international et droit interne* (1961) Seidl-Hohenveldern, ICLQ, 12 (1963), pp 88–124 van Panhuys, Hag R, 112 (1964), ii, pp 7–87 Falk, *The Role of Domestic Courts in the International Legal Order* (1964) Schroer, ZöV, 25 (1965), pp 617–57 Starke, *Studies in International Law* (1965), pp 1–20 Lardy, *La Force obligatoire du droit international en droit interne* (1966) Wilson, *International Law Standard and Commonwealth Development* (1966), pp 66–96 Holloway, *Modern Trends in Treaty Law* (1967), pp 238–316 Tammelo, Aust YBIL, 3 (1967), pp 211–18 Verzijl, *International Law in Historical Perspective* (vol 1, 1968), pp 90–183 H Lauterpacht, *Collected Papers* (vol 1, 1970), pp 151–78 P de Visscher, Hag R, 136 (1972), ii, pp 24–43 F A Mann, BY, 48 (1976–77, pp 14–39, and *Foreign Affairs in English Courts* (1986), pp 63–163 Sperduti, Ital YBIL, 3 (1977), pp 31–49 Verhoeven, *Rev Belge*, 15 (1980), pp 243–64 Sperduti, Hag R, 153 (1976), v, pp 319–410 Ferrari-Bravo in *The Structure and Process of International Law* (eds MacDonald and Johnston, 1983), pp 715–44 Cassese, Hag R, 192 (1985), iii, pp 341, 368–412 Rigaux, *La Théorie des limites matérielles à l'exercise de la fonction constituante* (1985), pp 149–98 *Restatement (Third)*, i, pp 40–69 Rubanov in *International Law and the International System* (ed Butler, 1987), pp 85–94 Jacobs and Roberts (eds), *The Effect of Treaties in Domestic Law* (1987) Tunkin and Wolfrum (eds), *International Law and Municipal Law* (1988). See also the authors cited in bibliography preceding § 620.

§ 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 *as such* form 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 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.[1]

[1] See Fitzmaurice, Hag R, 92 (1951), ii, p 71, and BY, 35 (1959), p 188. As to private international law see § 1, at nn 10, 11.

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, and as superior to it,[2] it can be regarded as incorporated in 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,[3] the stipulation in treaties of uniform internal laws[4] and the appearance of such legal orders as that of the European Communities,[5] 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.[1] 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]

[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; Decencière-Ferrandière, RG 40 (1933), pp 45–70, and, for trenchant criticism, Kelsen, *Souveränität*, pp 151–204. See also Rousseau, pp 55–68.

[3] See § 7.

[4] See §1, n 11.

[5] See § 19, sect (3).

[1] 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.

In considering this question it is convenient to distinguish customary international law and treaties. In addition there are certain special considerations concerning the effects, within national legal systems, of judicial decisions of international tribunals.[3] Whether such decisions have any direct authority within a national legal system is a question of some uncertainty, and will in part depend on the way in which that national legal system gives effect to international law. Since the facts on the basis of which an international tribunal delivers judgment will seldom be the same as those under consideration in a corresponding case in a national court, and since the parties[4] in the two proceedings will rarely be the same, national courts will often not regard themselves as bound to follow or give effect to a decision of an international tribunal[5] – a tendency reinforced by the provision in Article 59 of the Statute of the International Court of Justice that its decisions are binding only on the parties to the proceedings. Nevertheless where, for example, an international tribunal decides a matter such as the extent of a state's jurisdiction, the courts of that state may be expected to regard that determination as binding on them.[6] In any event, decisions of international tribunals will be weighty evidence as to rules of customary international law,[7] or as to the proper interpretation of treaties considered by them, and

[3] See generally Limburg, Hag R, 30 (1929), v, pp 523–615; Jenks, BY, 20 (1939), pp 1–36, and *The Prospects of International Adjudication* (1964), pp 727–56; Schreuer, ICLQ, 23 (1974), pp 681–708, and *ibid*, 24 (1975), pp 153–83; Giardina, Hag R, 165 (1979), iv, pp 233–352; El Ouali, *Effets juridiques de la sentence internationale* (1984); Jennings, ZöV, 47 (1987), pp 3–16; Fox, ICLQ, 37 (1988), pp 1, 22–8.

[4] As to the difficulty of an individual being regarded as a 'party to legal proceedings' in relation to proceedings before the European Commission and Court of Human Rights, see *Guilfoyle v Home Office* [1981] QB 309.

[5] *Czechoslovak Agrarian Reform (Swiss Subjects) Case*, AD, 4 (1927–28), No 94; *Re Société Intercommunale Belge d'Electricité* [1933] Ch 684, 689, and on appeal to the House of Lords *sub nom Feist v Société Intercommunale Belge d'Electricité* [1934] AC 161, 173; *Socobel v Greek State*, ILR, 18 (1951), No 2; *Mackay Radio and Telegraph Co v Lal-La Fatma Bent si Mohamed El Khadar*, ILR, 21 (1954), p 136; *Lighthouse Arbitration between France and Greece*, ILR, 23 (1956), p 81. Where the House of Lords has determined a rule to be a rule of English law, it does not cease to be such on being found by the European Court of Human Rights to be in breach of the European Convention on Human Rights: English courts will have regard to decisions of the European Court of Human Rights, as it will to provisions of a treaty, in cases where domestic law is not firmly settled, but the Court's decision will not be part of English law. See *Attorney-General v BBC* [1981] AC 303, 354, *per* Lord Scarman; *Cheall v Association of Professional, Executive, Clerical and Computer Staff* [1982] 3 All ER 855, at pp 879, 886, *per* Lord Denning MR and Donaldson LJ (reversed on other grounds, [1983] 1 All ER 1130). See however *Dallal v Bank Mellat* [1986] 2 WLR 745, recognising the conclusive nature *inter partes* of a decision of the USA–Iran Claims Tribunal (with comment by Kunzlik, CLJ, 45 (1986), pp 377–9, and Crawford, BY, 57 (1986), pp 410–14); and *Ministry of Defence of the Islamic Republic of Iran v Gould Inc*, AJ, 84 (1990), p 556. In *Committee of United States Citizens Living in Nicaragua v Reagan*, AJ, 83 (1989), p 380, a US Court of Appeals held individuals to have no private rights of action to enforce decisions of the ICJ.

[6] *Administration des Habous v Deal*, ILR, 19 (1952), No 67, In the *Martini Case* (1930), RIAA, ii, p 975, an Italian–Venezuelan arbitral tribunal held that findings of the Italian–Venezuelan Mixed Claims Commission constituted an international obligation for Venezuela with which Venezuelan courts had to comply; and see *E-Systems, Inc v Islamic Republic of Iran* (1983), ILR, 71, pp 631, 639.

[7] See § 13. See also, eg the citation of the decision of the ICJ in the *North Sea Continental Shelf Cases*, ICJ Rep, 4 (1969), by the High Court of Australia in *Bonser v La Macchia* (1969), ILR, 51, p 39.

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

[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 its laws'. See also Art 53 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (see § 407, n 49).

[9] See generally Skubiszewski, BY, 46 (1972–73), pp 353–64; E Lauterpacht in *The Effectiveness of International Decisions* (ed Schwebel, 1971), pp 57–65; Stein, *ibid*, pp 66–70; Schreuer, ICLQ, 27 (1973), pp 1–17, and *Decisions of International Institutions before Domestic Courts* (1981); Kunig in *International Law and Municipal Law* (eds Tunkin and Wolfrum, 1988), pp 59–78; Likashud, *ibid*, pp 79–88. See also cases cited at n 96, n 110 and n 113.

[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 Dealings) (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 *Diggs 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 Decree 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: *Régie des Télégraphes et Téléphones v Société pour la Coordination de la Production de l'Energie Electrique* (1978), ILR, 77, p 419; *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] 1 AC 514, 523–5.

[11] *Commentaries on the Laws of England*, iv, ch 5; Westlake, *Collected Papers*, pp 498–518; Vallat, *International Law and the Practitioner* (1966), pp 2–6; F A Mann, *Foreign Affairs in English Courts* (1986), pp 63–163; Butler in *International Law and the International System* (ed Butler, 1987), pp 67–76; Higgins in *The Effect of Treaties in Domestic Law* (eds Jacobs and Roberts, 1987), pp 123–40; Collier, ICLQ, 38 (1989), pp 924–35; and works cited at n 24. But see Picciotto, *The Relation of International Law to the Law of England and the United States* (1915), and Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), pp 238–43.

repeatedly acted upon by courts[12] 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.[17]

[12] See eg *Triquet and Others v Bath*, 3 Burr 1478; *Heathfield v Chilton* 4 Burr 2015, 2016; *Viveash v Becker*, 3 M & S 284, 292, 298; *De Wütz v Hendricks* 2 Bing 314, 315; *Emperor of Austria v Day*, 2 Giff 628, 678 (a striking application of the doctrine); and many other cases enumerated by Lauterpacht, *Grotius Society*, 25 (1939), pp 52–67, 77–84. Of more recent cases see *Zoernsch v Waldock* [1964] 2 All ER 256 265; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 All ER 881; *I Congreso del Partido* [1981] 3 WLR 328. See also Lord Finlay's emphatic affirmation of that view in the *Lotus Case*, PCIJ, Series A, No 10, p 54, and Judge Moore's reference, *ibid*, p 75, to 'the majestic stream of the common law, united with International Law'.

There have been occasional *obiter dicta* casting doubt on the traditional rule: eg *Mortensen v Peters* (1906) 14 SLR 227 (a Scottish case); *per* Atkin LJ in *Commercial and Estate Co of Egypt v Board of Trade* [1925] 1 KB 271, at p 295; *per* Lord Atkin in *Chung Chi Cheung v R* [1939] AC 160, 168; *per* Lord Macmillan in *The Cristina* [1938] AC 485, 497. In the last three cases international law was in fact relied upon to a substantial degree.

The unshaken continuity of the rule's observance suffered a reverse as the result of the *dicta* of some judges in *R v Keyn* (1876) 2 ExD 63, but *West Rand Central Gold Mining Co v R* [1905] 2 KB 391 must be regarded as a reaffirmation of the classical doctrine. For comment on the former decision see H Lauterpacht, *Analogies*, p 76(n); and Marston, LQR, 92 (1976), pp 93–107.

[13] See *R v Keyn* (1876) 2 ExD 63; and a Canadian decision, *Gavin v R* ILR, 23 (1956), p 154.

[14] See later in text.

[15] See Fawcett, *The British Commonwealth in International Law* (1963), pp 72–3; and BY, 42 (1967), pp 234–6.

[16] See *Re Piracy Jure Gentium* [1934] AC 586, 588; and, for an extensive inquiry into treaty practice, judicial practice, and opinions of writers, see *Radwan v Radwan* [1972] 3 WLR 735. In *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 All ER 881, 888, Lord Denning MR referred to the need for the courts to determine the rules of international law 'seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions'.

A term known to international law may not, however, bear the same meaning when used in a municipal law context: eg *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1983] QB 647 (as to 'piracy').

[17] See *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, 756.

Where the UK's international obligations require it to treat a contract as unenforceable, if the court becomes aware that the issue arises during the course of proceedings it must itself take the point even if the parties have not pleaded it: *United City Merchants (Investments) Ltd v Royal*

A question of some controversy is whether, if rules of international law are 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.[18] 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.[19] 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.[20] In 1977 the Court of Appeal, in *Trendtex Trading Corpn v Central Bank of Nigeria*,[21] which raised questions as to developments in 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.'[22]

Where a treaty affects private rights or, generally,[23] requires for the implementation 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.[24] Even then the court, unless directed otherwise by the legislation,[25] will apply the law as changed by the legislation rather than as

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

19 See Lord Alverstone in *West Rand Central Gold Mining Co v R* [1905] 2 KB 391, 406–8, and Lord Atkin in *Chung Chi Cheung v R* [1939] AC 160, 168. See generally Jenks, BY, 20 (1939), pp 28–32; Morgenstern, BY, 27 (1950), pp 80–83.

20 See eg *Thai-Europe Tapioca Service Ltd v Govt of Pakistan* [1975] 3 All ER 961; *Swiss Israel Trade Bank v Government of Salta and Banco Provincial de Salta* [1972] 1 Lloyd's Rep 497.

21 [1977] 1 All ER 881 (Stephenson LJ dissenting on this point). The *Trendtex* decision was not followed as regards the force of precedent in this context, in *Uganda Co (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 *Hispano Americana Mercantil SA v Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277, and accepted by the House of Lords in *I 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 (Owners) v Wallem Shipping (Hong Kong) Ltd* [1976] 1 All ER 78.

See also *Radwan v Radwan* [1972] 3 All ER 967, discounting certain earlier authorities relying on the now-discredited principle of exterritoriality as the basis for diplomatic immunities; and *R v Kent Justices, ex parte Lye* [1967] 2 QB 153, at pp 173, 188–90, as to changes in international law on the breadth of territorial waters.

22 At p 890, *per* Lord Denning MR. See also Schreuer, Neth IL 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 Tin Council* [1987] 1 WLR 641, 648. Similar views as to the need to apply international law as it develops were expressed by a US Court of Appeals in *Filartiga v Pena-Irala* (1980), ILR, 77, pp 169, 175–9 and *Amerada Hess Shipping Corp v Argentine Republic* (1987), ILR, 79, pp 1, 11; and by the South African Supreme Court in *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* (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 (eg 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 Freudenberg* [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 Estuary Radio Ltd* [1968] 2 QB 740, 756. By § 6 of the European Assembly Elections Act 1978 any treaty increasing the powers of the Assembly can be ratified by the UK only after approval by an Act of Parliament.

Note that a cause of action based on an alleged breach of a treaty is not justiciable in the English courts: *Maclaine Watson & Co Ltd v International Tin Council* [1987] 3 WLR 508, 518. That case was part of extensive litigation culminating in the judgment of the House of Lords in *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, esp. 526, 544–5, in which the courts, after extensive consideration, authoritatively reaffirmed the lack of competence of English courts to enforce or adjudicate upon rights based directly on a treaty binding on the UK unless it had been in some way incorporated into English law. Similarly, rights derived from a treaty to which the UK is not a party may be effective in English law by virtue of a law in a relevant foreign state giving effect to them, although they will not be so effective by virtue of the treaty itself; *Arab Monetary Fund v Hashim (No 3)*, [1991] 2 WLR 729 (House of Lords). See on both sets of proceedings, § 7, n 21.

Equally the court has no jurisdiction to interpret and enforce a treaty whose terms have not been expressly or by reference incorporated into English domestic law: see *British Airways Board v Laker Airways Ltd* [1985] AC 58, 85–6. However, this proposition has to be read subject to the invocation of a treaty as an international obligation resting on the UK and with which Parliament is, in enacting legislation, presumed to intend to act consistently (see n 33): it will be necessary in that context for the court to form a view on what the treaty means.

See nn 82–4 as to the direct effect of treaties concluded by the European Community.

24 See Westlake, *Collected Papers*, pp 498–518, and in particular McNair, BY, 9 (1928), pp 59–68. *Legal Effects of War* (3rd ed, 1948), ch 19, and *Law of Treaties* (1961), chs 4 and 17; Vallat, *International Law and the Practitioner* (1966), pp 6–13; Marsh *Droit communautaire et droit national* (1965), pp 161–70; F A Mann, *Grotius Society*, 44 (1958), pp 29–62; Lasok, RG, 70 (1966), pp 961–94; Elkind and Shaw, BY, 55 (1984), pp 233–41. And see § 636, n 5.

See also, generally, other works cited at n 11. There has been much discussion of the matter in the particular context of the application within the UK of the European Convention on Human Rights, as to which see § 442, n 5.

In addition, see *The Parlement Belge* [1880] 5 PD 197; *Walker v Baird* [1892] AC 491. See also *Porter v Freudenberg* [1915] 1 KB 857. There are cases in which courts have applied the rule that, in the absence of an enabling Act of Parliament, no effect can be given to treaties affecting private rights. See *Administrator of German Property v Knoop* [1933] Ch 439; and, to some extent, *Republic of Italy v Hambro's Bank* [1950] 1 All ER 430 (see Carter, ILQ, 3 (1950), pp 413–17); *Blackburn v Attorney-General* [1971] 2 All ER 1380; *McWhirter v Attorney-General* [1972] CMLR 882; *R v Chief Immigration Officer, ex parte Salamat Bibi* [1976] 3 All ER 843; *Malone v Commissioner of Police for the Metropolis (No 2)* [1979] 2 All ER 620, 637–8; *Winfat Enterprises (HK) Co Ltd v Attorney-General for Hong Kong* [1985] AC 733.

A treaty may come to represent customary international law, and may therefore fall to be applied in English law on that basis rather than as a treaty. For a consideration of this possibility in relation to the European Convention on Human Rights, see Duffy, ICLQ, 29 (1980), pp 585, 599–605.

On the separate question of the way in which treaties are interpreted by courts in the UK and other countries, see § 631, n 2.

25 See eg s 2(1) of the European Communities Act 1972 (on which see further, p 73). Somewhat similarly Orders in Council under the Extradition Act 1870 provide that the Acts shall apply 'under and in accordance with' the relevant Extradition Treaty, the terms of which are thus directly before the courts: that Act has been replaced by the Extradition Act 1989, allowing for equivalent Orders in Council under ss 3 and 4. But even in such circumstances a court may still ignore the treaty: *R v Davidson* (1976), 64 Cr App R 209, with comment by Crawford, BY, 49 (1978), p 285. Slightly different is the situation where provisions of a treaty are set out in a Schedule to an Act (eg the Diplomatic Privileges Act 1964), since it is not wholly clear in that

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 prerogative of the Crown, which would otherwise be in a position to legislate for the subject without obtaining parliamentary assent.[30] Since failure

case whether the court would be applying a treaty, or a Schedule to an Act (which happens to be in identical terms with the provisions of a treaty): the latter is probably the correct view (see *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 403, 416; *The Katikiro of Buganda v Attorney-General of Uganda* (1959), ILR, 27, p 260, 270, and in the Privy Council [1960] 3 All ER 849, 855), although in substance there may be little difference between the two views once account is taken of the various presumptions and interpretative rules which apply (see § pp 61–2 and § 20). 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.

26 See eg *Inland Revenue Commissioners v Collco Dealings Ltd* [1962] AC 1, 18. However, the terms of the treaty may affect the interpretation to be given to the statute: see § pp 61–2.

27 Thus public 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 impossibly vague): *R v Chief Immigration Officer, ex parte Salamat Bibi* [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 Phansopkar* [1976] 2 QB 606. The position in the law of Scotland is the same (but apparently with greater hesitation over resort to a treaty if an implementing statute is ambiguous): see *Kaur v Lord Advocate* 1981 SLT 322, and comment by J M T, 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 no obligation (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 Chundawadra* [1988] Imm AR 161); see also *Fernandes v Secretary of State for the Home Department* [1981] Imm AR 1; *R v Secretary of State for the Home Department* [1984] 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 Brind* [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. And see Warbrick, ICLQ, 38 (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 §, sect (3).

30 The constitutional position regarding the conclusion of treaties was the subject of debate in the House of Commons on 20 January 1972: see *Parliamentary 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.

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

March 1953 on the need for ratification of treaties: *Parliamentary Debates (Lords)*, vol 180, cols 1282–8.

31 Thus, under the so-called 'Ponsonby Rule', a treaty which requires ratification will normally lie before Parliament for 21 days before it is ratified. The mere approval of a treaty by Parliament is not in itself enough, however, to make the treaty have legal effects in the law of the UK: *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC at pp 347–8. Exceptions to the rule may be made when urgent or other important considerations arise: see eg BPIL, 1963–II, p 137, as to the Treaty banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water 1963. Where a treaty is subject to the 'Ponsonby Rule', an amending treaty which is not subject to ratification will nevertheless also be laid before Parliament where it requires the making of a statutory instrument for its implementation: see UKMIL, BY, 53 (1982), pp 344–5. See also § 602, n 4.

32 See eg *Mortensen v Peters* (1906) 14 SLR 227, 43 SLR 872 (a Scottish case); *Inland Revenue Commissioners v Collco Dealings Ltd* [1962] AC 1; *Cheyney v Conn* [1968] 1 All ER 779; *Woodend (KV Ceylon) Rubber and Tea Co Ltd v Commissioner of Inland Revenue* [1971] AC 321; *R v Secretary of State for the Home Department, ex parte Thakrar* [1974] 2 All ER 261; *R v Chief Immigration Officer, ex parte Salamat Bibi* [1976] 3 All ER 843. But see n 90 as to conflicts between a statute and EC Law.

A fortiori non-binding recommendations of an international authority cannot prevail over a statutory provision: *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] 1 AC 514, 523–5; *R v Immigration Appeal Tribunal, ex parte Alsawaf, The Times*, 29 August 1987.

In British prize courts (which are regarded as courts with an element of international character) the rules of international law are binding unless they be in conflict with an Act of Parliament. Orders in Council which are not in conformity with international law are not binding upon British prize courts unless they amount to a mitigation of the rights of the Crown in favour of the enemy or a neutral, or unless they order reprisals which are justified by the circumstances of the case and do not entail upon neutrals an unreasonable degree of inconvenience. See *The Zamora* [1916] AC 77, 93; *The Hakan* [1918] AC 148; *The Glenroy* [1945] AC 124; and see vol II (7th ed) of this work § 434, for further details; and Fawcett, *The British Commonwealth in International Law* (1963), pp 52–5.

As to the international character of, and the application of international law by, the Judicial Committee of the Privy Council, see Fawcett, BY, 42 (1967), pp 229–63.

33 See generally on the presumption, Maxwell, *Interpretation of Statutes* (12th ed, 1969), pp 183–6; Duffy, ICLQ, 29 (1980), pp 585, 586–96. Since the underlying basis for the presumption relates to Parliament's presumed intention when enacting a statute, it might seem difficult to apply it in relation to a treaty obligation arising after the enactment of the statute in question: see eg *Duke v GEC Reliance Ltd* [1988] AC 618. But for the contrary view see Scarman LJ in *Ahmad v Inner London Education Authority* [1978] 1 QB 36, 48–50; and see Duffy, ICLQ, 29 (1980), pp 591–3.

The presumption that English law is in conformity with international law does not allow a statute to be used as evidence of what international law was at the date of the statute: *I Congreso del Partido* [1983] AC 244, 260, *per* Lord Wilberforce. The presumption does not necessarily mean that a statute must be presumed to have an effect identical to that of a treaty obligation, so as to exclude the statute containing additional elements (so long as those additional elements are

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 Norwhale* [1975] 1 QB 589.

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.

34 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.

35 See *Ellerman Lines Ltd v Murray* [1931] AC 126; *Theophile v Solicitor-General* [1950] AC 186, 195–6; *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143; *Post Office v Estuary Radio Ltd* [1967] 1 WLR 1396, 1404; *The Annie Hay* [1968] P 341; *Corocraft v Pan American Airways Inc* [1969] 1 QB 616, 653 (and note by Keith, ICLQ, 19 (1970), pp 127–34); *Monte Ulia v Banco, The Banco* [1971] P 137; *Benin v Whimster* [1975] 3 All ER 706; *R v Home Secretary, ex parte Bhajan Singh* [1976] 2 QB 198, 207; *R v Home Secretary, ex parte Phansopkar* [1976] 2 QB 606, 626; *Pan-American World Airways Inc v Dept of Trade* [1976] 1 Lloyd's Rep 257; *Waddington v Niah* [1974] 2 All ER 377; *Quazi v Quazi* [1980] AC 744; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771; *Minister of Public Works of the Government of the State of Kuwait v Sir Frederick Snow and Partners* [1984] AC 426, 435–6; *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255; *The Antonis P Lemos* [1985] AC 711; *R v Immigration Appeal Tribunal, ex parte Chundawadra* [1988] Imm AR 161; *Pickstone v Freemans Plc* [1989] AC 66 (concerning the interpretation of a statutory instrument). See also § 442, n 5, as regards the European Convention on Human Rights.

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 *Alcom Ltd v Republic of Colombia* [1984] AC 580, 588.

If the statute is unambiguous there will be no room for the presumption to apply: see *Winfat Enterprise (HK) Co Ltd 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.

36 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* [1981] AC 303, 352, 354; *Cheall 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 *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] 2 All ER 620, 648), that does not deprive the interpretative principle of validity, since the presumption should probably be regarded as one aspect of a broader rule which, when there is room for choice, requires the courts to apply the law consistently with the UK's international obligations.

37 A treaty will clearly be relevant where the statute was enacted to give effect to that treaty, but it may also be relevant in other cases. Thus the Court of Appeal has held that it can and should take the European Convention for the Protection of Human Rights and Fundamental Freedoms into account 'whenever interpreting a statute which affects the rights and liberties of the individual': *R v Home Secretary, ex parte Bhajan Singh* [1976] QB 198, 207 (*per* Lord Denning MR: but see n 27); and see Mann, LQR, 94 (1978), pp 512, 517–22; and *Attorney-General v Guardian Newspapers Ltd* [1988] 3 All ER 545 (Convention confirming a rule of domestic law); *R v Secretary of State for Transport, ex parte Philippine Airways* [1984] TLR 273, 570 (exercise of statutory powers on basis of misinterpretation of treaty: and see Crawford, BY, 56 (1985), pp 320–4).

not directly give rise in English law to rights or obligations for private parties, but indirectly it may affect them, for example by bringing 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,[38] and may not inquire 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.[39]

(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

38 See § 460.

39 See *R v Kent Justices, ex parte Lye* [1967] 2 QB 153, 173.

40 See generally Seidl-Hohenveldern, AJ 49 (1955), pp 451–76; Oehlinger, *Der völkerrechtliche Vertrag in Staatlichen Recht* (1973). Article 9 of the 1955 Constitution followed the terms of Art 8 of the Austrian Constitution of 1934 re-enacting Art 9 of the Constitution of 1920 (as to which see Kelsen, *Die Verfassungsgesetze der Republik Osterreich*, Part 5 (1920), pp 75 *et seq*; Verdross, *Die einheit des rechtlichen Weltbildes* (1923), pp 111–18; Wittmayer, ZöV, 13 (1926), pp 1–5; Métall, *ibid*, 14 (1927), pp 161–87; Steiner, AJ 29 (1935), pp 125–29).

41 See *Austrian Treasury (Postal Administration) v Auer*, AD 14 (1947), No 125; *Dralle 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.

42 *Pokorny v Republic of Austria*, ILR, 19 (1952), No 98; *Execution of Judgments (Austrian Peace Treaty) Case*, ILR, 23 (1956), p 469; *German Assets (Restitution) Case* (1956), ILR, 40, p 228; *Restitution (Austria) Case* (1956), *ibid*, p 230; *Applicability in Austria of European Convention on Human Rights Case* (1960), *ibid*, p 238; *Highway Code (Austria) Case* (1960), *ibid*, p 235; *Confiscation of Austrian Property in Yugoslavia Case* (1960), *ibid*, p 175; *Deprivation of Liberty by Administrative Action (Austria) Case* (1961), *ibid*, p 244; *Ex parte Püschel* (1961), ILR, 38, p 174.

A law exacted to give effect to a treaty may be interpreted in the light of the treaty's origin and purposes: *Public Prosecutor v Günther B* (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 assent of the Belgian Parliament has been obtained. A treaty which has not received that assent 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 conflict with (and so cannot prevail over) the national law since they operate on different legal planes.[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,[46] provided that the treaty has been officially published.[47] Rules of customary international law do not prevail over Belgian municipal law.[48]

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.[49] This applies only to general customary rules of international law. A

[43] See Schreuer, ZöV, 42 (1982), pp 93–8; and, as to the previous arrangements, *ibid*, 37 (1977), pp 468–502.

[44] *Belgian State v Leroy*, ILR, 22 (1955), p 614; *Belgian State v Marquise de Croix de Maillie de la Tour Landry*, ILR, 24 (1957), p 9; *Régie des Télégraphes et Téléphones v Société pour la Coordination de la Production de l'Energie Electrique* (1978), ILR, 77, p 419. See generally Rolin in *Journaux des tribunaux* (1953), p 561ff; Smets, *L'Assentiment des chambres législatives aux traités internationaux et l'Article 68, alinéa 2, de la Constitution Belge* (1964); *L'Adaptation de la Constitution Belge aux réalités internationales: actes du colloque des 6 et 7 mai 1965* (1966); P de Visscher, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 605–12; Maresceau in *The Effect of Treaties in Domestic Law* (ed Jacobs and Roberts, 1987), pp 1–28.

As to the possibility of the Belgian Parliament delegating certain powers to organisations set up under public international law, see Article 25*bis* of the Constitution, promulgated in 1970.

[45] *SA Eau, Gaz, Electricité et Applications v Office d'Aide Mutuelle*, ILR, 23 (1956), p 205; *Pittacos v Etat Belge* (1964), ILR, 45, p 24; *Ananou v Defauw and Ploegaerts* (1964), ILR, 47, p 328; *Count Lippens v Etat Belge* (1964), *ibid*, p 336.

[46] *X v Y* (1966), ILR, 47, p 333; *Minister for Economic Affairs v Fromagerie Franco-Suisse 'Le Ski'* [1972] CMLR 330, 373 (and see comment by Pescatore in *Cahiers de droit européen* (1971), pp 561–86); see also *Sociaal Fonds voor de Diamantarbeiters v Chougol Diamond Co* [1969] CMLR 315.

[47] *Boileau v Mélard*, ILR, 20 (1953), p 409; *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).

[48] *Pittacos v Etat Belge* (1966), ILR, 48, p 20.

[49] See also Art 100(2). Article 25 is a striking 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 *ius cogens*, be applied under Art 25 if a relevant treaty concluded by

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 law[50] (as, for example, in a treaty codifying certain rules of international law).

Article 59 of the Basic Law requires treaties which regulate political relations[51] 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 taken to admit the application by 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

the Federal Republic contains a different provision: *Assessment of Aliens for War Taxation Case* (1965), ILR, 43, p 3. Legislative acts must be interpreted in accordance with the Basic Law, including therefore Art 25: *Acquisition of German Nationality Case* (1966), ILR, 57, p 306. The fact that respect for state sovereignty is a general rule of international law does not mean that Art 25 requires laws of foreign states to be applied if their application would conflict with basic rights recognised in the Basic Law: *Basic Right to Marry Case* (1971), ILR, 72, p 295. See also *Universal Jurisdiction over Drug Offences Case* (1976), ILR, 74, p 166.

For comment generally on the position in the Federal Republic see Mosler, *Das Völkerrecht in der Praxis der deutschen Gerichte* (1957); Pigorsch, *Die Einordnung völkerrechtlicher Normen in das Recht der Bundesrepublik Deutschland* (1959); Doehring, *Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts und das deutsche Verfassungsrecht* (1963); Boehmer, *Der völkerrechtliche Vertrag im deutschen Recht* (1965); Bleckmann, *Grundgesetz und Völkerrecht* (1975); Vitányi, Neth IL Rev, 24 (1977), pp 578–88; Frowein in *The Effect of Treaties in Domestic Law* (eds Jacobs and Roberts, 1987), pp 63–86; Rudolf, in *International Law and Municipal Law* (eds Tunkin and Wolfrum, 1988), pp 24–40; Randelzhofer, *ibid*, pp 101–14.

[50] *European Human Rights Convention Case*, ILR, 22 (1955), p 608; *German–Swiss Extradition Case (1)* (1967), ILR, 60, pp 310, 312; *Tax on Imported Lemons Case* (1969), ILR, 61, p 620.

[51] See *Commercial Treaty (Germany) Case*, ILR, 19 (1952), No 99.

[52] See eg *Judgment Involving the Non-Self-Executing Character of GATT (Art 111)* (1969), AJ, 65 (1971), p 627 (and comment by Riesenfeld, *ibid*, pp 548–50); *Town and Country Planning (United States Citizens in Germany) Case*, ILR, 24 (1957), p 8; *S v Free State of Bavaria* (1966), ILR, 45, pp 316, 319; *Greek Seamstress Residence Permit Case* (1974), ILR 74, p 397.

[53] 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 on Relations between the Federal Republic of Germany and the German Democratic Republic 1972* (1973), ILR, 78, pp 150, 160. For other decisions regarding the application of treaties see *Denominational Schools Case* (1967), ILR, 57, p 1; *Indemnification Claim Case* (1967), ILR, 59, p 597; *Officina Meccanica Gorlese v Burgsmüller* (1971), ILR, 70, p 428. But a mere understanding between relevant authorities of the Federal Republic and another state will not be applied by a court in 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[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 when duly ratified or approved[55] shall on publication[56] have an authority superior to that of laws,[57] even if later than the treaty,[58] subject to reciprocity.[59]

[54] This Article was used for the first time in 1970 (see *Re European Communities Amendment Treaty 1970* (1970), ILR, 52, p 418; RG 75 (1971) p 241) and for the second time in 1976 ([1977] 1 CMLR 121; see CML Rev, 14 (1977), p 648, with comment by Kovar and Simon, *ibid*, pp 525–60), in both cases in the context of French commitments to the European Communities. The Council's third decision under Art 54 was delivered in 1985: see Favoreu, AFDI, 31 (1985), pp 868–75. See also Blumann, RG, 82 (1978), pp 537–618; Luchaire, *Revue trimestrielle de droit européen*, 15 (1979), pp 391–428; Favoreu, AFDI, 23 (1977), pp 95–125. The Constitutional Council has also held that Art 61 of the Constitution (which provides for it to rule on the constitutionality of a law) does not enable it to examine the conformity of a law with a treaty binding on France: *Re Law on the Voluntary Termination of Pregnancy* (1975), ILR, 74, p 523, with comment by Franck, RG, 79 (1975), pp 1070–90. And see *Re Direct Elections to European Assembly* (1976), ILR, 74, p 527, with comment by Coussirat-Coustère, AFDI, 22 (1976), pp 805–21; and Decision of 17 July 1980, RG, 85 (1981), p 202. But it may rule on the constitutionality of a law passed in order to give effect to a treaty obligation: see eg *Re Law Authorising an Increase in the French Quota to the International Monetary Fund* (1978), ILR, 74, p 685, and RG 83 (1979), p 217; with comment by Carreau, *ibid*, pp 209–17. See also generally Nguyen Quoc Dinh, AFDI, 21 (1975), pp 859–87 and RG, 80 (1976), pp 1001–36; Dubois, AFDI, 17 (1971), pp 9–60.

[55] See *Re Société Navigator* (1965), ILR, 47, p 312; *Ministry of Finance v Chauvineau* (1967), ILR, 48, p 213.

[56] See eg *Orso and Nari v Sevastopoulo*, ILR, 23 (1956), p 468; *Government Commissioner with the Commission for the Distribution of Compensation for Czechoslovak Nationalisations* (1959), ILR, 28, p 438; *Gossard v Receveur des Finances de Compiègne* (1972), ILR, 73, p 696. In *Racca v Bourjac* (1960), ILR, 39, p 467, and *Sepicacchi v Giraldi Partners* (1960), ILR, 42, p 265, it was held that a treaty does not have force of law in France until publication in the OJ, and will not therefore be applied to events occurring before the date of publication; but if the terms of the treaty require otherwise, the treaty may be applied: *Kebailli v Dame Fethier Bent Romdane* (1958), ILR, 39, p 458, and *Boucher (Widow) v CATI and La Préservatrice* (1960), *ibid*, p 409. Mere publication of a treaty in the OJ, or publication of the law authorising ratification of the treaty but not the treaty itself, will not give the treaty the force of law: *Re Car* (1960), *ibid*, p 460; *Marteau Partners v Receveur des Finances de Saint-Nazaire* (1961), ILR, 44, p 291. As to the lack of effect in municipal law of an incorrectly published amendment to a duly published treaty see *Re Cartel d'Action Morale et Sociale* and *Union Feminine Civique et Sociale* (1966), ILR, 48, p 209. See generally Burdeau, AFDI, 32 (1986), pp 837–56.

[57] Eg *Klarsfeld v Office Franco-Allemand pour la Jeunesse* (1968), ILR, 72, p 191; *Croissant* (1978), ILR, 74, p 505. But if the treaty is not directly applicable it will not be given priority over national laws: *Males* (1973), ILR, 73, pp 698, 704.

[58] See *Administration des Douanes v Soc des Cafés Jacques Vabre*, RG, 80 (1976), p 960; *Kamolpraimpna* (1971), ILR, 72, p 670; *re Nicolo*, [1990] 1 CMLR 173 (on which see Lerche, ZöV, 50 (1990), pp 599–645).

[59] See *Lambert v Jourdan*, AD, 15 (1948), No 111; *Estate of Repetti*, ILR, 18 (1951), No 120; *Ministère Public v S*, ILR, 19 (1952), No 66; *Allahverdi v Lanauze*, ILR, 21 (1954), p 1; *Whitley v Aitchison*, ILR, 26 (1958–II), p 196. While the absence of reciprocity is relevant to the question whether or not a treaty prevails over an inconsistent law, it does not affect the constitutionality of a law in conformity with France's treaty obligations: Decision of the Constitutional Council, 30 December 1980, RG, 85 (1981), p 601, with comment by Decaux, at pp 603–18. The determination whether reciprocity exists is a matter for the Minister of Foreign Affairs: *Re Rekhou*, AJ, 77 (1983), p 161; *Keyla v Dame Lisak*, RG, 89 (1985), p 538. As to the practice in France regarding reliance by the courts on statements of the Executive on certain matters of international law, see § 460.

Greece Article 28(1) of the Constitution which entered into force in 1975[60] 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 Greek 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.[61] In cases of doubt about the correct interpretation of a statute, it should be construed subject to the general principles of international law.[62]

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) provides that only Parliament may make laws. Accordingly for a treaty to have effect in Irish law it must be given such effect through legislation.[63]

Italy[64] 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

See generally on the position in France, Preuss, AJ, 44 (1950), pp 641–69; Rousseau in *Etudes Georges Scelle* (vol ii, 1950), pp 565–81; Luchaire, *ibid*, pp 815–60; Bial, AJ, 49 (1955), pp 347–55; Pfloeschner, *Les Dispositions de la Constitution du 27 Octobre sur la primauté du droit international et leur effec sur la situation des etrangers en France sous la IV République* (1961); Schilling, *Völkerrecht und innerstaatliches Recht in Frankreich* (1964); Lesage, AFDI, 8 (1962), pp 873–88; Reuter and others, *L'Application du droit international par le juge Français* (1972); Nguyen Quoc Dinh, RG, 80 (1976), pp 1001–36; Bermann, ICLQ, 28 (1979), pp 458–90; de la Rochère in *The Effect of Treaties in Domestic Law* (eds Jacobs and Roberts, 1987), pp 39–62.

[60] See Fatouros, AJ, 70 (1976), pp 492–506.

[61] *Compulsory Acquisition (Greece) Case*, ILR, 20 (1953), p 328. But see *Foreign Judgments (Treaty of Lausanne) Case*, ILR, 19 (1952), No 9, at p 23.

[62] *Nisyros Mines Case*, ILR, 19 (1952), No 27 (concerning legislation enacted by another state).

[63] *Re O'Laighléis*, ILR, 24 (1957), p 420; *The State (at the Prosecution of Jennings) v Furlong* (1966), ILR, 53, p 9; *Re Woods* (1967), ILR, 53, p 552. See generally Temple Lang, ICLQ, 12 (1963), pp 552–81.

[64] See Miele, *La constituzione Italiana e il diritto internazionale* (1951); Sereni, *Diritto internazionale* (vol 1, 1956), p 228; Quadri, *Diritto internazionale publico* (1968), pp 63ff; Oellers-Frahm, ZöV, 34 (1974), pp 330–49; La Pergola and Del Duca, AJ, 79 (1985), pp 598–621; Gaja in *The Effect of Treaties in Domestic Law* (eds Jacobs and Roberts, 1987), pp 87–108.

generally accepted customary international law.[65] 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.[66] 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.[67] 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. If 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.[68] 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.[69]

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65 *Colorni v Ministry of War*, ILR, 17 (1950), No 138; *Ministero Della Difesa-Esercite v Salamone*, ILR, 18 (1951), No 211; *Ministero Difesa v Ambriola, ibid*, No 213; *Soc Timber et al v Ministeri Esteri e Tesoro, ibid*, No 192; *Castiglioni 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 Ergialli*, 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 Società Immobiliare Soblim* (1979), ILR, 78, p 101.

66 See *Combes de Lestrade v Ministry of Finance*, ILR, 22 (1955), p 882; *Re Masini*, ILR, 24 (1957), p 11; *Ente Nazionale per la Cellulosa e per la Carta v Cartiera Italiana, ibid*, p 12; *Re Berti*, AD, 16 (1949), No 3; *Costa v ENEL* [1964] CMLR 425, 435–6; *Union Manifatture v Ministry of Finance* (1972), ILR, 71, p 589; *Treasury Ministry v Di Raffaele* (1974), ILR, 77, p 562; *Finance Ministry v SpA Manifattura Lane Marzotto* (1973), *ibid*, p 551. In relation in particular 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 Cuillier, Ciamborrani and Vallon* (1979), ILR, 78, p 93.

68 *Huberty v Public Prosecutor*, ILR, 17 (1950), No 3; *Dieudonné v Administration des Contributions*, ILR, 18 (1951), No 5. See also Pescatore, *Journal des Tribunaux*, 68 (1953), p 645, *Conclusion et effets des traités internationaux selon le droit constitutionnel, les usages et le jurisprudence du Grand Duché de Luxembourg* (1964), and *Pasicrisie Luxembourgeoise* (1969), p 4.

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

The Netherlands[70] 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.[71]

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.[72] 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;[73] it is unclear whether they also prevail over subsequent national legislation.[74] Customary

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70 See Schurmann, *Grotius Society*, 30 (1944), pp 34–7; Erades, *Varia Juris Gentium: Liber Amicorum JPA François* (1959), pp 93–9; van Panhuys, AJ, 47 (1953), pp 537–58, and AJ, 58 (1964), pp 88–108; Erades and Gould, *The Relation between International Law and Municipal Law in the Netherlands and in the United States* (1961); Lammers in *International Law in the Netherlands*, vol 1 (eds van Panhuys *et al*, 1978), pp 333–69; Erades, *ibid*, vol 3 (1980), pp 375–434; Alkema, Neth IL Rev, 31 (1984), pp 307, 322–28; Schermers in *The Effect of Treaties in Domestic Law* (eds Jacobs and Roberts, 1987), pp 109–22.

71 *The Nyugat*, ILR, 24 (1957), p 916; *Schoning v State of the Netherlands* (1959), ILR, 30, p 1; *Permanent Court of Arbitration Employee Case* (1971), ILR, 73, p 1; *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA*, Neth YBIL, 11 (1980), pp 326, 329–30; van Panhuys, AJ, 58 (1964), at p 105. But see *Re Rohrig, Brunner and Heinze*, ILR, 17 (1950), No 125.

72 *Public Prosecutor v J V*, AD, 6 (1931–32), No 199; *Public Prosecutor v J de B*, ILR, 21 (1954), p 3; *Public Prosecutor v A J 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, 33, p 233; *Ex parte Minister X of the Oud-Gereformeerde Gemeente at Z* (1959–60), *ibid*, p 380; *Velleman en Tas NV v Leonidas* (1971), ILR, 70, p 435; *Nordstern Allgemeine Versicherungs AG v Vereinigte Stinnes Rheinreedereien* (1973), ILR, 74, p 2; *Public Prosecutor v JO* (1979), ILR, 74, p 130.

73 See generally Guggenheim, vol 1, pp 35–7; Rice, AJ, 46 (1952), pp 641–66; Schultz, *Ann Suisse*, 19 (1962), pp 9–30; *Re Lepeschkin*, AD, 2 (1923–24), No 189; *Thurgau v Lang and Legler*, ILR, 17 (1950), No 94; *Varini v Paoletti*, ILR, 21 (1954), p 264; *Rossier v Court of Justice of the Canton of Geneva* (1962), ILR, 32, p 348; *Ministère Public Fédéral v Glarner* (1963), *ibid*, p 344; *Pater v Pater* (1967), ILR, 72, p 639; *Verleye v Conseil d'Etat du Canton du Genève* (1967), *ibid*, p 668.

74 Guggenheim, vol 1, pp 35–7 and Rice, AJ, 46 (1952), pp 641–66 express differing views. In *Steenworden v Société des Auteuers*, AD, 8 (1935–37), No 4 the Swiss Federal Court seems to have held that it would be bound by a subsequent statute inconsistent with a treaty. However, in *Ktir v Ministère 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 required by the law itself); and see too *Rossier v Court of Justice of the Canton of Geneva* (1962), ILR, 32, p 348; *Librairié 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 Commission[76] 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 ... [T]he 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 sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.'[78]

Consequently Community law applies in each member state as part of the distinctive and autonomous Community legal system rather than solely in accordance with the rules which in each member state govern the application of international law within their legal systems.[79] Furthermore, directly applicable Community law (as to which, see below) retains its distinct character as Community law and does not become national law, although national procedures are available for its enforcement. As between Community law and international law, on the other hand, the European Court has held that a legislative act of a Community institution which is contrary to a rule of international law binding on the Community may be invalid, at least if the rule of international law is self-executing.[80]

The practice of several states has long acknowledged that treaty provisions which are sufficiently precise (often called 'self-executing' provisions) may be given direct effect by national courts. This practice has been significantly developed by the Court of Justice in order to establish, within the Community legal order, the direct effect[81] of many provisions of the treaties establishing the European Communities and of certain treaties amending or supplementing them. In Community law a treaty provision has direct effect so as to confer rights on individuals which national courts must protect, without the need for any intervention or specific enabling legislation by the state concerned, if it is clear and precise, unconditional, requires no further action to be taken, and leaves no significant discretion to the member states or to Community institutions.[82] Although it is now an extra-national court which decides with conclusive effect whether a Community treaty provision has direct effect, giving direct effect to such provisions has not in itself caused the member states serious problems of

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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 (1956), 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 Euratom, which, in the case of the Court and the Assembly, also supplanted the pre-existing equivalent ECSC institutions.

77 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

78 *Costa v ENEL* [1964] ECR 585.

79 The separateness of the Community legal order from that of the member states has been accepted by, eg the Italian and German constitutional courts, and has been the basis for denying their competence to entertain direct challenges against the validity of Community legislative instruments for being in alleged violation of provisions of the national Constitution: see eg Decision of the Federal Constitutional Court, 18 October 1967 (see Frowein, CMLR Rev, 5 (1967–68), p 483); *Internationale Handelsgesellschaft v EVst* [1974] 2 CMLR 540; *Soc Acciaierie San Michele v High Authority* [1967] CMLR 160; *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372.

80 *International Fruit Co v Produktschap voor Groenten en Fruit* [1972] ECR 1219. As to the relationship between Community law and international law generally, see van Panhuys, CML Rev, 3 (1965–66), pp 420–49; Pescatore, CML Rev, 7 (1970), pp 167–83, and *Cahiers de droit européen* (1970), pp 501–25; Schermers, CML Rev, 12 (1975), pp 77–90; van der Meersch, Hag R, 148 (1975), v, pp 1–433; Meessen, CML Rev, 13 (1976), pp 485–501. For a discussion of conflicts which can arise, at the international, European Community and national levels, between Community law and international law, see Dowrick, ICLQ, 31 (1982), pp 59–98.

81 The direct effect of Community law within the member states, and the relationship generally between Community law and the national laws of the member states, are the subject of an extensive literature, to be found in specialised works on European Community law.

82 See eg *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; *Costa v ENEL* [1964] ECR 585; *Salgoil v Italian Ministry for Foreign Trade* [1968] ECR 453; *Defrenne v SABENA* [1976] ECR 455.

legal or constitutional principle.[83] Provisions of treaties concluded between the Community and a non-member state may also have direct effect within member states if they are, in the light of the structure, context and purpose of the treaty, sufficiently precise and unconditional.[84]

The notion of direct applicability applies not only to Community treaties but also to instruments made by the Council and Commission of the Communities in accordance with the treaties. This has caused greater difficulties for member states, for it virtually amounted to conferring on those international bodies a power to legislate within the member states. While a limitation of their sovereign powers in favour of international organisations was envisaged in the constitutions of some member states,[85] this was not the case with all of them, who therefore had, by other means, to accommodate the effects of such an international legislative power. The most important of the instruments which are made by Community institutions are regulations, directives and decisions. Article 189 of the EEC Treaty[86] provides that regulations are of general application, binding in their entirety and directly applicable in all member states. Although the Treaty does not say that directives and decisions are directly applicable (and indeed, in the case of directives suggests the opposite by providing that they are binding upon the member states as to the result to be achieved but leave to the member states the choice of method for achieving that result), the Court of Justice has held that this does not exclude their provisions having direct effect if they are unconditional and sufficiently clear and precise.[87]

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[83] In the UK it was a constitutional innovation to enable treaty provisions to take direct effect as law in the UK, but that result was achieved, consistently with constitutional principle, by statute: European Communities Act 1972, s 2(1). So, where a statute refers to the law of any part of the UK that reference includes Community law: *Re Westinghouse Electric Corp (No 1)* [1977] 3 All ER 703, 711. For literature on the European Communities Act 1972, see n 90.

[84] *Hza Mainz v Kupferberg* [1982] ECR 3641. See also Groux, *Revue trimestrielle de droit européen*, 19 (1983), pp 203–32; Schermers, CML Rev, 19 (1982), pp 563–70; Pescatore in *The Effect of Treaties in Domestic Law* (eds Jacobs and Roberts, 1987) pp 171–96.

Where the principles of a treaty form part of Community law, they may, in that latter capacity rather than *qua* treaty, have effect within the domestic law of the member states: see eg Case No 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1663, 1682 (as to certain principles of the European Convention on Human Rights).

[85] Eg Belgium (Art 25*bis*), Denmark (Art 20), Italy (Art 11), Federal Republic of Germany (Art 24), the Netherlands (Art 92), Greece (Art 28(2) and (3)), and Spain (Art 93). See also § 37, n 6.

The Republic of Ireland amended its Constitution in 1972 to introduce an addition to Art 29 to allow for membership of the Communities: see Lang, CML Rev, 9 (1972), pp 167–78; and *Crotty v An Taoiseach* [1987] CMLR 666 (on which see Lang, CML Rev, 24 (1987), pp 709–18, and O'Connor, AFDI, 33 (1987), pp 762–73).

[86] Article 161 of the Euratom Treaty is in identical terms; Arts 14 and 15 of the ECSC Treaty use slightly different terminology.

[87] See *Grad v Finanzamt Trauenstein* [1970] ECR 825; *Van Duyn v Home Office* [1974] ECR 1337 (and see note by Simmonds, ICLQ, 24 (1975), pp 419–37); *Publico Ministero v Ratti* [1973] ECR 1629; *ENKA BV v Inspector of Customs and Excise* [1977] ECR 2203; *Delkvist v Public Prosecutor* [1978] ECR 2327; *Becker v Finanzamt Münster-Innenstaat* [1982] ECR 53; Case 152/84, *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, and note by Arnull, ICLQ, 35 (1986), pp 939–46; Case 188/89, *Foster v British Gas (The Times*, 13 July 1990; [1991] 2 WLR 258). While the incorporation of a treaty into national law may be enough to constitute compliance with a directive if the treaty covers the same ground as the directive, mere advisory circulars or notices will not be enough: *Commission v Belgium* [1986] ECR 3645. See also § 21, n 16. The direct effect of directives has not always been smoothly accepted in national courts: eg *Cohn-Bendit v Ministre de l'Interieur*, decided in 1978 by the French Conseil d'Etat (see Simon and Dowrick, LQR, 95 (1979), pp 376–85). See also Easson, ICLQ, 28 (1979), pp 319–53; Leitao, *Revue trimestrielle de droit européen*, 17 (1981), pp 425–41.

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,[88] and even where it is a provision of the constitution itself.[89]

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).[90]

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[88] *Costa v ENEL* [1964] ECR 585; *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1; *Amministrazione delle Finanze dello Stato v Simmenthal (No 2)* [1978] ECR 629 (and see comment by Carreau, *Revue trimestrielle de droit européen*, 14 (1978), pp 381–418).

[89] *Internationale Handelsgesellschaft v EVst* [1970] ECR 1125. But in parallel proceedings before the Federal German Constitutional Court that court did not accept that Community law prevailed over provisions of the Federal Constitution. Although in the case in point it found, as did the European Court, that there was no conflict between the Community instrument and the Constitution, it asserted its right to uphold the fundamental rights safeguarded in the Constitution against action taken on the authority of Community legislation which would to the extent of any conflict be inapplicable in the Federal Republic: *Internationale Handelsgesellschaft v EVst* [1974] 2 CMLR 540. But this decision was reversed, in the light of developments in Community law, in *Re the application of Wünsche Handelsgesellschaft* [1987] 3 CMLR 225, 262–5. See also, resulting from this judicial conflict, the Report of the Legal Affairs Committee of the European Parliament on the primacy of Community law and the Protection of Fundamental Rights, 26 November 1975 (Doc 390/75). See also *Fa Steinike & Weinlig v Bundesamt Ernährung & Forstwirtschaft* [1980] 2 CMLR 531; *Staatsanwalt Freiburg v Franz Keller* [1986] ECR 2897. The Italian Constitutional Court has also been hesitant about abdicating in principle all right to ensure, as against action by the Community, due observance of the fundamental principles of the Constitution, although recognising that in practice any conflicts of that kind were most unlikely to occur: *Costa v ENEL* [1964] CMLR 425, 430; *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372; *SpA Granital v Amministrazione finanziaria*, CMLR Rev, 21 (1984), p 756 (on which see La Pergola and Del Duca, AJ, 79 (1985), pp 598–621). For discussion of the issues see *Il primato del diritto comunitario e i giudici Italiani* (1978), by the Centro nazionale di prevenzione e difesa sociale. See also, generally, Bebr, *Development of Judicial Control of the European Communities* (1981), pp 614–718.

[90] See also s 3 on the effect to be given to decisions of the Court of Justice. The House of Lords has accepted the primacy of Community law over English law: *The Siskina* [1977] 3 All ER 803. See also *Macarthys Ltd v Smith* [1981] 1 All ER 1111; *Garland v British Rail Engineering Ltd* [1982]

(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.[91] Customary international law which is universally recognised, or has at any rate received the assent of the United States, is binding upon American courts and will be applied by them. In doing so the courts may be guided, or even bound, by suggestions or statements made to them by the executive branch of government on certain matters affecting the conduct of foreign relations.[92] By the Aliens Tort Claims Act federal courts have jurisdiction in any civil action by an alien for a tort 'committed in violation of the law of nations or a treaty of the United States'.[93]

As to treaties, Article VI of the Constitution provides that 'treaties made ... under the Authority of the United States' are part of the supreme law of the land, binding on the judges in every state, anything to the contrary in state constitutions or laws notwithstanding.[94] However, so called executive agreements,

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2 AC 751 (with comment by Hood Phillips, LQR, 98 (1982), pp 524–6); *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1990] 3 WLR 818, 856 (on which see *Parliamentary Debates (Commons)*, vol 175, cols 141–3 (written answers, 26 June 1990); Magliveras, ICLQ, 39 (1990), pp 899–914; Allott, CLJ, 49 (1990), pp 377–80; Wade, LQR, 107 (1991), pp 1–4).

See generally on the European Communities Act 1972 and the constitutional position concerning the relationship between Community law and the law of the UK, *Legal and Constitutional Implications of United Kingdom Membership of the European Communities* (1967), Cmnd 3301; Mitchell, CML Rev, 5 (1967–68), pp 112–32, and (with others) CML Rev, 9 (1972), pp 134–66; de Smith, MLR, 34 (1971), pp 597–614; Petersmann, *Die Souveränität des Britischen Parliaments in den Europäischen Gemeinschaften* (1972); Trindale, MLR, 35 (1972), pp 375–402; Howe, *International Affairs* (1973), pp 1–13; Forman, CML Rev, 10 (1973), pp 39–55; Allott, AFDI, 19 (1973), pp 35–101; Dreyfus, *Revue trimestrielle de droit européen*, 9 (1973), pp 242–59; Thelen, *Die Vereinbarkeit des Vertrages zur Gründung der europäischen Wirtschaftsgemeinschaft mit der britischen Verfassung* (1973); Hoggett in *The Law of the Common Market* (ed Wortley) (1974), pp 53–76; Collins, *European Law in the UK* (1975); Lasok and Bridge, *Law and Institutions of the European Community* (2nd ed, 1976), ch 12; Marescau, ICLQ, 28 (1979), pp 241–57; Jeconelli, *ibid*, pp 65–71; Hood Phillips, LQR, 96 (1980), pp 31–4; Steiner, *ibid*, pp 126–39; Usher in *International Law in the International System* (ed Butler, 1987), pp 99–112.

91 See Picciotto, *The Relation of International Law to the Law of England and the United States* (1915), pp 109–124; Wright, *The Enforcement of International Law through Municipal Law in the United States* (1916), and AJ, 11 (1917), pp 1–21; Scott, AJ, 1 (1907), pp 852–66; Potter, *ibid*, 19 (1925), pp 315–26; Sprout, *ibid*, 26 (1932), pp 280–95; Hyde, BY, 25 (1937), pp 1–16; Reif, AJ, 34 (1940), pp 661–79; Wright, *AJ Proceedings*, 1952, pp 71–85; Dickinson, *ibid*, pp 239–260, and in Hag R, 40 (1932), ii, pp 328–49; Erades and Gould, *The Relation between International Law and Municipal Law in the Netherlands and in the United States* (1961); Bourgignon, AJ, 71 (1977), pp 270–95; *Restatement (Third)*, i, pp 40–69; Klein, Yale JIL, 13 (1988), pp 332–65 (with particular reference to the application of human rights principles as customary international law); and (with particular reference to the power of the Executive, as a matter of US law, to authorise conduct contrary to international obligations resting on the USA) Charney, AJ, 80 (1986), pp 913–22, Glennon, *ibid*, pp 923–30, Henkin, *ibid*, pp 930–7, Kirgis, AJ, 81 (1987), pp 371–5, D'Amato, *ibid*, pp 375–7, Paust, *ibid*, pp 377–90). And see § 76.

See also *The Nereide* (1815) 9 Cranch 388; *United States v Smith* (1820) 5 Wheaton 153; *The Scotia* (1871) 14 Wallace 170; *The Paquete Habana* (1899) 175 US 677; *Respublica v De Longchamps* (1784), 1 Dall, 111. In the *Interhandel* case the US asserted in argument that international law was applied and administered by domestic courts as part of the law of the land: *Pleadings*, p 504; see also the judgement of the ICJ in that case, ICJ Rep (1959), p 28. In *US v Montgomery* the Court of Appeals for the 11th Circuit acknowledged that in a proper case a defendant could justify a violation of domestic law on the ground that it was inconsistent with international law: AJ, 80 (1986), p 346. In *Amerada Hess Shipping Corporation v Argentine Republic* a US Court of Appeals held that, for the purposes of the case with which it was dealing, international law was to be applied as it had evolved rather than as it had been at the date the statute in question was enacted: (1987), ILR, 79, pp 1, 11 (reversed by the Supreme Court, on other grounds, ILR, 81 p 658). See, similarly, *Tel-Oren v Libyan Arab Republic*, ILM, 24 (1985), pp 370, 373, 385–6; and see this § n 22.

The universal jurisdiction in respect of certain grave crimes of an international character accepted in customary international law is recognised and applied by US courts: *Demjanjuk v Petrovsky* (1985), ILR, 79, p 535. Even where a rule of customary international law is part of US law, it will depend on its content whether it gives rise to a private right of action to enforce it: *Handel v Artukovic* (1985), ILR, 79, pp 397, 401–3.

From the principle that international law is part of the law of the land it would seem to follow that the residuary power of a final and authoritative interpretation of international law is within the jurisdiction of the supreme legislative and judicial organs of the Union as distinguished from those of the states. See also Jessup, AJ, 33 (1939), pp 740–43. Although it is in the application of that principle that lies to some extent the explanation of the occasional refusal of the courts of the USA to exercise jurisdiction following upon seizure or arrest contrary to international law (see *The Mazel Tov*, reported as *Cook v The United States* (1933) 288 US 102, and see for comment thereon, Dickinson, AJ, 27 (1933), pp 305–10, and *ibid*, 28 (1934), pp 231–45), it is more normal for the courts to exercise jurisdiction even though the seizure may have been contrary to international law (see § 119); similarly, the courts will usually accept evidence notwithstanding that it was obtained in violation of international law (see § 119, n 16, final para), and apply the act of state doctrine even in respect of foreign laws contrary to international law (see § 112).

As to the application of international law as between the member states of a federation, or as between the federal state and its member states, see § 75, n 11.

92 See § 460.

93 28 USC § 1350 (originally enacted in 1789). See Burley, AJ, 83 (1989), pp 461–93. For cases arising from this provision see *Abdul Rahman Omar Adra v Clift* (1961), ILR, 32, p 1; *Lopes v Reederei Richard Schroder* (1963), ILR, 34, p 1; *Tel-Oren v Libyan Arab Republic*, AJ, 78 (1984), p 668, ILM, 24 (1985), p 370 (and see comment by d'Amato and Rubin, AJ, 79 (1985), pp 92–113); *Filartiga v Pena-Irala* (1980, 1984), ILR, 77, p 169 (and see comment by Hassan, ICLQ, 32 (1983), pp 250–8, and Blum and Steinhardt, Harv ILJ, 22 (1981), pp 53–113); *Jean-Juste v Duvalier*, AJ, 82 (1988), p 594. The value of the Act is diminished by the entitlement of the defendant in many cases to sovereign immunity, whether of a foreign state (eg *Siderman v Republic of Argentina*, AJ, 79 (1985), p 1065 (on which see Dieterich, Harv ILJ, 26 (1988), pp 594–600); *von Dardel v USSR*, AJ, 80 (1986), p 177; *Argentine Republic v Amerada Hess Shipping Corp* (1989), ILR, 81 p 658 (on the various stages of which see Montgomery, Harv ILJ, 29 (1988), pp 215–22; Kirgis, AJ, 82 (1988), pp 323–30; Janney, Harv ILJ, 31 (1990), pp 368–76), affirming that the Foreign Sovereign Immunities Act (below, p 344) provides the sole basis for jurisdiction over a foreign state, and that the Alien Tort Claims Act cannot be used for that purpose) or of the USA (eg *Sanchez-Espinoza v Reagan*, AJ, 80 (1986), p 350, with comment by Cole, Harv ILJ, 26 (1985), pp 155–88): and see § 110, n 1. In this context note also the observation in *Dreyfus v von Fink*, AJ, 71 (1977), p 149, that the law of nations, like a general treaty, has been held not to be self-executing so as to vest a plaintiff with individual legal rights.

94 See generally *Restatement (Third)*, i, pp 40–69; Jackson, *The Effect of Treaties in Domestic Law* (eds Jacobs and Roberts, 1987), pp 141–70. For an interesting example of the treaty-making power being effectively used for (legislative) action which might otherwise be impossible under the Constitution see the American case of *State of Missouri v Holland, United States Game Warden* (1920) 252 US 416; AD 1 (1919–22), No 1 (with further references). See also Black, Ill Law Rev, 25 (1930), pp 911–28 for a criticism of the decision. See also Dumbauld, AJ 50 (1956), pp 69–80, as regards the early law in respect of the application of treaties in the USA. As to the proposed constitutional amendment to limit the treaty-making power so as to prevent increases in executive power, see Whitton and Fowler, AJ, 48 (1954), pp 23–56; Finch, *ibid*, pp 57–82; Oliver, AJ, 51 (1957), pp 606–8. The applicability of a treaty depends on the other relevant state also being a party to it: see *Williams v Blount* (1970), ILR, 56, p 234; *US v Cadena*, AJ, 73 (1979), p 302.

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 executive agreements, although 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 USA 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 § 607, 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 prevailing over US law, see *Williams v Blount* (1970), ILR, 56, pp 234, 240.

[96] See *Foster v Nielson* (1829) 27 US (2 Pet) 253, 314; *Clark v Allen* (1947) 331 US 503, 508; *Fujii v California*, ILR, 19 (1952), p 312 (and comment thereon, cited at § 433, n 17); *Milliken v State of Florida* (1961), ILR, 32, p 342; *US v Mason* (1965), ILR, 42, p 232; *Spiess v C Itoh & Co (America)*, AJ, 75 (1981), p 972; *Frolova v USSR*, AJ, 79 (1985), p 1057; *People of Saipan v United States Department of the Interior* (1974), ILR, 61, pp 113, 134–5; *Handel v Artukovic* (1985), ILR, 79, pp 397, 399–401; *Islamic Republic of Iran v Boeing Co*, AJ, 80 (1986), p 347. A treaty's provisions will not be enforced where to do so would defeat foreign policy objectives of the US Government: *Federal Republic of Germany v Elicofon* (1970–73), ILR, 61, pp 143, 154.

See also Evans, BY, 30 (1953), pp 178–205, and *AS Proceedings* (1951), pp 66–76; Turlington, *ibid*, pp 76–82; Byrd, *Treaties and Executive Agreements in the United States* (1960); Russotto, *L'Application des traités self-executing en droit Américain* (1969); Riesenfeld, AJ, 74 (1980), pp 892–904; Paust, AJ, 82 (1988), pp 760–83.

A resolution of the UN Security Council has been held not to be a self-executive agreement: see *Diggs v Dent*, ILM, 14 (1975), p 797; *Diggs v Richardson*, AJ, 72 (1978), p 152; *Kangai v Vance*, AJ, 73 (1979), p 297.

[97] See *Mannington 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 Lufthansa AG v Civil Astronautics Board* (1973), ILR, 61, p 625.

[98] See eg *Clark v Allen* (1947) 331 US 503; *US v Pink* (1942) 315 US 203; *Territory of Hawaii v Ho*, ILR, 26 (1958–II), p 557; *Bethlehem Steel Corporation v Board of Commissioners of the Department of Water and Power of Los Angeles* (1969), ILR, 53, p 19; *Guiseppe v Cozzani* (1960), ILR, 31, p 1; *Testa v Sorrento Restaurant Inc* (1960), *ibid*, p 344; *Baldwin–Lima–Hamilton Corporation v Superior Court in and for City and County of San Francisco* (1962), ILR, 33, p 390; *Diggs v Schultz* (1971), ILR, 60, p 393; *United States v City of Glen Cove* (1971), ILR, 57, p 332; *United States v County of Arlington, Virginia* (1982), ILR, 72, p 652.

[99] *Re Dillon*: see Wharton, i, p 667; Moore, v, p 78. See also eg *Santovincenzo v Egan* (1931) 284 US 30; *US v Claus*, 63 F Supp 433; AD 3 (1946), No 83; *Lauritzen v Larsen* (1953) 345 US 571, ILR, 20 (1953), 197; *Ballester v US*, ILR, 22 (1955), p 460; *Hing Lowe v US*, ILR, 23 (1956), p 453;

will give way to a subsequent self-executing treaty[100] although perhaps not to a later executive agreement:[101] neither a treaty nor an executive agreement may derogate from the Constitution.[102] In doubtful cases statutes will be interpreted in the light of a presumption that the legislature did not intend to overrule international law[103] and if at all possible treaties will be carefully construed so as not to derogate from the authority and jurisdiction of the states.[104]

(5) Other states

The position in other states is similarly varied.[105] In a number of states, which were formerly British dependent territories and are now, or were, members of the Commonwealth, the law is similar to that of the United Kingdom.[106] Thus in

Reid v Covert, ILR, 24 (1957), p 549; *Yee Si v Boyd*, *ibid*, p 577; *Tag v Rogers* (1959), ILR, 28, p 467; *Brandon v SS Denton* (1962), ILR, 33, p 385; *Diggs v Schultz* (1971), ILR, 60, p 393; *Committee of United States Citizens Living in Nicaragua v Reagan*, AJ, 83 (1969), p 380. A statutory requirement to pay taxes is not avoided by being in part required to support action by the state (*in casu*, the war in Vietnam) which is allegedly contrary to international law: *Farmer v Rountree*, ILR, 23 (1956), p 1. As to the effects of the President's proclamation of a treaty see Reiff, AJ, 30 (1936), pp 63–79.

[100] See *Cook v The United States* (1933) 288 US 102; AJ, 27 (1933), pp 559–69; and *Minerva Automobiles Inc v United States*, AD, 9 (1938–40), No 196; *US v Postal*, AJ, 73 (1979), p 698 (with comment by Reisenfeld, AJ, 74 (1980), pp 892–904); *Zenith Radio Corp v Matsushita Electric Industrial Co Ltd*, AJ, 75 (1981), p 379; *United States v Palestine Liberation Organisation*, ILM, 27 (1988), pp 1055, 1079ff (this case was part of a wider dispute, involving also an Advisory Opinion of the ICJ on 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; see also associated documents at ILM, 27 (1988), pp 712–834; and § 49, n 9); *United States v McIntire* (1973), ILR, 61, p 182.

[101] *US v Guy W Capps, Inc*, ILR, 20 (1953), p 412; *US v Copeland*, ILR, 23 (1956), p 241.

[102] On the problems raised, in the USA, by a conflict between a treaty and the provisions of the Constitution, see Cowles, *Treaties and Constitutional Law: Property Interferences and Due Process of Law* (1941), and *Reid v Covert*, ILR, 24 (1957), p 549, in which the Supreme Court held the provisions of certain treaties unconstitutional (also *Burdell v Canadian Pacific Airlines Ltd*, AJ, 63 (1969), p 339); *Seery v US*, ILR, 22 (1955), pp 398, 403; *Geisser v United States* (1975–77), ILR, 61, p 443.

[103] See eg, cases cited in previous n, and *Peters v McKay*, ILR, 18 (1951), No 152; *Lauritzen v Larsen*, ILR, 20 (1953), p 197; *Petes Allen Claim* (1959), ILR, 30, p 204; *US ex rel Perez-Varella v Esperdy* (1960), ILR, 31, p 405; *McCulloch v Sociedad Nacional de Marineros de Honduras* (1963), ILR, 34, p 51; *Leasco Data Processing Equipment Corpn v Maxwell* (1972), ILR, 60, p 51; *Federal Trade Commission v Compagnie de Saint-Gobain-pont-à-Mousson*, ILM, 20 (1981), p 597 (and see Millon, Harv ILJ, 22 (1981), pp 458–64); *Immigration and Naturalization Service v Cardoza-Fonseca* (1987), ILR, 79, pp 610, 618–24, 628.

Similarly a self-executing treaty's application in US law is not deemed to have been abrogated or amended by a later statute unless Congress's intention to do so is clear: see eg *Trans World Airways Inc v Franklin Mint*, ILM, 23 (1984), pp 814, 819.

[104] *US v Pink* (1942), 315 US 203, 230; *von Engelbrechten v Nevy Bros Inc*, AJ, 64 (1970), p 433.

[105] See generally Ruth Masters, *International Law in National Courts* (1932); Mosler, Hag R, 91 (1957), i, pp 625–705; Seidl-Hohenveldern, ICLQ, 12 (1963), pp 90–101; Liparti, RI, 32 (1954), pp 149–60; Verdross, *ibid*, pp 3–14; Holloway, *Modern Trends in Treaty Law* (1967), pp 105–383; the replies from governments to the ILC concerning the law of treaties, YBILC (1950), ii, pp 197–221; and those parts of *Laws and Practices concerning the Conclusion of Treaties* (1953) (UN Legislative Series) which refer to the application of treaties in internal law.

[106] See generally, Fawcett, *The British Commonwealth in International Law* (1963), pp 16–74. As to the problems which can arise in federal states, including those of the Commonwealth, in giving effect to international obligations entered into by the state, see § 76.

Canada a treaty requires legislative action before private rights are affected,[107] and a statute will prevail notwithstanding that it may be in conflict with a treaty.[108] In *Australia* effect will be given to an established rule of customary international law unless to do so would be inconsistent with a statute;[109] legislative action is required before a treaty can have effect in Australian law.[110] The law of *India* requires legislation in order that a treaty may create rights or obligations enforceable in the courts, confers priority on a statute over a treaty (and over customary international law) should the two be in conflict, and recognises the need to interpret a statute so as, if at all possible, to avoid such a conflict.[111] In *Kenya* the attitude of the courts appears to be similar, at least as regards treaties.[112] In *New Zealand* too legislation is required if implementation of a treaty calls for a change in the existing law;[113] 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.[114]

In *South Africa* treaties, in the absence of legislation giving the relevant

[107] See *Re Arrow River Tributaries Slide and Boom Co*, AD, 6 (1931–32), No 2; *Re Noble and Wolf*, AD, 15 (1948), No 100; *Francis v R*, ILR, 23 (1956), p 459; *R v Canada Labour Relations Board* (1964), ILR, 42, p 267; *Mastini v Bell Telephone Co of Canada* (1971), ILR, 60, p 389; *Minister of Manpower and Immigration v Diaz Fuentes* (1974), ILR, 69, p 295. See generally Jacomy-Millette, *L'Introduction et l'application des traités internationaux au Canada* (1971).

[108] See *Swait v Board of Trustees of Maritime Transportation Unions* (1966), ILR, 43, p 1. See also *Croft v Dunphy* (1933) 1 DLR 225, [1933] AC 156, where the same view was expressed, *obiter*, with regard to the right of Canada to legislate outside Canadian territorial waters.

[109] See *Polites v The Commonwealth*, AD, 12 (1943–45), No 61; *Chow Hung Ching v R*, AD, 15 (1948), No 47; *Chin Yin Ten v Little* (1976), ILR, 69, pp 76, 80; *Koowarta v Bjelke-Petersen* (1962), ILR, 68, p 181.

[110] See *Bluett v Fadden*, ILR, 23 (1956), p 477; and *Bradley v Commonwealth of Australia* (1973), ILR, 52, p 1, treating a UN Security Council resolution as if it were a treaty. See generally Alexandrowicz, ICLQ, 13 (1964), pp 78–95.

Article 51(29) of the Constitution gives the federal government power to legislate with respect to external affairs, which includes legislation to implement a treaty: see *Commonwealth of Australia v State of Tasmania* (1983), ILR, 68, p 266.

[111] See *Birma v State*, ILR, 17 (1950), No 5; *Union of India v Jain and Others*, ILR, 21 (1954), p 256; *Sharma v State of West Bengal*, *ibid*, p 272; *Maharaja Bikram Kishore of Tripura v Province of Assam*, ILR, 22 (1955), p 64; *Steenhof v Collector of Customs* (1959), ILR, 31, p 241; *M/S Tilakram Rambaksh v Bank of Patiala* (1959), *ibid*, p 4; *Sudhansu Sekhar Singh Deo v State of Orissa* (1960), ILR, 53, p 568; *Jolly George Varghese v Bank of Cochin*, Indian JIL, 20 (1980), p 231. See also Alexandrowicz, ICLQ, 1 (1952), pp 289–300; Irani in *Studies in Law: An Anthology of Essays in Municipal and International Law* (ed Deshpande, 1961); Agrawala, *International Law: Indian Courts and Legislature* (1965). Note also that Art 51 of the Constitution exhorts the agencies of the state to foster respect for international law and treaty obligations in the dealings of organised peoples one with another.

[112] See *Okunda v Republic*, and (on appeal) *East African Community v Republic* (1969–70), ILR, 51, pp 414, 420; and comment by Ross, ICLQ, 21 (1972), pp 361–74. See also Isabirye, Indian JIL, 20 (1980), pp 63–82.

[113] *Hoani te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308; *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (on which see Elkind and Shaw, BY, 55 (1984), pp 189–248); and see Hastings, ICLQ, 38 (1989), pp 668–82. Ambiguous statutory provisions are, if possible, to be interpreted consistently with even a non-binding resolution of the Council of the League of Nations: *Levave v Immigration Dept* [1979] 2 NZLR 74; *Falema'i Lesa v Attorney-General of New Zealand* [1983] 2 AC 20.

[114] *Imperial Tobacco Company of India v Commissioner of Income Tax, South Zone, Karachi*, ILR, 27 (1958), p 103; *R v Fineberg* (1967), ILR, 45, pp 4, 17.

provisions the force of law, do not affect the rights of individuals,[115] and do not prevail over a contrary statute;[116] while customary international law forms part of the law of the land and will be ascertained and applied by the courts.[117]

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;[118] 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;[119] 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.[120]

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.[121] Just as a number of former British territories have in general

[115] *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* (1965), ILR, 52, p 422; and see generally Bridge, ICLQ, 20 (1971), pp 746–9; Schaffer, ICLQ, 32 (1983), pp 277–315.

[116] *S v Tuhadeleni* (1968), ILR, 52, p 29; and see note in ICLQ, 18 (1969), pp 789–90. See also *Binga v Cabinet for South West Africa* (1988), ILR, 82, pp 465, 486.

[117] *Parkin v Government of the République Democratique du Congo* [1971] 1 SA 259 (W); *South Atlantic Islands Development Corporation v Buchan* (1970), ILR, 55, p 1; *Nduli v Minister of Justice* (1977), ILR, 69, p 145; *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (1979), ILR, 64, p 689; *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* (1980), ILR, 64, p 708.

[118] *Silberwacht v Attorney-General*, ILR, 20 (1953), p 153; *Stampfer v Attorney-General*, ILR, 23 (1956), p 284; *Attorney-General of Israel v Eichmann* (1962), ILR, 36, pp 5, 277, 280–1. See generally Lapidoth, RG, 63 (1959), pp 65–93, and *La Conclusion des traités internationaux en Israel* (1962).

[119] *Custodian of Absentee Property v Samra*, ILR, 22 (1955), p 5; *Richuk v State of Israel* (1959), ILR, 28, p 442; *Attorney-General of Israel v Kamiar* (1966–68), ILR, 44, p 197; *Abd al Affo v Commander of the IDF Forces in the Gaza Strip*, ILM, 29 (1990), pp 139, 155–8.

[120] *Steinberg v Attorney-General*, ILR, 18 (1951), No 4; *Waskerz v Attorney-General*, ILR, 21 (1954), p 236; *Attorney-General of Israel v Eichmann* (1962, ILR, 36, pp 5, 277, 280–1; *Attorney-General of Israel v Kamiar* (1966–68), ILR, 44, p 197.

[121] See generally on the developments of the constitutional law of various countries in the direction of applying international law directly within states, Mirkine-Guetzevitch, RG, 52 (1948), pp 375–86; Morgenstern, BY, 27 (1950), pp 86–90; Preuss, Mich Law Rev, 51 (1953), pp 1117–42. See also Deever, Corn Law Rev, 36 (1951), pp 505–33; Paul de Visscher, 'Les tendances internationales des constitutions modernes', Hag R, 80 (1952), i, pp 515–76 and Mangoldt, *Jahrbuch für Internationales Recht*, 3 (1954), pp 11–25; Golsong, BY, 38 (1962), pp 445–56; Wilson, AJ, 58 (1964), pp 432–6.

In a different category are those constitutional provisions which embody particular rules of international law, such as the renunciation of war, or the treatment of aliens in accordance with

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.[122] 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[123] 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'.[124] 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.[125] A treaty may be applied by the courts even if there has been no detailed implementing legislation.[126] Customary rules of international law have also been held to be binding on Argentine courts.[127] 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,[128] they cannot derogate from provisions of the Constitution itself.[129]

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).

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*, (1953) (UN Legislative Series), pp 4–5.

125 *Martin y Cia Ltda v The Government*, ILR, 26 (1958–II), p 567.

126 *Montero v Fernandez*, AD, 9 (1938–40), No 188; *Editorial Noguer v Editorial Forjador*, AJ, 55 (1961), p 751.

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.

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.[130]

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;[131] in *Brazil* a treaty has been held to prevail over prior and subsequent national laws.[132] 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.[133] Soviet legal theory has always tended towards a dualist approach to the relation between international law and municipal law. Prevailing 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 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

130 See generally Kotani, RG, 64 (1960), pp 16–20; Takano, Jap Ann IL, 8 (1964), pp 9–24; Holloway, *Modern Trends in Treaty Law* (1967), pp 313–15.

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: *Ryuichi Shimoda v The State* (1963), ILR, 32, p 626.

131 *Ecoffard (widow) v Air France* (1964), ILR, 39, p 453; and see *Administration des Habous v Deal*, ILR, 19 (1952), No 67, for acceptance of the effect on Moroccan law of a judgment of the ICJ.

132 *Federal Government v Companhia de Radio Internacional do Brazil*, ILR, 20 (1953), p 1.

133 See Margolis, ICLQ, 4 (1955), pp 116–28; Triska and Slusser, *The Theory, Law and Policy of Soviet Treaties* (1962), pp 106–11; Ginsburgs, AJ, 59 (1965), pp 523–44; Grzybowski, *Soviet Public International Law* (1970), pp 45–7, 441–3; Blishchenko, AJ, 69 (1975), pp 819–27; Korbut in *International Law and the International System* (ed Butler, 1987), pp 95–8. See also, as to the position in Hungary before it became a Communist state, Arato, AJ, 43 (1949), pp 536–41. But note Art 8(1) of the Constitution of the German Democratic Republic, which provided for the generally recognised principles of international law to be binding on every citizen: cf. n 49.

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 always be so interpreted as to avoid such conflict.[1]

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,[2] 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.[3] This presumption, like that previously mentioned, cannot however be applied where the legislature's contrary intention is clear.[4]

§ 21 Municipal law and the fulfilment 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 rights, states are free to choose whether or not to exercise their rights to the full. If they do not do so international law has no concern with that omission, so long as any duties associated with the possession of those rights are performed. So far as concerns international obligations, however, international law requires that states fulfil 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

1 See nn 33–6, for a number of English decisions; and n 103, for some decisions of US courts; as to other countries see, as to India n 111; as to Israel n 120; as to Pakistan n 114; as to Greece n 62. Other states whose courts have applied the same rule of interpretation include France (*French State v Etablissements Monmousseau*, ILR, 15 (1948), No 197); Federal Republic of Germany (*Yugoslav Refugee (Germany) Case*, ILR, 23 (1956), p 386); and Austria (*Interpretation of Customs Valuation Statute (Austria) Case* (1962), ILR, 40, p 1).

In *Cooperative Committee on Japanese Canadians v Attorney-General for Canada* [1947] AC 87, there will be found an observation to the effect that the principle according to which statutes must be interpreted so as not to conflict with international law, did not apply to the interpretation of the Canadian War Measures Act 1927 – an Act relating to powers to be exercised at a time of war, invasion or insurrection. As to whether a statute whose terms differ from those of a related treaty indicate the State's interpretation of the treaty, see § 633, n 24.

2 See §§ 138–9.

3 See *American Banana Co v United Fruit Co* (1909) 213 US 347, 357; *Amsterdam v Minister of Finance*, ILR, 19 (1952), pp 229, 231; *Lauritzen v Larsen*, ILR, 20 (1953), pp 197, 201; *Air Line Stewards and Stewardesses Assoc International v Northwest Airlines Inc* (1959), ILR, 28, pp 115, 124; *Air Line Stewards and Stewardesses Assoc International v Trans World Airlines Inc* (1959), *ibid*, pp 125, 134–5; *US v First National City Bank*, AJ, 57 (1963), p 927; *Draper v Turner* [1965] 1 QB 424; *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966), ILR, 52, p 291; *US v Mitchell*, AJ, 71 (1978), p 788; *Bourlesan v ARAMCO*, AJ, 83 (1989), p 375; *Holmes v Bangladesh Biman Corp* [1989] AC 1112, 1126ff; *Argentine Republic v Amerada Hess Shipping Corp* (1989), ILR, 81, pp 658, 667; *Somchai Liangsiriprasert v Government of the United States of America* (Privy Council), ILM, 29 (1990), pp 1391, 1402. See generally Mann, Hag R, 111 (1964), i, pp 63–72; Maxwell, *Interpretation of Statutes* (12th ed, 1969), pp 169–77; *Craies on Statute law* (7th ed, 1971), ch 18.

4 Eg *Theophile v Solicitor General* [1950] AC 186, 195; *Boissevain v Weil* [1950] AC 327; and see comments by Lord Diplock, *Treacy v DPP* [1971] AC 537, 561–2.

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.[1]

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,[2] 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.[3] 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.[4]

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 Mainz v Kupferberg* [1982] ECR 3641, 3663–4.

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

See also § 150, n 9 as to the extent to which decisions as to nationality taken by the authorities of the state in question are not necessarily binding upon an international tribunal. Similarly, while statements by the executive branch of government as to the existence of a state of war might be binding on a national court, they are not conclusive for an international arbitration: *Dalmia Cement Ltd v National Bank of Pakistan* (1976), ILR, 67, p 611.

3 See the *Case Concerning German Interests in Polish Upper Silesia* (1926) PCIJ, Series A, No 7, at p 19; *Serbian 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 p 22; *Panevezys-Saldutiskis Railway Case* (1939) PCIJ, Series A/B, No 76, at p 19; *Nottebohm Case* ICJ Rep (1959), at pp 20–1, 24–6.

See generally on the role of national laws on the plane of international law, Jenks, BY, 19 (1938), pp 67–103; Marek, RG, 66 (1962), pp 260–98; Strebel, ZöV, 31 (1971), pp 855–82, and (as regards municipal law influences on international law) *ibid*, 36 (1976), pp 168–87; and n 4 below, and § 13, n 6. Note also the remarks in the Opinions of Judges Morelli, Gros and Riphagen in the *Barcelona Traction Case* (Second Phase), ICJ Rep (1970), at pp 233–4, 272–4 and 335–8.

4 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 recognised by civilised nations', which involves reference to concepts and principles adopted in municipal law. See also *The Word '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 distinction between a treaty 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.[5] On the international plane such a law will however be inapplicable[6] 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,[7] and which therefore are entitled to disregard that law and its purported consequences to the extent of its conflict with international law.[8] 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;[9] this applies equally to a state's assertion of its

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).

For a general discussion of references by international law to national law, see Furet, RG, 68 (1964), pp 887–916; Schnitzer, *Receuil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 702–42; Jenks, *The Prospects of International Adjudication* (1964), pp 547–603; Rougeaux, RG, 81 (1977), pp 361–85; Thirlway, BY, 60 (1989), pp 117–28; and § 632, n 10.

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

6 The national law is not rendered null and void by international law: see *Interpretation of the Statute of the Memel Territory* (1932) PCIJ, Series A/B, No 49, at pp 336–7. In the *Nottebohm Case*, ICJ Rep (1955), 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.

7 Thus in the *Anglo-Norwegian Fisheries* Case, ICJ Rep (1957), 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 ... the validity of the delimitation with regard to other States depends upon international law' (at p 132). See also the *Tunisia–Libya Continental Shelf Case*, ICJ Rep (1982), pp 67–9. As to the applicability of a state's nationality against another state see, to similar effect, the *Nottebohm Case*, ICJ Rep (1955), pp 20–21; see also the *Flegenheimer Claim*, ILR, 25 (1958–I), p 91. *Portugal v Liberia (ILO Complaint)* (1963), ILR, 36, p 351, demonstrates how strictly an international tribunal may look at a state's assertions that its legislation is consistent with its international obligations: the tribunal said that the implied repeal of legislation contrary to a treaty did not necessarily constitute compliance with a treaty's positive obligations, that an assertion that a treaty forming part of the national law prevailed over later contrary legislation was not to be lightly accepted, that legislation inconsistent with international obligations cannot be asserted to be constitutionally invalid because of the inconsistency, and that legislation contrary to treaty obligations was not lightly accepted as having become obsolescent (at pp 397–403).

8 See eg AJ, 74 (1980), pp 933–4. It should be noted that in some concession agreements there is provision to the effect that the governing law shall be the law of the grantor state *insofar as it is consistent with international law*, but otherwise shall be general principles of law: see generally § 12, n 12.

9 See, for instance, the *Alabama Arbitration*, Lapradelle et Politis, ii (1924), at p 891; *Jurisdiction of the Courts of Danzig* (1928) PCIJ, Series B, No 15, pp 26–7; and the *Greek and Bulgarian Communities Case* (1930) PCIJ, Series B, No 17, at p 32, where the Court said, 'it is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty'.

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.[10] 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,[11] 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.[12] The answer probably turns to a large extent on whether the particular international obligation in question relates to the possession or non-

Similarly, in the Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the ICJ recalled 'the fundamental principle of international law that international law prevails over domestic law': ICJ Rep (1988), pp 12, 34. See also Fitzmaurice, BY, 35 (1959), pp 185–94, and Hag R, 92 (1957), ii, pp 85–90; Vienna Convention on the Law of Treaties, 1969, Art 27; Draft Articles on State Responsibility, Art 4 (YBILC, 1973, ii, p 184); *Wollenborg Claim*, ILR, 24 (1957), pp 654, 661–2; *Droutzkoy Claim (No 2)* (1965), ILR, 40, pp 442, 447; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic* (1975–77), ILR, 53, pp 389, 480–1; *Re Revere Copper and Brass Inc and Overseas Private Investment Corporation* (1978), ILR, 56, pp 258, 282–4, 285–6.

10 See the decision of the French–Mexican Claims Commission in the *Georges Pinson Case*, AD, 1927–28, No 4. See also the Advisory Opinion of the PCIJ of 4 February 1932, in the matter of the *Treatment of Polish Nationals in Danzig*, pointing out that a state cannot adduce against another state its own constitution in order to evade obligations incumbent upon it under international law: (1932) PCIJ, Series A/B, No 44. See also § 37, n 6.

The European Court of Justice has consistently adopted the same principles as regards the failure of member states to implement Community obligations, even where the failure has been due to overriding constitutional difficulties such as are caused by the dissolution of Parliament. See eg *European Commission v Italy* [1970] ECR 961; *European Commission v Belgium* [1970] ECR 237; *European Commission v UK* [1979] ECR 419; *European Commission v Italy* [1979] ECR 771; and *ibid*, 3837; *European Commission v Italy* [1980] ECR 3635; *European Commission v Belgium* [1982] ECR 163; *European Commission v Belgium* [1988] ECR 1, 11. In the *Guincho Case* (1984), ILR, 78, p 355, the European Court of Human Rights held that delays in national court proceedings as a result of constitutional changes could only in exceptional circumstances constitute a justification for non-compliance with the state's human rights obligations.

As to the problems which may be caused in federal states, see § 76.

Useful collections of modern constitutions will be found in Peaslee, *Constitutions of the Nations* (4 vols, 3rd ed, 1965–70; vol 2, 4th ed, 1985); Blauenstein and Flanz, *Constitutions of the Countries of the World* (5 vols, 1971; looseleaf updating).

11 The PCIJ regarded it as a 'self-evident' principle that 'a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken': *Exchange of Greek and Turkish Populations Case* (1925), PCIJ, Series B, No 10, p 20.

12 See Draft Articles on State Responsibility, Arts 20, 21 and 23, together with the respective commentaries on those texts: YBILC (1977), ii, pp 11–30, and *ibid* (1978), ii, pp 81–6. See also Bin Cheng, *General Principles of International Law* (1953), pp 174–5; Fitzmaurice, Hag R, 92 (1957), ii, pp 89–90.

possession of certain laws, in which case the existence or otherwise of the law itself will affect the state's international obligations;[13] or whether the obligation is 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.[14] 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,[15] 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.[16]

[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).

See also *Portugal v Liberia (ILO Complaint)* (1963), ILR, 36, pp 351, 403–4, *European Commission v France* [1974] ECR 359, 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*, ZöV, 32 (1972), p 36 (with comment by Mosler, *ibid*, pp 57–68); *Klass Case* (1978), ILR, 58, pp 423, 443; *Marckz 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 needing to decide 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.

[14] 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.

[15] See § 19, nn 81–7, as to directly applicable Community law; and § 442, n 5 as to the European Convention on Human Rights. In the context of the implementation of 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.

[16] 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 MacGibbon, BY, 30 (1953), pp 293, 299–305; Wortley, *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

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Cruchaga, §§ 84–93 Holland, *Lectures*, pp 37–40 Schwarzenberger, pp 36–41 Smith, i, pp 14–36 Sibert, pp 21–30 Decevla, *Concetti di 'Civiltà' e di 'Nazioni Civili' nel diritto internazionale* (1937) Wright, AJ, 20 (1926), pp 265–68 Kunz, ZöR, 7 (1927), pp 86–99, *Staatenverbindungen* (1929), pp 258–73 and AJ, 49 (1955), pp 370–6 Kelsen, Hag R, 42 (1932) (4), pp 178–81 Basdevant, *ibid*, 58 (1936), iv, pp 484–96 H Lauterpacht, *ibid*, 62 (1937), iv, pp 188–200 Wilk, 45 (1951), pp 648–70 Fitzmaurice, Hag R, 92 (1957), ii, pp 95–116 Jenks, *The Common Law of Mankind* (1958), pp 63–172 McDougall and Laswell, AJ, 53 (1959), pp 1–29 Bos in *Varia Juris Gentium* (1959), pp 62–72 Truyol y Serra, Hag R, 116 (1965), iii, pp 95–171 H Lauterpacht, *Collected Papers* (vol 1, 1970), pp 112–29 Bozeman, *The Future of Law in a Multicultural World* (1971) Rubin, AJ, 67 (1973), pp 319–24 Ago, Ital YBIL, 3 (1977), pp 3–30 Lachs, Hag R, 169 (1980), iv, pp 239–51 Green, Can YBIL, 23 (1985), pp 3–32 Jennings in *Liber Amicorum for Lord Wilberforce* (1987), pp 39–51 *AS Proceedings*, 1989, pp 547–68.

§ 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.[1] The old Christian states of Western Europe constituted the original international community within which international law grew up gradually through custom and treaty.[2] Whenever a 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

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 about 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 712ff. 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.

[1] See Eppstein, *The Catholic Tradition of the Law of Nations* (1935). See also Wright, *Medieval Internationalism* (1930), and Bentwich, *The Religious Foundations of Internationalism* (1933), pp 83–158; and Guerry, *The Popes and World Government* (1964); de Riedmatten, Hag R, 151 (1976), iii, pp 115–58; Kooijmans, Hag R, 152 (1976), iv, pp 79–118. For an exposition of international law from the catholic point of view see Pasquazi, *Jus internationale publicum* (vol i, 1935).

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

[2] As to the application of international law in early English practice see Schwarzenberger, BY, 25 (1948), pp 52–90; Corbett, *Law in Diplomacy* (1959), pp 3–37; Parry, BPIL, *passim*.

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 1856.[5] Nevertheless the so-called capitulations in Turkey (and other non-European states) were maintained.[6] 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.[7]

[3] As to the position of non-Christian states and peoples at different stages in the development of international law see Westlake, i, p 40; Phillimore, i, §§ 27–33; Bluntschli, §§ 1–16; Heffter, § 7; Gareis, *Das heutige Völkerrecht* (1879), § 10; Rivier, i, pp 13–18; Fauchille, §§ 40–44 (1); Martens, § 41; Nys, i, pp 126–37; Westlake, *Papers*, pp 141–43; Lindley, pp 10–47 and *passim*; Smith, i, pp 14–33; Plantet, *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 underrated. See similarly the same writer in BY, 35 (1959), pp 162–82, BY, 37 (1961), pp 506–16, BY, 39 (1963), pp 441–8, 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 117–214. See also Wright, AJ, 48 (1954), pp 616–26; Higgins, *Conflict of Interests* (1965), pp 11–45; Mössner, *Die Völkerrechtspersönlichkeit und die Völkerrechtspraxis der Barbareskenstaaten* (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 Corbett, *Law in Diplomacy* (1959), pp 38–82.

[5] 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 'déclarent la Sublime Porte admise 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 262–74 – who regards Art 7 as an 'act of admission to what today might be called a regional understanding' (at p 274); see also Higgins, *Conflict of Interests* (1965), p 12.

[6] 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' was assented to by the other parties to the Treaty of Lausanne 1923, Art 28; see § 406.

[7] 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.

As to the application of the laws of war to non-civilised states and savage tribes see Wright, AJ, 20 (1926), pp 265–68, and Colby, *ibid*, 21 (1927), pp 279–88. The USA applied, in some respects, the rules of international law to their relations with Red Indian tribes: see Rice, JCL, 3rd series, 16 (1934), pp 78–95; Deloria, *AS Proceedings*, 1974, pp 276–80.

For relations with Indian peoples in the USA, see especially the judgments of Marshall CJ of the Supreme Court in *Fletcher v Peck* (1810) 6 Cranch 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 *Mitchell v United States* (1835) 9 Peters 711, 9 L Ed 283; *Goodall v Jackson* (1823) 20 Johns R 693; *United States v Sioux Nation of Indians* (1980) 448 US 371; *Totus v United States*, AD, 10 (1941–42), No 1; *Ex parte Green, ibid*, No 128.

For the position of Indian peoples in Canada see Cumming, *AS Proceedings* (1974), pp 265–76; Torrelli, AFDI, 20 (1974), pp 227–49; Sanders, *Indigenous People in the Constitution of Canada* (1980); and Slattery, *The Land Rights of Indigenous Canadian Peoples* (1979). The nature of 'treaty' relations between the Crown and Indian tribes in Canada, and the resulting status of Canadian Indians, was considered at length in the context of the enactment at Westminster, at the request of the Government of Canada, of the Canada Act 1982, to which were annexed new Constitutional provisions for Canada: see *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892; *Noltcho v Attorney-General* [1982] 3 All ER 822; and comment by Crawford, BY, 53 (1982), pp 253–9. See also *Logan v Styres* (1959), ILR, 27, p 239; *Calder v Attorney-General of British Columbia* (1973), ILR, 73, p 56.

For a discussion of the rights of aboriginal tribes in lands inhabited by them see *Re Southern Rhodesia* [1919] AC 211. See also generally Snow, *The Question of Aborigines in the Law and Practice of Nations* (1921); Octavio, Les sauvages Americains devant le droit, Hag R, 31 (1920), pp 181–289; Scott, *op cit* in n 3, p 50, n 2, and the Award of the American-British Claims Arbitration Tribunal in the case of the *Cayuga Indians* (1926), RIAA, 6, pp 173, 176–7.

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.

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-

[8] See § 406.

[9] 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 too 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'.

[10] See § 5, n 3 and § 22, n 10.

See in particular as to the Islamic contribution to international law Armanazi, *Les principes islamiques et les rapports internationaux en temps de paix et de guerre* (1929); Bentwich, *The Religious Foundations of Internationalism* (1933), pp 159–80; Rechid, Hag R, 60 (1937), ii, pp 375–502; Hamidullah, *The Muslim Conduct of State* (revised edition, 1945); Kruse, *Islamische*

ing over that period, particularly as a result of the attainment of independence by large numbers of formerly dependent territories in Africa and Asia[11] and the development of the United Nations as an organisation with 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, without possibility of withdrawal or expulsion, 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

Völkerrechtslehre (1953); Khadduri and Liebesny, *Law in the Middle East*, 1 (1955), pp 348–72; Khadduri, *The Law of War and Peace in Islam* (1955), and AJ, 50 (1956), pp 358–72; Mahmassani, Hag R, 117 (1966), i, pp 205–328; Khadduri (ed), *The Islamic Law of Nations: Shaybani's Siyar* (1966). As to ancient Egypt, see Rey, RG, 48(1), (1941–45), pp 35–52.

As to Indian and Hindu influences see Bandyopadhyay, *International Law and Custom in Ancient India* (1920); Chacko, Hag R, 93 (1958), i, pp 121–42; Sastry, *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 Jayatilleke, Hag R, 120 (1967), i, pp 441–563, as to the influence of Buddhist doctrine on international law.

As to Chinese influence on and attitudes to international law see Sui Tchoan Pao, *Le droit des gens et la Chine antique* (1924); Escarra, *La Chine et le droit international* (1931); Britton, AJ, 29 (1935), pp 616–35; Tung, *China and Some Phases of International Law* (1940); Chow, *La doctrine de droit international chez Confucius* (1940); Chen, AJ, 35 (1941), pp 641–50; Chiu, AJ, 60 (1966), pp 245–67; Iriye, Hag R, 120 (1967), i, pp 1–60; Cohen, *AS Proceedings* (1967) pp 108–116, and (ed), *China's Practice of International Law* (1972); Cohen and Hungdah Chiu, *People's China and International Law* (2 vols, 1974); Hsiung, *Law and Policy in China's Foreign Policy* (1972).

Mention should also be made of the contribution of Judaism to the conception of the Law of Nature: see Isaacs, *The Legacy of Israel* (Oxford, 1927); Bentwich, *The Religious Foundations of Internationalism* (1933), pp 59–82, and Weil, Hag R, 151 (1976), iii, pp 253–333. Selden published in 1640 his *De Jure Naturali et Gentium juxta Disciplinam Ebraeorum*.

11 See § 5, n 3. See also Elias, *Africa and the Development of International Law* (2nd ed, Akinjide, 1988).

12 A notable non-member is Switzerland (see § 97). Certain small states have chosen not to become members, such as Kiribati, and Nauru and Tuvalu.

13 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; 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 Organisations* (1977). In addition, in 1964 South Africa's voting privileges in WHO were suspended; in 1973 the ITU Plenipotentiary Conference decided to exclude 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 UPU; and in the same year the credentials of the South African delegation to the General Conference of the IAEA were rejected.

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 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.[1] 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.[2] These diversities between states may render necessary developments and adjustments on the basis of a regional community of interests.[3] The importance of regional arrangements in appropriate fields is recognised in Chapter VIII of the Charter of the United Nations. Geographical propinquity and broad 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 as 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.

2 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 TA, *Acta Scandinavica* 7 (1936), p 9. See also Schindler, Hag R, 46 (1933), iv, p 265.

3 See González Gálvez in *The Structure of International Law* (eds Macdonald and Johnston, 1983), pp 661–84. On the dangers of a regionalisation of international law see Mahnke, *Das Problem der Einheit der Völkerrechtsgemeinschaft und die Organisation der internationalen Sicherheit* (1965).

These factors largely account not only for the notable degree of legal cooperation amongst American states[4] 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.[5] Although these various regional activities[6] 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.[7] 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 expatriation 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

4 See § 27, nn 11 and 13; § 31, n 5.

5 See Grzybowski, *The Socialist Commonwealth of Nations: Organisations and Institutions* (1964); Kis, *Les Pays de l'Europe de l'Est* (1964); and other works cited in n 22.

6 The annual reports of the International Law Commission to the UN General Assembly, in the section devoted to 'Cooperation with other bodies', summarise regional activities in the field of international law undertaken within the framework of the Inter-American Juridical Committee, the Asian–African Legal Consultative Committee, the European Committee on Legal Co-operation and the Arab Commission for International Law.

7 See eg Blühdorh, *Einführung in das angewandte Völkerrecht* (1934), pp 95, 96; Anzilotti, p 89; Strupp, Hag R, 47 (1934, i), pp 317–24. See also Fedozzi, *Trattato di diritto internazionale* (2nd ed, 1933), pp 69 *et seq*. But see Bustamante, i, pp 33, 34; Verdross, *Verfassung*, p 92; Scott, 'L'universalité du droit des gens'. *Le Progrès du droit des gens* (vol i, 1931), pp 151 *et seq*, *Annuaire*, 33 (1927), pp 61, 62, and *AS Proceedings*, 1929, pp 48–54.

and governments,[8] on state responsibility,[9] on the extent of the territorial sea and other maritime zones,[10] title to territory,[11] and diplomatic (and other forms of) asylum,[12] 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,[13] 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,[15] 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.[16] It is in any case surrounded by con-

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, 314ff, 327ff.

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 § 496) 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 legations, fugitives from justice in the receiving country.

13 See § 665, n 15.

15 See § 1, n 12, § 27, nn 11 and 13; and § 31, n 5.

16 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.

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.

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 § 133). This Project was not amongst those adopted by the International Commission of

troversy, 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[17] 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,[18] resulting from such differences in national legal systems. In such limited international practice as

American Jurists at Rio de Janeiro in April–May 1927 (see Scott, AJ, 21 (1927), p 437).

See also, in support of the thesis that there exists an American international law, Urrutia, *Le Continent américain et le droit international* (1928); Yepes, *La Contribution de l'Amérique Latine au développement du droit international public et privé* (1931), and Hag R, 32 (1930), ii, pp 697–792, and *ibid*, 47 (1934), i, pp 5–137; Baak, RI, 3rd series, 13 (1932), pp 367–97. See, on the other hand, Vianna, *De la Non-Existence d'un droit international américain* (1912); Leger, *La Codification du droit des gens et les conférences des juristes américains* (1929), pp 88 *et seq*: Guerrero, *La codification du droit international* (1930), p 12. See also Lamas, *La Crise de la codification et las doctrine argentine du droit international* (1931), and Fauchille, §§ 44(2)–44(12). See also Cereti, *Panamericanismo e diritto internazionale* (1939); Savelberg, *Le problème du droit international américain* (1946); Yepes, *Philosophie du Panaméricanisme et organisation de la paix* (1945); Cok Arango, *Derecho internacional Americano* (1948); Puig, *Principios de derecho internacional publico americano* (1952), and *Les Principes de droit international public américain* (1954); Jacobin, *A Study of the Philosophy of International Law as Seen in the Work of Latin-American writers* (1954); Dupuy, *Le Nouveau Panaméricanisme* (1956); Langrod, *Revue Hellénique*, 10 (1957), pp 132–230; Alvarez, *Le Droit international nouveau dans ses rapports avec la vie actuelle des peuples* (1959), pp 143–59; Sepúlveda, *Las fuentes del derecho internacional Americano* (1969).

See also § 27, nn 11 and 13, and § 31, n 5, on the numerous attempts at regional codification of parts of international law on the American continent, and § 665, n 15, on American regional organisation.

17 See eg Keith's Wheaton, i, p 34; Fischer Williams, *Chapters*, p 58; Pearce Higgins, *International Law and Relations* (1928), pp 30, 31; Lord Hailsham, then Lord Chancellor, in the House of Lords on 1 May 1929: *Parliamentary Debates (Lords)*, vol 74, cols 303, 304. See also Jenks, *The Common Law of Mankind* (1958), pp 89–92, 109–14. With regard to *travaux préparatoires* see § 663(1).

There has probably been in recent years a weakening of the tendency to assume the existence of differences between the Anglo-American and Continental schools as a ready explanation of difficulties. On the contribution of Great Britain and the USA to international law see Dickinson, Hag R, 40 (1932), ii, pp 309–93; but it is probably not inconsistent with the view of the learned author to point out that that contribution is not, in most matters there referred to, exclusively confined to Anglo-American countries and that it is not connected with the peculiarities of the common law as distinguished from Continental law. The UK has found no serious difficulty, from the point of view of any supposed fundamental difference in basic legal concepts and traditions, in joining with other states of the European continent in membership of the European Communities, which calls for far-reaching coordination, and even integration, of national legal systems in areas of concern to the Communities. See § 19, sect (3); and see Cmnd 3301 of May 1967, para 26.

18 With regard to the law of war, the undoubted divergence between the Anglo-American and Continental views as to the subjects of the relation of war (see vol II of this work, 7th ed, § 57) has probably been rendered obsolete by the changes in the character and scope of modern warfare. See H Lauterpacht, BY, 12 (1931), pp 31–62, for a discussion of the whole question.

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.[19] 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[20] writers in the Soviet Union denied for a time the possibility of a permanent and general international law;[21] 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.

Even after coming to terms with the rest of the international community and international law as, in practice, a permanent feature of international society, writers in the Soviet Union have endeavoured to see it in notably restricted terms.[22] Thus they continued to regard states, and to a limited extent internation-

19 See H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 6–23. There is no pronouncement of the ICJ referring to any difference between the two schools of thought in international law.

See also §§ 21, 378, 380 and 170, as to the application of international law of legal concepts developed in the context of systems of national law, such as 'nationality', 'company' and 'lease'.

20 As to the attitudes adopted by Germany after 1933, see 8th ed of this vol, p 65, n 2. See also Vagts, AJ, 84 (1990), pp 661–704.

21 See Korovin, *Das Völkerrecht der Übergangszeit* (trans from Russian, 1929), pp 7, 24. See, generally, on the relation of Soviet Russia to international law, Hrabar, ZV, 14 (1927–28), pp 188–214; Mirkine-Guetzévitch, RI (Paris), 2 (1928), pp 1012–49; Alexeiew and Zaitzeff, ZV, 16 (1931–32), pp 72–99; Hazard, AJ, 32 (1938), pp 244–252; Florin in *Revue internationale de la théorie du droit*, 12 (1938), pp 97–115. See also Taracouzio, *The Soviet Union and International Law* (1935), *AS Proceedings* (1934), pp 105–20 and *War and Peace in Soviet Diplomacy* (1940); Stoupnitzky, *Statut international de l'URSS État commerçant* (1936); Lapenna, *Conceptions soviétiques de droit international public* (1954). As to the conduct of foreign relations by the member states of the Union, see § 75.

22 As to the change of the Russian attitude in connection with its entry into the League of Nations, see Mannzen, *Soviet-union und Völkerrecht* (1932); Davis, 'The Soviet Union and the League of Nations', *Geneva Special Studies*, 5, No 1 (1934); Kleist, *Die völkerrechtliche Anerkennung Sovietrusslands* (1934); Miliokov, *La Oblique extérieure des Soviets* (1936); Hartlieb, *Das politische Vertragssystem der Sowietunion*, 1920–35 (1936); Makarov, ZöV, 5 (1935), pp 34–60 (with a bibliography), and 6 (1936), pp 479–95; Maurach, ZV, 21 (1937), pp 19–45; and Beckhoff, *Völkerrechtgegen Bolschevismus* (1937). See also Prince, AJ, 36 (1942), pp 425–45 (on the participation of Soviet Russia in international organisation), *ibid*, 39 (1945), pp 450–85, Hazard, Yale LJ, 55 (1946), pp 1016–35, and Krylov, Hag R, 70 (1947), i, pp 407–74.

Among more recent literature on the Soviet approach to international law see Hazard, *Law and Social Change in the USSR* (1953), pp 274–300; Calvez, *Droit international et souveraineté en URSS* (1953); Stone, *Legal Controls of International Conflict* (1954), pp 57–64; Kelsen,

al organisations, as the only subjects of international law and emphasised the sovereignty of the state above all else, from which follows the need for express consent by all states to rules restricting their sovereign powers and a reluctance to acknowledge any compulsory jurisdiction of international tribunals.[23] Conscious of the limits which this approach places upon the efficacy of customary international law, the attempt has been made to build up 'principles of peaceful co-existence' as a suitable substitute.[24]

In 1987, however, the Soviet Union appeared to revise its view of the role of international law in international relations, accepting the need to ensure the 'primacy of international law in politics', including a readiness to see greater use made of the International Court of Justice.[25] It is too soon to say how fundamental this change may prove to be,[26] but it would appear to mark an acceptance of the broad system of contemporary international law, including customary international law.

CODIFICATION OF INTERNATIONAL LAW

Politis, *Les nouvelles tendances du droit international* (1927), pp 193–229 Maresh, *La codification du droit international* (1932) Crocker, AJ, 18 (1924), pp 38–55 Scott, *ibid*, pp 260–80 Baker, BY, 5 (1924), pp 38–65 de Visscher, Hag R (1925), i, pp 329–452 Garner, *Developments*, pp 708–74, and AJ, 19 (1925), pp 327–333 Root, *ibid*, pp 675–84 Hudson, *ibid*, 20 (1926), pp 655–69 Bellot, JCL, 3rd series, 8 (1926), pp 137–41 Niemeyer, ZI, 37 (1926), pp 1–10 Alvarez, *Annuaire*, 35, i (1929), pp 1–113, and (the same article), RI (Paris), 4 (1929), pp 179–263, and 8 (1931), pp 7–85, and *Méthodes de la codification du droit international public* (1947) Saavedra Lamas, RI (Paris), 7 (1931), pp 26–106 Brierly, BY, 12 (1931), pp 1–12 Garner, Hag R, 35 (1931), i, pp 676–93 Cosentini, RG, 42 (1935), pp 411–30 Hurst, *Grotius Society*, 32 (1946), pp 135–53 Jennings, BY, 24 (1947), pp 301–29 Liang, AJ, 42 (1948), pp 66–97 and in Hag R, 73 (1948), ii, pp 411–527 *International Law Association Report*, 47 (1950), pp 64–121. See also § 29, n 4, on the Codification Conference of 1930 UN Secretariat Memorandum A/AC/10/5 (1947) (printed in AJ, 41 (1947), p 29) Cheng, *Current Legal Problems*, 5 (1952), pp 251–73 McNair, *The Development of International Justice* (1954), pp 14–31 H Lauterpacht, AJ, 49 (1955), pp 16–43 Johnson, BY, 35 (1959), pp 1–33 Alfaro, Hag R, 97 (1959), ii, pp 131–60 Rosenne, BY, 36 (1960), pp 104–73 Briggs, *The International Law Commission* (1965), and Hag R, 126 (1969), i, pp 242–316 Ago, *Recueil d'études de droit international en hommage à Guggenheim* (1968), pp 93–131 Baxter, *ibid*, pp 146–66 Dhokalia, *The Codification of Public International Law* (1970) Marek, ZöV, 31 (1971), pp 489–520 Thirlway, *International Customary Law and Codification* (1972) de Visscher in *Transnational Law in a Changing Society* (eds Friedmann, Henkin, Lissitzyn, 1972), pp 17–33 Weissberg, ICLQ, 24 (1975), pp 460–524 Ramcharan, *The International Law Commission* (1977) Pathak, Indian JIL, 17 (1977), pp 1–20, 137–78 *The Work of the International Law Commission* (UN Publications, 3rd ed, 1980) Villiger, *Customary International Law and Treaties* (1985), pp 63–137 *Review of the Multilateral Treaty-Making Process* (UN Legislative Series, ST/LEG/SERIES B/21 (1985)), pp 91–112, 268–313 Sinclair, *The International Law Commission* (1987) Ago, RG, 92 (1988), pp 539–76.

§ 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.[1] 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.[2] 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 Mankind of

Communist Theory of Law (1955); Kulski, AJ, 49 (1955) pp 518–34; Snyder and Bracht, ICLQ, 7 (1958), pp 54–71; Triska and Slusser, AJ, 52 (1958), pp 699–726; Corbett, *Law in Diplomacy* (1959), pp 83–109; Meissner, *Sowjetunion und Völkerrecht 1917 bis 1962* (1963), a valuable bibliographical work, and *Aussenpolitik und Völkerrecht der Sowjetunion* (1987); Zile, AJ, 58 (1964), pp 359–88; Ramundo, *The (Soviet) Socialist Theory of International Law* (1964); Higgins, *Conflict of Interests* (1965), Pt III; Baade (ed), *The Soviet Impact on International Law* (1965); Dutoit, *Coexistence et droit international à la lumière de la doctrine Sovietique* (1966); Nasinovsky, *AS Proceedings* (1968), pp 189–96; Ginsburgs, *ibid*, pp 196–203; Tunkin and Lewin, *Drei sowjetische Beitrage zur Völkerrechtslehre* (1969); Grzybowski, *Soviet Public International Law* (1970), and *Soviet International Law and the World Economic Order* (1987); Patry, Can YBIL, 9 (1971), pp 102–13; Ginsburgs, YB of World Affairs (1971) pp 39–55; Hazard, AJ, 65 (1971), pp 142–8; Butler, *ibid*, pp 796–800; Osakwe, AJ, 66 (1972), pp 596–600; Butler, YB of World Affairs (1972), pp 331–45; Tunkin, *Theory of International Law* (1974), Hag R, 147 (1975), iv, pp 1–208, and in *Ius et Societas* (ed Wilner, 1979), pp 338–49; Lapenna, YB of World Affairs (1975), pp 242–64; Schweisfurth, *Sozialistiches Völkerrecht?* (1979); Grzybowski, AJ, 77 (1983), pp 862–72; Kartashkin in *The Structure and Process of International Law* (eds Macdonald and Johnston, 1983), pp 79–102; Green, Yale JIL, 13 (1988), pp 306–31; Malenovsky, Rev Belge, 22 (1989), pp 307–38; Mullerson, AJ, 83 (1989), pp 494–513. See also § 104, n 6 (on 'peaceful co-existence'), and § 133 (on the 'Brezhnev doctrine').

On the implications for international law of the existence of East–West 'tension' see Schwarzenberger, *Grotius Society*, 36 (1950), pp 229–69; McWhinney, AJ, 59 (1965), pp 1–15; Tunkin, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 888–98.

23 See § 10, n 22.

24 See § 104, n 6.

25 Paper by General Secretary Mikhail Gorbachev, *Pravda*, 17 September 1987.

26 It has had the result, so far, that in 1989 the Soviet Union for the first time accepted the jurisdiction of the ICJ, in respect of six treaties covering various aspects of human rights.

For discussion of these new trends in Soviet attitudes to international law see Green, Yale JIL, 13 (1988), pp 306, 322–31; Quigley, AJ, 82 (1988), pp 788–97; Szawlowski, *ibid*, pp 878–88 (a review article of Gorbachev, *Perestroika* (1987); Franck, AJ, 83 (1989), pp 531–43.

1 '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 customary and conventional, 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.

2 See Bentham's *Works*, viii (ed Bowring), p 537; Nys, LQR, 1 (1985), pp 226–31. See also Schwarzenberger, *Jeremy Bentham and the Law* (1948), pp 152–84 (a valuable assessment of Bentham's contribution to international law).

1789, and the Abbé 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.[3] 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.[4] 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.[5] 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,[6] private work has continued to

[3] See Rivier, i, p 40, where the full text of these articles is given. They do not contain a real code, but certain principles only. See also Redslob, *Völkerrechtliche Ideen der französischen Revolution* (1916).

[4] It was not until 1861 that a real attempt was made to show the possibility of a codification. This was done by an Austrian jurist, Alfons von Domin-Petruschévecz, who published in that year at Leipzig a *Précis d'un code de droit international*. In 1863 Professor Francis Lieber, of the Columbia College, New York, drafted the Laws of War in a body of rules which the US published during the Civil War for the guidance of her army (see vol II of this work (7th ed), § 68(4); and see Scott, RI (Paris), 4 (1929), pp 393–408). In 1868 Bluntschli, the celebrated Swiss writer, published *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*. This draft code has been translated into the French, Greek, Spanish, and Russian languages. In 1872 the great Italian politician and jurist Mancini raised his voice in favour of codification of the Law of Nations in his able essay, *Vocazione del nostro secolo per la riforma e codificazione del diritto delle genti*. Likewise in 1872 appeared at New York David Dudley Field's *Draft Outlines of an International Code*. In 1874 the Emperor Alexander II of Russia took the initiative in assembling an international conference at Brussels for the purpose of discussing a draft code of the Law of Nations concerning land warfare. At this conference jurists, diplomatists, and military men assembled as delegates of the invited states, and they agreed upon a body of 60 Articles under the name of the Declaration of Brussels. But these Articles have never been ratified. In 1880 the Institute of International Law published its *Manuel des lois de la guerre sur terre*. In 1887 Leone Levi published his *International Law with Materials for a Code of International Law*. In 1890 the Italian jurist Fiore published his *Il diritto internazionale codificato e la sua sanzione giuridica*, of which a fifth edition appeared in 1915. An English translation of the fifth edition appeared in 1916. In 1906 E Duplessix published his *La Loi des nations: projet d'institution d'une autorité nationale, législative, administrative, judiciaire: projet de code de droit international public*. In 1911 Jerome Internoscia published his *New Code of International Law* in English, French, and Italian. In the same year Epitacio Pessoa published his *Projecto de codigo de direito internazionale publico* (see Alvarez, *La codification du droit international* (1912), p 276(n)). In 1913 the Institute of International Law published its *Manuel de la guerre maritime*. See also, Alvarez, *Exposé de motifs et Déclaration des grands principes du Droit international moderne* (1936), and for comment thereon Redslob, *Les Principes du droit des gens moderne* (1937), *passim*, and Le Fur in Hag R, 54 (1935), iv, pp 132, 133. Much of the modern law of human rights finds its origin in H Lauterpacht's *An International Bill of Rights of Man* (1945). See also the UN Secretariat's *Note of the Private Codification of Public International Law* (1947), UN Doc A/AC 10/25.

[5] The Institute normally meets annually or every other year, and publishes its proceedings in its *Annuaire*. On the work of the Institute in general see Charles de Visscher, the Institute's *Livre du Centenaire 1873–1973*, pp 128–61, and Schachter, *ibid*, pp 403–51.

[6] See the UN Secretariat's *Historical Survey of the Development of International Law and its Codification by International Conferences* (1947), Doc A/AC 10/5.

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.[7]

§ 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.[1] 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.[2]

§ 26 Work of the second Hague Peace Conference The second Hague Peace Conference of 1907[1] produced no less than 13 conventions,[2] 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 the place of 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[3] and the opening of hostilities,[4] they were devoted to the regulation of rules of warfare and neutrality in war on land and sea.[5]

[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 vol. 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).

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

[2] For a general account of the work of the Hague Conferences see Wehberg, Hag R, 37 (1931), iii, pp 533–664.

[1] Shortly after the Hague Peace Conference of 1899, the USA published on 27 June 1900, 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.

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

[3] See § 408.

[4] See vol II of this work (7th ed), § 94.

[5] See vol II of this work (7th ed), § 68.

§ 27 Codification in the period after the First World War In the domain of the law of war the period after the First World War produced in 1929 general conventions on the treatment of prisoners of war[1] and sick and wounded[2] and, in 1925, on the use of poisonous and asphyxiating gases.[3] 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,[4] the General Act of the Pacific Settlement of International Disputes of 1928,[5] and the General Treaty for the Renunciation of War.[6] Some of the major multilateral treaties of this period concerning air navigation[7] and inland[8] and maritime navigation,[9] 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,[10] 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.[11] 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.[12] The Seventh Pan-American

1 See vol II of this work (7th ed), §§ 126–132.
2 See vol II of this work (7th ed), §§ 119–124*a*.
3 See vol II of this work (7th ed), § 113.
4 See vol II of this work (7th ed), § 25*ae*.
5 See vol II of this work (7th ed), § 25*aj*.
6 See vol II of this work (7th ed), § 52*i*.
7 See 218ff.
8 See 175ff.
9 See 296ff.
10 See § 432; and see generally, on the part played by so-called law-making conventions, Hudson, *Legislation*, i (1931), pp xvii, and xviii; and v (1936), pp viii–x; AJ, 22 (1928), pp 330–49, and *ibid*, Suppl, pp 90–108; Rühland, *System der völkerrechtlichen Kollektivverträge als Beitrag zur Kodification des Völkerrechts* (1929). See also § 11, n 9.
11 As long ago as the Panama Congress of 1826 the movement for the codification of international law among the states of the New World became prominent. In 1906 the Pan-American Conference at Rio de Janeiro (at which the USA were represented) decided to establish a commission of jurists for the purpose of preparing codes both of public and of private international law for submission to a future conference. After the interruption caused by the First World War the task was actively resumed, with the close cooperation of the new American Institute of International Law founded in 1912, and in 1925 this Institute transmitted to the Pan-American Union the texts of 30 projects of conventions for a code of public international law (printed in AJ, Special Suppl, October 1926). These projects were considered at a meeting of an International Commission of American Jurists in Rio de Janeiro in April and May 1927, and 12 of them were adopted and recommended for consideration by a Sixth Pan-American Conference, which was held in January and February 1928. For the projects referred to, see AJ, 22 (1928), Special Suppl, January 1928. The Conference adopted, on 20 February 1928, the following seven codifying conventions: (1) on the status of aliens; (2) on treaties; (3) on diplomatic officers; (4) on consular agents; (5) on maritime neutrality; (6) on asylum; (7) on duties and rights of states in the event of civil strife. For the texts of these conventions see AJ, 22 (1928), Suppl, pp 124 *et seq*; Hudson, *Legislation*, iv, pp 2374–419. The Seventh Pan-American Conference adopted on 26 December 1933, the following conventions: (1) on the nationality of women; (2) on nationality; (3) on extradition; (4) on political asylum; (5) on rights and duties of states. See also § 31, n 5.
12 For the texts of these conventions, see AJ, 22 (1928), Suppl, pp 124ff; Hudson, *Legislation*, iv, pp 2374–419. A Protocol to the Convention on Duties and Rights of States in the event of Civil Strife was concluded in 1957.

Conference in 1933 adopted five further conventions, on the nationality of women, nationality, extradition, political asylum, and rights and duties of states.[13]

§ 28 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.[1] 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 proce-

13 For the texts of these conventions, see AJ, 28 (1934), Suppl, pp 61 *et seq*. The Conference also passed a resolution on methods of codification to be pursued in the future (*ibid*, p 55). The resolution proposed, *inter alia*, (a) the establishment of a permanent commission whose members were to serve both as experts and as official representatives of their governments with full powers to sign conventions, and (b) the elimination of codification from the agenda of future Pan-American conferences. For comment on the resolution, see Reeves, AJ, 28 (1934), pp 319–21. See also Borchard, AJ, 31 (1937), pp 471–73, and the same, *ibid*, 33 (1939), pp 268–82, on this work of the Committee of Experts created by the resolution of 1933. For the various conventions codifying, to some extent, the previous conventions as to pacific settlement and adopted by that Conference, see *International Conciliation* (Pamphlet No 238), March 1937. See Alvarez, *La Codification du droit international* (1912, a work which was considered in some detail by the Codification Commission of American Jurists in that year), *La Codificación del derecho internacional en América* (1923), *Le Nouveau droit international et sa codification en Amérique* (1924), and RG (1913), pp 24–52 and 725–47; Rauchhaupt, *Völkerrechtliche Eigenthümlichkeiten Amerikas* (1924); Scott, *AS Proceedings* (1925), pp 14–48, AJ, 19 (1925), pp 333–37, *ibid*, 20 (1926), Suppl No 2, pp 284–95, and *ibid*, 21 (1927), pp 417–50; *Revista de Derecho Internacional*, March 1925, special number; Brierly, BY, 7 (1926), pp 14–23. On American efforts to codify international law, see Léger, *La codification du droit des gens et les conférences des juristes américains* (1929); Urrutia, Hag R, 22 (1928), ii, pp 85–230; UN Secretariat's *Codification of International Law in the Inter-American System with Special Reference to Methods of Codification* (1947), Doc A/AC 10/8. The Conference of American States at Lima adopted, on 21 December 1938, a resolution concerning the methods for the gradual and progressive codification of international law through a number of agencies: AJ, 34 (1940), Suppl, p 194; *The International Conferences of American States. First Supplement*, 1933–40 (1940), p 246. See also n 11; and § 31, n 5, for Inter-American measures of codification since 1945. See also literature cited at § 23, n 16, on 'American International Law'.
1 *Procès-Verbaux* of the Meetings of the Committee, p 747.

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.[1] 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.[2] 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 agreement on such questions as the legal status of territorial waters, including the right of innocent passage, and the base line for measuring the territorial waters. The views of the Conference on these matters were embodied in a Report submitted by the Second Committee of the Conference.[3] With regard to state responsibility, the Conference disclosed complete disagreement on the question, *inter alia*, of responsibility for the treatment of aliens in cases in which there is no discrimination against the aliens as compared with the nationals of the state.[4]

Those participating in the Hague Conference of 1930 apparently assumed that it was to be the first of a series of conferences for pursuing the work of codification under the auspices of the League. For the Conference adopted detailed recommendations concerning the methods of preparation and of summoning of future conferences.[5] In 1930, the Eleventh Assembly reaffirmed the great interest of the League in the work of codification and invited the observations of member states concerning the recommendations of the Conference.[6] These observations were on the whole not unfavourable[7] to continuing the task of codification, but the Twelfth Assembly, while deciding in principle to continue that work, laid down elaborate details governing the future procedure in the matter.[8] Their main effect was to transfer the formal initiative from the League and its organs to the members of the League and thus to lessen the chances of codification in the near future.

§ 30 The International Law Commission Article 13 of the Charter of the United Nations lays down that the General Assembly shall initiate studies and make recommendations for the purpose, *inter alia*, 'of encouraging the progressive development of international law and its codification'.[1] The General

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[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.

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.

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 prepared by that body (see § 565), recommended the Council to take no further action at that time.)

[3] They are: vol I, Nationality: C/73/M/38/1929/V; vol II, Territorial Waters: C/74/M/39/1929/V; vol III, Responsibility of States, etc: C/75/M/69/1929/V. For an account of the preparatory work of the Conference up to 1930 see Hudson, AJ, 20 (1926), pp 656–69; Wickersham, *AS Proceedings* (1926), pp 121–35; Reeves, AJ, 21 (1927), pp 659–67, and 24 (1930), pp 52–7; McNair, *Grotius Society*, 13 (1928), pp 129–40.

[1] As to all these see §§ 395 and 398.

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

[3] See AJ, 24 (1930), Suppl, p 234.

[4] See § 409. On the various aspects of the Hague Codification Conference of 1930, see Alvarez, *Les Résultats de la Ière Conférence de codification de droit international* (1931); Reeves, AJ, 24 (1930), pp 52–7, 486–99; Hudson, *ibid*, pp 447–66; Flournoy, *ibid*, pp 467–85; Hackworth, *ibid*, pp 500–16; Borchard, *ibid*, pp 517–40; Hunter Miller, *ibid*, pp 674–93; Guerrero, RI (Paris), 4 (1930), pp 478–91; Niemeyer, ZI, 42 (1930), pp 1–26; Rolin, RI, 3rd series, 11 (1930), pp 581–99; Hunter Miller, *AS Proceedings*, 1930, pp 213–21; Borchard, *ibid*, pp 221–29; Hudson, *ibid*, pp 229–34; Rauchberg, ZöR, 10 (1931), pp 481–522. For the texts of the Final Act, the Convention on Nationality, the three protocols adopted by the Conference and the reports of the Committees on Nationality and Territorial Waters, see AJ, 24 (1930), Suppl, pp 169–258. See also Hudson, *Legislation*, v, pp 359–394; League Doc A/19/1931/V; C/351/M/145/1930/V (the Final Act).

For the preparatory documents, and records, of the Hague Conference see Rosenne, *League of Nations: Committee of Experts for the Progressive Codification of International Law (1925–28)* (2 vols 1972) and *League of Nations Conference for the Codification of International Law (1930)* (4 vols, 1975).

[5] See the Final Act of the Conference: Doc C/351/M/145/1930/V, p 138; AJ, 24 (1930), Suppl, p 257.

[6] Off J, Special Suppl, No 83, p 9.

[7] See Docs A/12/1931/V/A12(a)/1931/V and A/12(b)/1931/V.

[8] Off J, Special Suppl No 92, p 9. For comment see Hudson, AJ, 26 (1932), pp 137–43. And see Brierly, BY, 12 (1931), pp 1–12.

[1] See Jessup, AJ, 39 (1945), pp 755–57. For the recommendations of the Inter-American Juridical Committee of October 1944 on the reorganisation of agencies engaged in the codification of international law see AJ 39 (1945), Suppl, pp 231–45.

Assembly decided, in 1947, to set up an International Law Commission charged with the task of codifying and developing international law.[2]

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[3] 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'.[4] The Commission, which was first elected in 1948, meets yearly. It possesses no permanent organs of its own,[5] although it is provided with supporting services by the Secretariat of the United Nations.[6] By setting up the International Law Commission the General Assembly has not exhausted its powers under Article 13 of the Charter; for example, it acted under that article in setting up a Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States, and in adopting a Declaration on those Principles.[7]

At its first session, in 1949, the Commission drew up a provisional list of 14 topics selected for codification.[8] Since then it has added additional topics (or sub-divisions of topics) to its work programme, either on its own initiative or at the request of the General Assembly. On each of those original 14 topics (numbered (1)–(14) in the list below), and on the more substantial topics subsequently added to the Commission's work programme, the outcome has been as follows:

(1) Recognition of states and governments: the Commission has not begun work on this topic.[9]

(2) Succession of states and governments:[10] the Commission decided to divide the item into three aspects, namely succession (a) in respect of treaties, (b) in respect of matters other than treaties, and (c) in respect of membership of international organisations. Priority was given to the first, and in 1978 a convention was adopted on the basis of draft articles prepared by the Commission.[11] On the second aspect a convention was adopted in 1983 on the basis of further draft articles prepared by the Commission.[12] For the time being it has left aside the third aspect.

(3) Jurisdictional immunities of states and their property: the Commission has this subject under active consideration.

(4) Jurisdiction with regard to crimes committed outside national territory: the Commission has not begun work on this topic.

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2 GA Res 174 (II). The decision was adopted in pursuance of the recommendations of a committee composed of representatives of governments, which sat in June 1947. See Finch, AJ, 41 (1947), pp 611–16. See also the Resolutions of the International Law Association of 1947 based on the Report of a Committee of the Association under the chairmanship of Judge McNair, and emphasising the importance of a restatement – not amounting to official codification in the form of conventions – of selected portions of international law (Report of the Session of the International Law Association held in Prague in 1947).

On some aspects of the work of the Commission see Marx, *Archiv des Völkerrechts*, 1 (1948–49), pp 279 *et seq*; Parry, BY, 26 (1949), pp 508–28; Hertz, *Friedenswarte*, 52 (1953), pp 19–47. On the origins, organisation and functioning of the Commission see generally Pal, UN Rev, 9 (1962), No 9, pp 29 34; Rosenne, YB of World Affairs, 19 (1965), pp 183–98; Lee, AJ, 59 (1965), pp 183–98; Gotlieb, Can YBIL, 4 (1966), pp 64–80; and other works cited in the bibliography preceding § 24.

3 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 (XI) (1956)), and then to 25 (GA Res 1674 (XVI) (1961)).

4 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).

5 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 convoke a conference for the purpose of concluding a convention (Art 23). 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.

6 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 under consideration by the ILC and published in the several volumes of the UN Legislative Series.

7 GA Res 1815 (XVII) (1962) and 2625 (XXV) (1975); see also § 105.

8 YBILC (1949), p 281. For a general review of the Commission's programme of work up to 1970 see the Working Paper prepared by the UN Secretariat, Doc A/CN 4/230 of 7 April 1970.

The work of the Commission is surveyed in the annual reports of the Commission submitted to the General Assembly, and in YBILC. See also the following publications of the UN Secretariat: *Historical Survey of the Development of International Law and its Codification by International Conferences* (1947); *Preparatory Study concerning a Draft Declaration on the Rights and Duties of States* (1948); *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (1949) (a document now known to be the work of H Lauterpacht: see YBILC (1960), i, p 52); *Ways and Means of Making the Evidence of Customary International Law More Readily Available* (1949); *Historical Survey of the Question of International Criminal Jurisdiction* (1949); *The Charter and Judgment of the Nuremberg Tribunal* (1949); *Future Work in the Field of the Codification and Progressive Development of International Law* (1962); *Survey of International Law* (1971). On the UN programme for the codification and progressive development of international law see Wyzner, *AS Proceedings*, 1962, pp 90–99.

9 See § 39, n 2.

10 The Commission decided in 1963 to give priority to state succession and to consider succession of governments for the time being only to the extent necessary to supplement the study of state succession.

11 Convention on Succession of States in Respect of Treaties 1978. See § 69.

12 Convention on Succession of States in Respect of State Property, Archives and Debts 1983. See § 70.

(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 Conventions[15] 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 concluded[18] 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 1977[19] 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] and 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] The conventions on these four subjects entered into force, respectively, in 1962, 1966, 1964 and 1964. See § 281.
[14] YBILC (1951), ii, p 140.
[15] YBILC (1954), ii, pp 143–7; GA Res 896 (IX) (1954).
[16] The Convention entered into force in 1975. See § 398.
[17] YBILC (1954), ii, p 149, para 39. See also the remarks of the Commission as to the nationality of married women, *ibid* (1952), ii, p 67, para 30. The General Assembly took note (GA Res 683 (VII) (1952)); eventually work on a Convention on the Nationality of Married Women was completed in the UN itself, and the Convention was adopted in GA Res 1040 (XI) (1957). See § 386.
[18] YBILC (1977), ii, pt 2, p 129, para 109.
[19] Pursuant to GA Res 3465 (XXX) (1975). See § 402.
[20] See § 495.
[21] The Convention entered into force in 1980. See § 581.
[22] The Convention entered into force in 1964. See § 490.
[23] The Convention entered into force in 1967. See § 536.

(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 in 1950.[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

[24] See § 145.
[25] See YBILC (1958), ii, pp 83–8; GA Res 1262 (XIII) (1958). A Draft Convention on Arbitral Procedure was prepared by the Commission in 1953; see YBILC (1953), ii, pp 208–12, and GA Res 989 (X) (1955).
[26] See GA Res 178 (II) (1947); YBILC (1949), pp 286–90; GA Res 375 (IV) (1949) and 596 (VI) (1951). See § 104.
[27] See GA Res 177 (II) (1947); YBILC (1950), ii, pp 374–8; GA Res 485 (V) (1950). See vol II of this work (7th ed), § 582.
[28] See GA Res 260B (III) (1948); YBILC (1950), ii, pp 1–23, 378–9.
[29] GA Res 1187 (XII) (1957). See also Res 489 (V) (1950), Res 687 (VII) (1953), Res 898 (IX) (1954). See also § 148, n 27, including a further Report prepared by the ILC in 1990.
[30] YBILC (1950), ii, pp 367–74.
[31] YBILC (1954), ii, pp 149–52; and see vol II of this work (7th ed), § 582, and Johnson, ICLQ, 4 (1955), pp 445–68.
[32] GA Res 1186 (XII) (1957).
[33] YBILC (1977), ii, pt 2, p 130, para 111.
[34] Res 33/97 (1978).
[35] GA Res 36/106 (1981); YBILC (1982), ii, pt 2, p 121. See also Ferencz, AJ, 75 (1981), pp 674–9. See also § 148.
[36] See YBILC (1951), ii, pp 131–7.

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 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 Com-

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[37] The task of defining aggression was considered by special committees set up by the General Assembly, which in 1974 approved a definition of aggression: Res 3314 (XXIX).

As regards the threat of aggression, and preparation of aggression, as possible crimes against the peace and security of mankind, see ILC, *Report (40th session, 1988)*, paras 217–18, 224–8. As regards aggression itself, which the ILC included as such a crime in terms following those approved by the General Assembly, see draft Art 12 and commentary, *ibid*, para 280.

See generally on aggression, vol II of this work (7th ed), §§ 52*fg*–52*l*. See also Schwebel, Hag R, 136 (1972), ii, pp 419–95; Zourek, AFDI, 20 (1974), pp 9–30; Ferencz, *Defining International Aggression* (2 vols, 1975); Stone, AJ, 71 (1977), pp 224–46, and *Conflict Through Consensus: United Nations Approaches to Aggression* (1977); Broms, Hag R, 154 (1977), i, pp 305–97; Bruha, *Die Definition der Aggression* (1980); Röling in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 413–21.

[38] GA Res 478 (V) (1950); YBILC (1951), ii, pp 125–31; and see § 616, n 5.

[39] GA Res 1766 (XVII) (1962); YBILC (1963), ii, pp 217–23. See also GA Res 1903 (XVIII) (1963), and 2021 (XX) (1965).

[40] GA Res 2530 (XXIV) (1969). The Convention entered into force in 1985. See § 533.

[41] GA Res 3166 (XXVIII) (1973). The Convention entered into force in 1977. See § 492.

[42] Convention on the Representation of States in their Relations with International Organisations of a Universal Character 1975. See § 531, n 1.

[43] YBILC (1978), ii, pt 2, ch II. The General Assembly has in effect repeatedly deferred action, while making a series of requests for comments on the Commission's draft: see GA Res 33/139 (1978), 35/161 (1980), 36/111 (1981) and 40/65 (1985), and Decision 43/429 (1988). See § 669.

[44] YBILC (1967), ii, p 369.

[45] YBILC (1977), ii, pt 2, p 129, para 109.

[46] See § 581.

[47] See UN Doc A/35/312, Add 2.

[48] ILC, *Report (41st session, 1989)*, paras 17–72; GA Res 44/36. See also § 498.

[49] YBILC (1977), ii, pt 2, p 130, para 113. See also n 5.

[50] *Ibid*, p 131, paras 116–17.

[51] See also Art 17.

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[52] 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 concluded or before it enters into force.[53] 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'.[1] 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[2] – on which there is 'extensive state practice, precedent and doctrine' are often so controversial 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[3] – 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

[52] See also § 32, n 14, as to certain optional protocols.
[53] See § 11, n 14.
[1] Article 15.
[2] See § 196.
[3] See § 314ff.

recognition and preservation, subject to reasonable modifications, of the principle of the freedom of the seas.[4] 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[5] or European[6] 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 different methods 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,[7] 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.

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 Inter-American draft Convention on Jurisdictional Immunity of States, adopted by the 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.

[6] 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 1969 a Report on the Privileges and Immunities of International Organisations was considered by the Committee of Ministers: Res (69) 29. See generally on the legal programme of the Council of Europe, Simmonds, ICLQ, 13 (1964), pp 675–80; ICLQ, 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.

[7] On the voting procedure in international codification conferences from 1864 to 1930, see Sohn in *Ius et Societas* (ed Wilner, 1979), pp 278–96.

attempts to reach agreement in the form of codified rules might result in reducing the value of the rules eventually agreed upon. The product of codification could thus to that extent retard instead of advance the progress of international law.[8] Article 9.2 of the Vienna Convention on the Law of Treaties marks a notable advance in this respect in that it prescribes as the normal rule a two-thirds majority for the adoption of the text of a treaty at an international conference, unless the states attending it decide otherwise.[9] The rigidity of the rule of unanimity has similarly been diminished by the practice of concluding treaties within the framework of an international organisation which reaches decisions by less than unanimity: this is particularly important in the case of treaties adopted by the General Assembly of the United Nations.[10] Thirdly, there is the danger that, given the cautious attitude of governments, attempts at codification may in many cases emphasise differences in cases where agreement was hitherto supposed to exist.[11] Fourthly, it appears that, in so far as codification implies uniform regulation, its scope must necessarily be limited for the reason that in many cases the diversity of interests and conditions render uniformity difficult or undesirable. Fifthly, the Hague Conference showed that even with regard to generally non-controversial matters the work of codification requires lengthy preparation and discussion which cannot always usefully take place in the hurried atmosphere of an international conference. Thus the programme of the Hague Conference in 1930 was probably too ambitious inasmuch as it attempted within the space of one month to codify three important branches of international law. In marked contrast to the experience of the Hague Conference is the full preparation of draft articles by the International Law Commission, their prior study by governments and the ample time devoted to the ensuing conferences; these factors have undoubtedly contributed to the general success of codification conferences since 1945.[12]

There is now little likelihood of states abandoning the task of introducing, through general conventions, uniformity and certainty in those branches of

[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/V. See generally, Baxter, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 146–66, and also Wolfke in *Essays 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).

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.[13] 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 smaller extent, to the willingness of states to submit disputes to obligatory judicial or arbitral settlement.[14] 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.[15] 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.[16]

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

[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 (1958), 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 García-Amador, AJ, 77 (1983), 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 to 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 n 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 Rights[18] 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 convention[19] 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 incorporating 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 development 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 demonstrated – conscious attempts to make radical changes to existing law. Nevertheless, there is no machinery of international legislation[1] for effecting changes of this nature against the dissent of a minority of interested states.[2] The establishment of such machinery would amount, to a substantial degree, to setting up an international legislature.[3] 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 Geck, ZöV, 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 Sepúlveda, Germ YBIL, 33 (1990), pp 432–59. At 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.

present prepared to accept. Its realisation requires further abandonment of the principle of unanimity[4] and far-reaching changes in the matter of equality of voting and representation.

[4] See, however, on the development of consensus procedures, § 575, n 13.

Part 1

The subjects of international law

Chapter 2

International persons

SOVEREIGN STATES AS INTERNATIONAL PERSONS

Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp 1–85 Verdross, § 28 Dickinson, *The Equality of States in International Law* (1920) Sukiennicki, *La souveraineté des états en droit international moderne* (1927) Knubben, *Die Subjekte des Völkerrechts* (1928), pp 127–90 Kunz, *Die Staatenverbindungen* (1929), pp 1–61 Wright, *Mandates under the League of Nations* (1930), pp 267–309 Korte, *Grundfragen der völkerrechtlichen Rechtsfähigkeit und Handlungsfähigkeit der Staaten* (1934), pp 28–55, 135–186 Kelsen, *Principles of International Law* (1952), pp 100–14 Von der Heydte, *Die Geburtsstunde des souveränen Staates* (1952) Gunst, *Der Begriff der Souveränität im modernen Völkerrecht* (1953) Brierly, Hag R, 23 (1928), iii, pp 503–45 Bruns, ZöR, 1 (1929), pp 31–40 Dupuis, Hag R, 32 (1930), ii, pp 5–165 van Zanten, RI, 3rd series, 11 (1930), pp 494–528 Ross, *ibid*, 3rd series, 12 (1931), pp 652–68, and 13 (1932), pp 112–30, and in ZöR, 11 (1931), pp 441–64 Kaufmann, Hag R, 55 (1935), v, pp 349–77 – Bilfinger, *ibid*, 62 (1938), i, pp 155–203 Aufricht, Corn LQ, November 1944 and March 1945 Kelsen, Yale LJ, 53 (1944), pp 207–20 Rousseau, Hag R, 73 (1948), ii, pp 171–249 Marek, *Identity and Continuity of States in Public International Law* (1954) Waldock, Hag R, 106 (1962), ii, pp 156–71 Arangio-Ruiz, *L'Etat dans le sens du droit des gens et la notion du droit international* (1975) Crawford, BY, 48 (1976–77), pp 93–182, and *The Creation of States in International Law* (1979) Lachs, Hag R, 169 (1980), iv, pp 29–41 Feldman, Hag R, 191 (1985), ii, pp 351–84 James, *Sovereign Statehood* (1986) Henkin, Hag R, 216 (1989), iv, pp 23–35 Hannum, *Autonomy, Sovereignty and Self-Determination* (1990), pp 14–26. See also the literature cited at § 36, n 1.

§ 33 The concept of international person An international person is one who possesses legal personality in international law,[1] meaning one who is a subject[2] 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

[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 was 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; Barberis, 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)[3] 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';[4] an international person need not possess all the international rights, duties and powers normally possessed by states.[5] Some states only possess some of those rights and duties;[6] 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[7] 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[8] and insurgents recognised as belligerents in a civil war.[9]

§ 34 Concept of the state A state[1] 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.

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[3] See § 7.

[4] *Reparations for Injuries Case*, ICJ Rep (1949), p 178.

[5] *Ibid*, pp 179–80.

[6] See §§ 75, 82.

[7] See § 7.

[8] See § 74.

[9] See § 49.

[1] As to the concept of a state in international law, see generally Kelsen, AJ, 35 (1941), at pp 606–9; and *Principles of International Law* (1952), pp 205–7, 257–64; Chen, *The International Law of Recognition* (1951), pp 54–63; Guggenheim, Hag R, 80 (1952), i, pp 80–96; Marek, *Identity and Continuity of States in Public International Law* (1954), especially pp 161–90; Blix, Hag R, 130 (1970), ii, at pp 632–8; Crawford, *The Creation of States in International Law* (1979), especially pp 31–76, and BY, 48 (1976–77), pp 93–182.

On the formation of states see also Biscottini, *Rivista*, 18 (1939), pp 378–406; Mouskhély, RG, 66 (1962), pp 469–85; and Jessup, *Birth of Nations* (1974).

On the birth of new states, see Hall, § 1; Westlake, i, pp 44–50; Smith, i, pp 233–45; Fauchille, §§ 195–198(3): Off J Special Suppl No 3 (Report of Committee of Jurists on the Aaland Islands question); Masaryk, *The Making of a State* (Czecho-Slovakia) (1927), pp 443–47; and Kelsen, RI (Paris), 3 (1929), pp 613–41.

As to the Baltic States, see Rutenberg, *Die baltischen Staaten und das Völkerrecht* (1928); Montfort, *Les Nouveaux États de la Baltique* (1933); Graham, *The Diplomatic Recognition of the Border States, Finland* (1935); and § 46, n 4 and 55, n 41ff.

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,[2] although there is 'no rule that the land frontiers of a State must be fully delimited and defined';[3] they may indeed be disputed. But it matters not whether the country is small[4] 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, ZI, 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 continuity of the same state: see *Ivanevic v Artukovic*, ILR, 21 (1954), p 66; *Artukovic v Rison* (1986), ILR, 79, pp 383, 395. See also *DC v Public Prosecutor* (Netherlands Supreme Court) (1972), ILR, 73, p 38 and see Tomitch, *La Formation de l'État Yougoslave* (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 '(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 § 40, 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 construction or interpretation: see eg § 56, n 32. 'State' is not necessarily the same as 'nation', although in the context of 'most favoured Nation' clauses (see § 669) the ILC equated the two terms: YBILC, 1978, vol II, pt 2, p 18, para (2) of commentary on draft Art 4.

As to the meaning of the word 'state' considered historically, see Dowdall, LQR, 34 (1923), pp 98–125. See also Reglade in *Etudes Georges Scelle* (vol ii, 1950), pp 507–34, and Andrews, LQR, 94 (1978), pp 408–27.

[2] In its Advisory Opinion in the *Western Sahara* case the ICJ concluded that although the emirates and tribes which existed in the area in question at the time of the Spanish colonisation of that area did not have the character of a personality or corporate entity distinct from the several emirates and tribes in question, and thus could not be considered as enjoying some form of sovereignty in Western Sahara, the nomadic peoples of the area did possess some rights relating to the lands through which they migrated, constituting legal ties with the territory of Western Sahara (ICJ Rep (1975), at pp 63–5). See generally on this case § 250, n 5.

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

[3] *North Sea Continental Shelf Cases*, ICJ Rep (1969), at p 33, citing the example of Albania and the *Monastery of St Naoum Case* (1924), PCIJ, Series B, No 9, at p 10. See also *Deutsche Continental Gas-Gesellschaft v Polish State*, AD, 5 (1929–30), No 5, as to the existence of a state even though its boundaries have not been legally delimited. See also § 226, n 1. Many states have border disputes with neighbouring states and to that extent have unsettled frontiers. On unsettled frontiers see Bardonnet, Hag R, 153 (1976), v, pp 9–166.

A state may either be part of a larger land area, or be an island. As to certain features of islands as sovereign states, see Crawford, ICLQ, 38 (1989), pp 277–98.

[4] Thus Nauru, which became an independent state in 1968, has a population of 8,042 (1983 census) and a territory of 5,263 acres. See § 102 (as to the Vatican City), § 77, n 3 (as to Liechtenstein), § 83, n 2 (as to Andorra), and § 81, n 1 (as to Monaco and San Marino). But a small artificial island is inadequate: *Re Duchy of Sealand* (1978), ILR, 80, p 683.

On the various problems associated with the admission of very small states to the UN, see

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.[5] A state calls for a community organised as a political unit (*polis*) as distinguished from, say, a tribe.[6] But once a state is established, temporary interruption of the effectiveness of its government, as in a civil war[7] 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.[8] Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country.[9]

Blair, *The Ministate Dilemma* (1967); Rapoport, *AS Proceedings* (1968), pp 155–63; Fisher, *ibid*, pp 164–70; Chappez, AFDI, 17 (1971), pp 541–51; van de Steen, *Rev Belge*, 7 (1971), 578–618; Rapoport *et al*, *Small States and Territories: Status and Problems* (1971); St Girons, RG, 76 (1972), pp 445–74; Mendelson, ICLQ, 21 (1972), pp 609–30; Schwebel, AJ, 67 (1973), pp 108–16; Gunter, AJ, 68 (1974), pp 496–501, and AJ, 71 (1977), pp 110–24; de Smith in *International Organisation: Law in Movement* (eds Fawcett and Higgins, 1974), pp 64–76; Adam, Ital YBIL, 2 (1976), pp 80–101. In 1969 the Security Council considered the mini-state problem and established a Committee of Experts to study the matter. It was unable to agree upon any recommendations, and submitted only an interim report: UN Doc S/9836 (1970). See UNYB (1969), pp 260–2, and (1970), pp 300–1; Gunter, AJ, 71 (1977), pp 110–24.

As to the participation of small states in the international community generally see also Vellas, RG, 58 (1954); Fleiner, *Die Kleinstaaten in den Staatenverbindungen des zwanzigsten Jahrhunderts* (1966); Ehrhardt, *Der Begriff des Mikrostaats im Völkerrecht und in der internationales Ordnung* (1970); Mendelson, ICLQ, 21 (1972), pp 609–30.

5 In its Advisory Opinion in the *Western Sahara* case, the ICJ said that 'no rule of international law, in the view of 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.

6 See n 2.

7 In the *Sambiaggio* claim 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 should not apply: (1903), RIAA, 10, pp 499, 523–4. See also § 40, n 2.

8 Note the distinction between sovereignty, and ties of allegiance or personal influence: *Western Sahara Case*, ICJ Rep (1975), p 53. As to the concept of 'autonomy' see Hannum and Lillich, AJ, 74 (1980), pp 858–89; Dinstein (ed), *Models of Autonomy* (1980); Hannum, *Autonomy, Sovereignty and Self-Determination* (1990); and see § 84, n 2.

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 § 89ff.

9 '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 Palmas Arbitration* (1928), RIAA, 2, pp 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 by a state of its sovereign rights: see *North Atlantic Coast Fisheries Case* (1910), RIAA, 11, pp 167, 188; *The Wimbledon* (1923), PCIJ, Series A, No 1, at p 25. See also § 121, n 10. The PCIJ'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 that of the other state: 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.

For a state to agree to discuss with another state certain aspects of its government of part of its territory does not affect its legal independence: see eg the UK–Ireland Agreement of 15 November 1985 relating to Northern Ireland (TS No 62 (1985)), O'Connor, AFDI, 31 (1985), pp 191–203, and *Ex parte Molyneaux* [1986] 1 WLR 331.

The fact that a state's constitution is embodied in legislation of another state and can only be amended by further legislation by the latter, need not prevent the state being accepted as such if in all matters of substance it has in practice independent control of its affairs. This was the situation as regards Canada, until the enactment of the Canada Act 1982 by the Parliament of the UK. On the patriation of the Canadian Constitution see UKMIL, BY, 53 (1982), pp 348–9; Bruha, ZöV, 43 (1983), pp 585–618; Hood Phillips, ICLQ, 31 (1982), pp 845–8; and see § 22, n 7. Similarly, certain rights of the UK in relation to the government of the states of Australia were only brought to an end by the Australia Act 1986: see Watts, ICLQ, 36 (1987), pp 132–9.

The constitutions of states which were formerly colonies or other forms of dependent territories of another state will often have been enacted by a legislative instrument of the former parent state. Attempts after the attainment of independence to challenge such constitutions in the courts of the former parent state are unlikely to succeed. See *Buck v Attorney-General* [1965] 1 Ch 753 and 765.

10 For consideration of particular features see below, §§ 40 and 45 (recognition of states and governments), §§ 57–8, (continuity of states), and §§ 81–3 (states under protection). See also vol II of this work (7th ed), § 166–72*b*, as to military occupation.

11 See p 136, as to the continued existence of 'Germany' as a single state distinct from the Federal Republic of Germany and the German Democratic Republic.

1 See §§ 75, 81–3.

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,[10] while the state nevertheless continues to exist. In some extreme cases it may do so in only a very attenuated form.[11]

§ 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.[1]

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 is apparent 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 fulfil 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[1] 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)[2] 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.[3]

[1] The literature upon sovereignty is extensive. The following authors give a survey of the opinions of the different writers: Hobhouse, *Metaphysical Theory of the State* (1918); Laski, *Studies in the Problem of Sovereignty* (1917), *Foundations of Sovereignty* (1921), *A Grammar of Politics* (1925), pp 44–88, and *The State in Theory and Practice* (1935); MacIver, *The Modern State* (1926), pp 165–290; Heller, *Souveränität* (1927); Mattern, *Concepts of State Sovereignty and International Law* (1928); Musacchia, *La sovranità e il diritto internazionale* (1938); J W Jones, *Historical Introduction to the Theory of Law* (1940), pp 79–97; Lindsay, *The Modern Democratic State* (1943), pp 212–28; Friedmann, *Legal Theory* (1944), pp 138–143, 386–98; van Kleffens, Hag R, 82 (1953), i, pp 1–130; Sauer, *Souveränität und Solidarität* (1954); McNair in *Symbolae Verzijl* (1958); Korowicz, Hag R, 102 (1961), i, pp 5–113; Waldock, Hag R, 106 (1962), ii, pp 156–72; Kelsen in Strupp-Schlochauer, *Wört* (vol III, 1962), p 278ff; Larson and Jenks, *Sovereignty within the Law* (1965); Salcedo, *Soberaniá del estado y derecho internacional* (2nd ed, 1976); Hinsley, *Sovereignty* (2nd ed, 1986), especially pp 158–213; Wildhaber in *The Structure and Process of International Law* (eds MacDonald and Johnston, 1983), pp 425–52; Anand, *Confrontation or Cooperation? International Law and the Developing Countries* (1984), pp 72–102. See also works cited in the bibliography to this section, p 119.

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 *superanus*: see further van Kleffens, 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, primarily a matter of internal constitutional power and authority, conceived as the highest, underived 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[1] and independence[2] and, in fact, by their interdependence. Although states are often referred to as 'sovereign' states, that is descriptive of their internal constitutional position[3] 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[4] – 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.[5]

A number of states in their constitutions have made express provision for limitations on their national sovereign powers in the interests of international cooperation.[6] These provisions are to the effect that certain sovereign rights and powers of the state may be limited in connection with international organisa-

[1] See § 107.

[2] See § 117.

[3] So distinguishing from such states those others which do not merit that description.

[4] See § 7.

[5] Article 14 of the Draft Declaration on Rights and Duties of States, adopted by the ILC in 1949, provides that 'Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law': YBILC (1949), pp 286–90. See Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), pp 249–50. See also §§ 118, 121, 132, as to the concept of 'domestic jurisdiction', which in many respects represents the area where the state is truly sovereign.

Note also the emphasis placed on the sovereignty of the state in the Marxist, and particularly Soviet Russian, approach to international law: see § 23, n 22, and § 104, nn 5 and 6.

As to the emphasis sometimes placed by newly independent states on their new-found sovereignty, see p 15.

Earlier editions of this volume reflected the contemporary tendency to suppose that the further development of international law must be conditioned by what was called 'a surrender of sovereignty'. For writings of this nature, see 8th ed of this vol, p 123, n 5.

[6] Eg Art 24(1) of the Basic Law of the Federal Republic of Germany; Art 92 of the Constitution of the Netherlands; Art 11 of the Italian Constitution; Art 20 of the Danish Constitution; Art 25*bis* of the Belgian Constitution; Art 49*bis* of the Luxembourg Constitution; Art 93 of the Norwegian Constitution (on which see Hambro, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 557–72; Art 28(2) and (3) of the Greek Constitution. For comment on some of these constitutional provisions see the literature cited in § 19 in respect of the countries concerned.

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 acting 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,[7] 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 involved in membership of the European Communities, but the continued international statehood of its member states is not in question.

RECOGNITION OF STATES AND GOVERNMENTS

Borchard, § 85 Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp 228–235, and *Principles of International Law* (2nd ed, Tucker, 1966), pp 381–416 Spiropoulos, *Die de facto-Regierung im Völkerrecht* (1926), pp 11–62, 164–71 Kunz, *Die Anerkennung der Staaten und Regierungen im Völkerrecht* (1928) Knubben, *Die Subjekte des Völkerrechts* (1928), pp 305–49 Hervey, *The Legal Effects of Recognition in International Law* (1928) Redslob, *Les Principes du droit des gens moderne* (1937), pp 48–69 Scalfati Fusco, *Il riconoscimento di stati nel diritto internazionale* (1938) Venturini, *Il riconoscimento nel diritto internazionale* (1946) Jiminez de Arechaga, *Reconocimento de Gobiernos* (1947) H Lauterpacht, *Recognition in International Law* (1947), and *International Law: Collected Papers* (vol i, 1970), pp 308–48 Jessup, *A Modern Law of Nations* (1948), pp 43–67 Chatelain in *Etudes Georges Scelle* (vol i, 1950), pp 717–34 Chen, *The International Law of Recognition* (1951) Biscottini, *Atti unilaterali nel diritto internazionale* (1951), pp 36–66 Erich, Hag R (1926, iii), pp 431–502 Temperley, v, pp 157–162; vi, pp 284–309 Sanders, ZöR, 1 (1919), pp 132ff Larnaude, RG, 28 (1921), pp 457–503 McNair, BY (1921–22), pp 57–67 Charles de Visscher, RI, 3rd series, 3 (1922), pp 150–70, 300–365 Fraenkel, Col Law Rev, 25 (1925), pp 544–70 Salvioli, *Rivista*, 18 (1926), pp 330–36) Miceli, *ibid*, 19 (1927), pp 169–86 Houghton, Am Law Rev (1928), pp 228–47 Fischer, Williams, *Grotius Society*, 15 (1929), pp 53–81; HLR, 47 (1934), pp 776–94; and Hag R, 44 (1933), ii, pp 202–312 Marshall Brown, RI, 3rd series, 13 (1932), pp 5–33 Kelsen, Hag R, 42 (1932), iv, pp 260–94 Cavaglieri, *Rivista*, 24 (1932), pp 305–45 Diena, *ibid*, pp 465–82 Salvioli, Hag R, 46 (1933), v, pp 44–56 Scelle, *ibid*, pp 373–93, and 55 (1936), i, pp 107–35 Brierly, *ibid*, 58 (1936), iv, pp 48–62 Heuss, ZV, 18 (1934), pp 37–89, and *ibid*, 19 (1935), pp 1–38 Redslob, RI (Paris), 13 (1934), pp 429–43 Cavaré, RG, 42 (1935), pp 5–99 Ottolenghi, *Rivista*, 28 (1936), pp 3–33, 152–71 Raestad, RI, 3rd series, 17 (1936), pp 257–313 Resolution of the Institute of International Law adopted in 1936, AJ, 30 (1936), Suppl, p 185 Kelsen, AJ, 35 (1941), pp 605–17 H Lauterpacht, Hag R, 62 (1937), iv, pp 244–96, in Yale LJ, 53 (1944), pp 385–458, and Col Law Rev, 45 (1945), pp 815–64, and 46 (1946), pp 37–68 Sperduti, *Rivista*, 36 (1953), pp 30–63 Marek, *Identity and Continuity of States* (1954), pp 130–61 Charpentier, *La Reconaissance internationale et l'évolution des droits des gens* (1956) Fitzmaurice, Hag R, 92 (1957), ii, pp 16–35; Kopelmananas, *Comunicazioni e studi*, 9 (1958), pp 1–45 Lachs, BY, 35 (1959), pp 252–9 Bindschedler, *Archiv des Völkerrechts*, 9 (1962), pp 377–97 Suy, *Les Actes juridiques unilateraux en droit international* (1962), ch VI Starke, *Studies in International Law* (1965), pp 91–100 Jennings, Hag R, 121 (1967), ii, pp 349–68 Blix, Hag R, 130 (1970), ii, pp 593–700 Salmon, *La Reconnaissance d'état* (1071) Verhoeven, *La Reconnaissance internationale dans la pratique contemporaine* (1975) Arangio-Ruiz, *Osterreichische Zeitschrift für öff Recht*, 26 (1975), pp 3–63, 265–406 Kuyper in *International Law in the Netherlands* (ed van Panhuys *et al*, vol 1, 1978), pp 371–403 Crawford, *The Creation of States in International Law* (1979) Brownlie, BY, 53 (1982), pp 187–211, and in *The Structure and Process of International Law* (eds Macdonald and Johnston, 1983), pp 627–42 Feldman, Hag R, 191 (1985), ii, pp 385–405 *Restatement (Third)*, i, pp 77–93 Sen, *A Diplomat's Handbook of International Law and Practice* (3rd ed, 1988), pp 501–45.

[7] See § 19, n 85ff.

§ 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 cognisance 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 régime 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 § 50, as to implied recognition.

[3] See § 46, n 6. See also *Carl Zeiss 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 Mann, ICLQ, 16 (1967), pp 760–99. Similarly, in *GUR Corpn v Trust 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 Elicofon* (1973), ILR, 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 Bouchage* (1959), ILR, 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]

§ 40, n 52. See also § 40 nn 28 and 30, as to special characteristics of the recognition accorded by the UK (and others) to the Federal Republic of Germany and the German Democratic Republic.

5 The unwillingness of many states to recognise the German Democratic Republic for many years after its apparent establishment in 1949 was in part due to the obligations imposed by the various Four Power Agreements concluded at the end of the Second World War: see Bathurst and Simpson, *Germany and the North Atlantic Treaty* (1956), pp 196–207; *Parliamentary Debates (Commons)*, vol 843, cols 774–5 (23 October 1972); and generally, § 40, n 19ff. So too, obligations to respect the unity of Vietnam were relevant to the refusal of some states to recognise a second state in Vietnam: see *Parliamentary Debates (Commons)*, vol 684, col 106 (written answers, 20 November 1963), and vol 714, col 136 (written answers, 21 June 1965). Treaty obligations have also been relevant to the non-recognition of the purported independent state administration in northern Cyprus: see eg UKMIL, BY, 50 (1979), p 295, and 54 (1983), p 385, and generally, § 55, n 15.

1 On the history of the law as to recognition, see Alexandrowicz, BY, 34 (1958), pp 176–98.

2 The opposing views of states on the question of recognition were considered by the ILC in 1949 in connection with its Draft Declaration on the Rights and Duties of States, but were regarded by it to be 'too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration': YBILC (1949), p 289. Although recognition of states and governments was one of the topics selected for codification by the ILC in 1949 (see § 30), the Commission has not yet begun work on it, although it has, incidentally, touched on aspects of it in dealing with other subjects on its agenda. See the UN Secretary-General's *Survey of International Law* (1971) (reprinted in YBILC (1971), ii, pt 2, pp 16–18); draft Articles on the Representation of States in their Relations with International Organisations, Art 79 (and Commentary), YBILC (1971), ii, pt 1, pp 330–2, which became Art 82 of the Convention of the Representation of States in their Relations with International Organisations of a Universal Character 1975 (UN Juridicial YB (1975), p 87).

3 See, for instance, Hall, §§ 2 and 26; Rivier, i, p 57; Salvioli, Hag R, 46 (1933), iv, pp 44–56; Kelsen, Hag R, 42 (1923), iv, pp 260–94, RI (Paris), 4 (1929), pp 613–41, and in AJ, 35 (1941), pp 605–17; Verdross, § 30; and in Strupp, *Wört*, i, pp 283–86; Balladore Pallieri, pp 190–97;

Although in practice recognition is necessary to enable every new state to enter into official intercourse with other states, theoretically every new state becomes, according to this view, a member of the international community *ipso facto* by its rising into existence: recognition is thus viewed as purely declaratory or confirmatory in nature, supplying only the necessary evidence of the fact of a new state's existence.

The opposed view[4] is that it is a rule of international law that no new state has a right as against other states to be recognised by them; that no state has a duty to recognise a new state; that a new state before its recognition cannot claim any right which a member of the international community has as against other members; and that it is recognition which constitutes the new state as a member of the international community.

The problem is largely theoretical because state practice is inconclusive and may be rationalised either way.[5] The international community is still largely decentralised. The extent to which a new state is able to participate in the international community is in practice largely determined by the extent of its bilateral relationships with other states, which in turn depends primarily on its recognition by them. Only by being granted recognition is a new state fully admitted by an existing state into its circle of bilateral relationships[6] within the framework of international law; this is precisely what the existing state intends when granting recognition, and what it knows it is preventing when withholding

Fedozzi, *Trattato di diritto internazionale* (2nd ed, vol i, 1933), pp 101–8, distinguishes between long-established states, whose personality is grounded in the fact that they are already members of the international community, and new states; Wegner, in *Festgabe für Paul Heilborn* (1931), pp 181–202; Fischer Williams, Hag R, 44 (1933), ii, pp 203–313, and HLR, 47 (1934), pp 776–80; Borchard, AJ, 36 (1942), pp 108–11; Chen, *The International Law of Recognition* (1951), p 4; Kidd, MLR, 33 (1970), pp 99–102; *Restatement (Third)*, i, p 77; and others noted in Whiteman, *Digest*, 2, p 21. See also *Deutsche Continental Gas-Gesellschaft v Polish State*, decided by the Germano-Polish Mixed Arbitral Tribunal, AD, 5 (1929–30), No 5, for a pronouncement in favour of the declaratory view. But see Herz, RI, 3rd series, 17 (1936), pp 564–90.

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 merely signifies that the State which recognises it accepts the personality of the other with all the rights and duties determined by International Law' (Art 6): LNTS, 165, p 19. The Charter of the OAS 1948, as amended in 1967, repeats, in Art 12, the provision 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'.

4 Fauchille, § 204; Anzilotti, pp 156–68 and *Cours de Droit International* (trans Gidel), (1929), I, p 173; Strupp, Hag R, 47 (1934), i, pp 422–52; Cavaglieri, *Rivista*, 24 (1932), pp 305–45; H Lauterpacht, *Recognition in International Law* (1947), Ch 5; Quincy Wright, AJ 49 (1955), pp 320ff, at p 325; 8th ed of this vol, p 121; and for others see Whiteman, *Digest*, 2, p 20.

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.

5 For example, H Lauterpacht, *op cit*, p 61, asserts that practice supports the constitutive theory, whilst Kunz, AJ, 44 (1950), p 713, at p 717, asserts the contrary.

6 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' formula for avoiding problems of recognition arising in relation to participation 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. The grant of recognition by a state is a unilateral act affecting essentially bilateral relations, and neither constitutes nor declares the recognised state to be a member of the international community as a whole. 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.[7] 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 community 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 fulfils 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.[8] 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)[9] 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;[10] 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,[1] so that the new state can be regarded, *quoad* 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,[2] as has lack of real independence.[3] However, a state may

[7] 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 5 and § 55, n 15.

[8] 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 Prizes*, Moore, i, p 169; *International Arbitrations*, v, p 4572. See also the case of the *Macedonian*, 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: Whiteman, *Digest*, 2 pp 16–17; UN Doc A/CN 4/2, 15 December 1948, pp 186–7.

[9] See § 54.

[10] See §§ 41 and 128.

[1] See § 34.

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 of states: they are still 'recognise[d] ... in accordance with common international doctrine' (*Parliamentary Debates (Commons)*, vol 984, col 278 (written answers, 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 as 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 when other factors, including relevant United Nations resolutions, may have to be taken into account'.

Parliamentary Debates (Commons) vol 55, col 226 (written answers, 29 February 1984). See also *ibid*, vol 102, col 977 (written answers, 23 October 1986) and vol 169, cols 449–50 (written answers, 19 March 1990). 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 for the judgment of 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 fulfil 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).

[2] As in the case of the refusal by the US to recognise Cuba in 1875: Moore, i, 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: Whiteman, *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 Flory, RG, 93 (1989), pp 385–415; Salmon, AFDI, 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 representatives 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 PLO 'has the power and responsibilities of the Provisional Government of the State of Palestine': eg UN Doc A/44/691 of 30 October 1989), 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 new name of 'Palestine' (GA Res 43/177): this decision was taken on a basis not prejudicing 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 without necessarily affecting the state's continued existence, as may happen during a civil war; similarly in 1945 Germany was virtually without a government (as opposed to the authorities of the occupying powers) but was still regarded as continuing as a state (see literature cited at n 19). The UK recognises no government in Kampuchea (Cambodia), but still acknowledges its continuation as

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.[4] 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,[5] a party to a civil war,[6] or in some other way.[7] 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.[8]

Although not always consistent, the bulk of state practice[9] probably supports

a state: see § 52, n 3 and UKMIL, BY, 54 (1983), p 385. France similarly recognises no government in that country: RG, 93 (1989), pp 108–9.

3 See *Parliamentary Debates (Commons)*, vol 588, col 884 (19 May 1958), as to the British Government's attitude to the 'German Democratic Republic'. As to the reasons of the US in 1959 for not recognising the 'German Democratic Republic' see Whiteman, *Digest*, 2, pp 387–90. See also § 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. Thus neither Biafra (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.

4 See, eg, Arts 181–2 of the Constitution of Cyprus, and the Cyprus Treaty of Guarantee 1961 (TS No 5 (1961)), and Lavroff, RG, 65 (1961), pp 527–45; see also § 131, n 41. The State of Vietnam was widely recognised after 1950, even though France did not finally relinquish certain powers in relation to Vietnam until later: see n 48ff. As to the Federal Republic of Germany and the German Democratic Republic, see n 19ff. See above, § 34, n 9, as to certain constitutional rights retained by the UK in relation to Canada and Australia until, respectively, 1982 and 1986; and § 79, n 1, as to the position of Ceylon (Sri Lanka). As to the consequences of part or all of a state's territory being subject to restrictions on the military uses to which it may be put, see § 96, n 7.

5 As to the position of the British Dominions between 1918 and 1939 see § 78, and, as to India, see § 41, n 14, and § 78, n 9. As to protected states, see § 81; and as to certain colonial territories with 'advanced' constitutions, see § 84.

6 See § 49.

7 Note the consideration given by the ICJ in its Advisory Opinion on the *Western Sahara* to the notion of a 'Mauritanian entity' prior to the creation of the State of Mauritania: ICJ Rep (1975), pp 57–64. See generally on the claim to statehood of the Saharan Arab Democratic Republic, Naldi, Indian JIL, 25 (1985), pp 448–81.

8 See Alexandrowicz, AJ, 46 (1952), pp 631–40.

9 State practice regarding the recognition of new states will be found recorded in many of the works cited in the bibliography of this section at p 126, and also particularly in Whiteman, *Digest*, 2, pp 1–746; Kiss, *Répertoire*, 3, pp 3–88; Myers, AJ, 55 (1961), pp 703–20, and O'Brien and Goebel in *The New Nations in International Law and Diplomacy* (ed O'Brien, 1965), pp 98–223 (the two last works relate to the practice of the US concerning new states since 1945);

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.[10] 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.[11] 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.[12]

Korea Divided views on recognition in relation to Korea also remained for

Misra, AJ, 55 (1961), pp 398–424 (as to Indian practice); Dai, Can YBIL, 3 (1965), pp 290–305 (as to Canadian practice); Tammes in *Symbolae Verzijl* (1958), p 362 (as to Dutch practice); Blix, Hag R, 130 (1970), ii, pp 682–3 (as to Swedish practice); and, more generally, Jessup, *The Birth of Nations* (1974); Crawford, BY, 48 (1976–77), pp 93–182, and *The Creation of States in International Law* (1979).

10 In particular, the recognising state must exercise care not to wrong the parent state by a precipitate act of recognition. See § 41.

11 This is the view of, amongst others, the USA: see Whiteman, *Digest*, 2, pp 5–7, 10. A considerable number of writers hold a similar view. For a detailed discussion of the subject, see H Lauterpacht, Yale LJ, 53 (1944), pp 385–458 and *Recognition in International Law* (1947).

Recognition of states is, of course, a political function in the meaning that it is within the province of the Executive and not of the Judiciary, but, it will be noted, the executive organs within the state are often charged with the function of ascertaining and applying the law. As to the extent to which national courts are bound by statements made to the court by the executive branch of government, see § 460.

12 Although Israel's belligerent status has been recognised by the conclusion of armistice agreements with Israel and the assertion that a state of war with Israel exists. See § 50, n 20. The official visit of President Sadat of Egypt to Israel in 1977, and the return visit of Prime Minister Begin of Israel to Egypt shortly thereafter, were followed by the signature by both leaders of the 'framework for peace' agreement in September 1978 (the so-called 'Camp David Agreement': ILM, 17 (1978), p 1466), and the Treaty of Peace 1979 (ILM, 18 (1979), p 362) in which the mutual recognition of the two states is stipulated in Art III.1(a) and 3. See Thierry, AFDI, 21 (1975), pp 45–64; Giardina, Ital YBIL, 4 (1978–79), pp 20–30; Le Morzellec, AFDI, 26 (1980), pp 175–92; and § 55, n 51.

See also, § 40, n 2, as to 'Palestine'.

many years.[13] At the end of the Second World War the independence and unity of Korea were the declared aims of the United Nations.[14] 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,[15] but has not yet been achieved. The Republic of Korea was recognised by most states and became a member of many international organisations.[16] The Democratic People's Republic of Korea was recognised by most Communist states and by some others;[17] 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'[18] have now been largely resolved. In each case

[13] See generally Whiteman, *Digest*, 2, pp 172–82; Charvin, *Rev Belge*, 14 (1978–79), pp 5–39; and n 18. As to the conflict in Korea, 1950–53, see vol II of this work (7th ed), pp 165–6.

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 Fin 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 Whiteman, *Digest*, 2, pp 172–82; and Myers, AJ, 55 (1961), pp 707–9; O'Brien (ed), *The New Nations in International Law and Diplomacy* (1965), pp 134–9. 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 Ei v Municipality of Tokyo*, ILR, 32, (1957), p 185.

[14] Korea had been Japanese 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).

[15] Although the UN Committee for the Unification and Rehabilitation of Korea (UNCURK), which was established by 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 Unified 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 inappropriate to recognise the Democratic People's Republic of Korea: see eg *Parliamentary Debates (Commons)*, vol 32, 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.

[16] 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.

[17] 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.

[18] See generally on 'divided states' Martinez-Agullo, *Clunet*, 91 (1964), pp 265–84; Caty, *Le Statut juridique des etats divisés* (1969); Crawford, *The Creation of States in International Law* (1979), pp 271–87.

special historical circumstances affected the attitude of other states to the question of recognition.

Germany In the case of Germany,[19] after the unconditional surrender in 1945 the United Kingdom, the United States of America, the Soviet Union and France, in a joint Declaration issued on 5 June 1945, assumed supreme authority with respect to Germany, including all the powers possessed by the German Government and 'any state, municipal, or local government or authority'.[20] Those Four Powers divided the country into four occupation zones (one administered by each of the Four Powers) and the jointly occupied special Berlin area.[21]

[19] The literature on the status of Germany is extensive. See, in addition to works cited at n 6, those cited in vol II of this work (7th ed), p 603, n 2, at pp 604–5; Jennings, BY, 23 (1946), pp 112–41; Sauser Hall, *Ann Suisse*, 3 (1946), pp 9–63; Gros, RG, 50 (1946), pp 67–78; Nobelman, AJ, 41 (1947), pp 650–5; Mann, *Grotius Society*, 33 (1947), pp 119–45, ILQ, 1 (1947), pp 314–35, and ICLQ, 16 (1967), pp 760–99; Friedmann, *The Allied Military Government of Germany* (1947); Delbez, RG, 54 (1950), pp 3–40; Wright, AJ, 46 (1952), pp 299–308; Schwarzenberger, *Current Legal Problems*, 6 (1953), pp 296–314; Plischke, AJ, 48 (1954), pp 245–64; Virally, AFDI, 1 (1955), pp 31–52; Bishop, AJ, 49 (1955), pp 125–47; Briggs, *ibid*, pp 148–65; Kunz, *ibid*, pp 210–16; Bathurst and Simpson, *Germany and the North Atlantic Community* (1956); Marschall von Bieberstein, *Zum Problem der völkerrechtlichen Anerkennung der beiden deutschen Regierungen* (1959); Scheuer, *Die Rechtslage des geteilten Deutschlands* (1960); Grewe, AJ, 56 (1962), pp 510–13; Schuster, *Deutschlands staatliche Existenz im Widerstreit politischer und rechtlicher Gesichtspunkte 1945–63* (1963); Hacker, *Die Rechtslage der Sowjetischen Bezatzungszone* (1965); Fielder, *Staatskontinuität und Verfassungsrechtsprechung* (1970); Meyrowitz, AFDI, 16 (1970), pp 85–124; Frenzke, *Die Anerkennung der DDR* (2nd ed, 1971); Colard, RG, 77 (1973), pp 444–77; Frowein, ICLQ, 23 (1974), pp 105–26; Hacker, *Der Rechtsstatus Deutschlands aus der Sicht der DDR* (1974); Frowein in *Handbuch des verfassungsrechts der Bundesrepublik Deutschlands* (1983), pp 29–58; Fiedler, in *Staatliche Kontinuität* (eds Meissner and Zieger, 1983), pp 9–24; Zieger, *ibid*., pp 25–45; Klein, *ibid*., pp 129–41; Hendry and Wood, *The Legal Status of Berlin* (1987), pp 17–27; Lagoni, Indian JIL, 27 (1987), pp 1–12; Whiteman, *Digest*, 1, pp 330–38, and 2 pp 379–90; *Selected Documents on Germany and the Question of Berlin 1944–61* (Cmnd 1552) and *1961–73* (Cmnd 6201); Dept of State, *Documents on Germany 1944–85* (4th ed); Piotrowicz, ICLQ, 38 (1989), pp 609–35.

Among many judicial decisions see *Occupation of Germany Case (Zurich)*, AD, 13 (1946), No 86; *Acheson 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), p 541) and 18 December 1959 (*International Registration of Trade-Mark (Germany) Case*, ILR, 28, p 82); *Upright v Mercury Business Machines Co* (1960–61), ILR, 32, p 65; decision of the German Federal Constitutional Court of 31 May 1960 (AJ, 55 (1961), p 994); *Billerbeck and Cie v Bergbau-Handel GmbH* (1967), ILR, 72, p 59; *Carl Zeiss Stiftung v Rayner and Keeler* [1967] AC 853; *Carl Zeiss Stiftung v VEB Carl Zeiss Jena* (1970), ILR, 61, p 36 (and see other cases involving the disposition of assets of the Carl Zeiss enterprise cited below, § 407, n 21); decision of the German Federal Constitutional Court of 31 July 1973 in *Re Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic* (1972), ILR, 78, p 150; decision of the same court on 7 July 1975 in *Eastern Treaties Constitutionality Case*, *ibid*, p 176; *Federal Republic of Germany v Elicofon* (1973), ILR, 61, p 143, and ILM, 14 (1975), p 806; *Norddeutsches Viek-Und Fleischkontor GmbH v Hza-Ausfuhrerstattung Hamburg-Jonas* [1974] ECR 899; *Trawnik v Lennox* [1985] 2 All ER 368. See also n 35, as to the status of Berlin.

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

[20] Cmnd 1552, p 38.

[21] 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, pp 27, 29 and 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,[22] 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.[23] The Four Powers expressly disclaimed any intention to annex Germany;[24] 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,[25] and the Soviet Union similarly permitted the creation on its zone of occupation of the German Democratic Republic.[26] 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[27] recognised

part of the Soviet zone of occupation under the Protocol of 12 September 1944). It was also stated at the Potsdam Conference that the final determination of the frontiers of Germany must await a peace settlement (see Cmnd 1552, pp 56, 57).

22 See, for instance, Law No 1 of 20 September 1945, issued by the Control Council and repealing a series of laws of a political and discriminatory nature upon which the National–Socialist régime rested: *Official Gazette of the Control Council for Germany*, No 1, 29 October 1945, p 3.

See also Proclamation No 2 of 20 September 1945, which contained certain additional requirements imposed upon Germany: AJ, 40 (1946), Suppl, p 21. Section III of the Proclamation laid down that the Allied Representatives will regulate all matters affecting Germany's relations with other countries – such regulation to include directions concerning the abrogation, bringing into force, or revival of treaties to which Germany was a party. The same section provided that in virtue and as from the date of the surrender of Germany its diplomatic, consular, commercial and other relations with foreign states had ceased to exist and that German diplomatic and consular representatives abroad were recalled. The control and disposal of the buildings, property, and archives of German diplomatic and other agencies abroad was to be prescribed by the Allied Representatives.

For the text of the Occupation Statute of Germany of 8 April 1949, see AJ, 43 (1949), Suppl, p 172; it was repealed on the entry into force of the Convention of Relations in 1955.

23 It would appear that by virtue of the Declaration of 5 June 1945 (see n 20), authority over Germany was vested in three bodies; (a) in the British, US, Russian and French Commanders-in-Chief, each with respect to his own zone of occupation; (b) in the Control Council, composed of the four Commanders-in-Chief, in matters affecting Germany as a whole; (c) in an Inter-Allied Governing Authority for the area of 'Greater Berlin' operating under the general direction of the Control Council and consisting of four Commandants.

24 See Kelsen, AJ, 39 (1945), pp 518–26, for the view that Germany ceased to exist as a sovereign state. In April 1946, in connection with a case on appeal arising out of the continued detention of a German national, the British Foreign Office stated that Germany continued to exist as a state and that the war with her had not come to an end: *Rex v Bottrill, ex parte Kuechenmeister* [1946] 1 All ER 635 (Divisional Court): [1942] 2 All ER 434 (Court of Appeal). For lucid comment, see BY, 23 (1947), p 381. See also *Netz v Ede* (1946), *Solicitors Journal*, 20 March, p 187. See also n 36, as to *Trawnik v Lennox* [1985] 2 All ER 368.

25 See the letters from the Military Governors, 12 May 1949, approving the constitution of the Federal Republic of Germany (the Basic Law) for submission to the German people: Cmnd 1552, p 117.

26 See statement by the Soviet Military Governor, 8 October 1949 (Cmnd 1552, p 124) and responses by the three Western powers (*ibid*, pp 125, 126).

27 See Art 1.2 of the Convention on Relations between the Federal Republic and those three states, as amended in 1954: TS No 10 (1959). The 1952 Convention was accompanied by a Convention

the Federal Republic as having the 'full authority of a sovereign State over its internal and external affairs', rather than as a sovereign state;[28] 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.[29]

In February 1973 the same language was used by the British Government in informing Parliament of recognition of the German Democratic Republic.[30] 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.[31] Both became members of the United Nations in 1973.

on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany (TS No 11 (1959)), a Finance Convention (TS No 12 (1959)), and a Convention on the Settlement of Matters arising out of the Occupation (TS No 13 (1959)).

See § 121, n 11, as to certain limitations imposed upon the Federal Republic of Germany as regards its armed forces.

28 See in particular Bathurst and Simpson, *Germany and the North Atlantic Community* (1956), pp 135–7, and ch 15. In October 1954 the three Western powers declared the Federal Republic of Germany to be the only German government freely elected and legitimately constituted and therefore entitled to speak for Germany as the representative of the German people in international affairs (Cmnd 1552, p 189): the significance of that declaration was greatly reduced when the German Democratic Republic was recognised in 1973. The transitional nature of the Basic Law of the Federal Republic of Germany, pending the reunification of Germany, is reflected in the preamble, Arts 23 and 146; they have now been amended.

On the effect on the status of Germany of the formal termination by the President of the US of the state of war on 24 October 1951, see Wright, AJ, 46 (1952), pp 299–308.

29 The most important of these exceptions was: (a) the power vested in the Allied States, whose forces remained in Germany, to declare a state of emergency in the whole or part of Germany; (b) the retention of full rights with regard to Berlin; (c) the reservation of the supreme authority of the Allies with regard to 'Germany as a whole, including the unification of Germany and a peace settlement'.

30 *Parliamentary Debates (Lords)*, vol 338, col 959 (6 February 1973).

31 ILM, 12 (1973), p 16; the Treaty entered into force on 21 June 1973. See also RG, 77 (1973), pp 478–80. For the Four Power Declaration of November 1972 concerning the admission of the FRG and the GDR to the UN, and making clear that admission did not affect Four Power rights and responsibilities for Germany, see ILM, 12 (1973), p 217. On the admission of the FRG and the GDR to the UN see Bettati, AFDI, 19 (1973), pp 211–31. The GDR became a member of a specialised agency for the first time by joining the WHO on 8 May 1973. The USA recognised the GDR on 4 September 1974 (see *Federal Republic of Germany v Elicofon*, ILM, 14 (1975), pp 806, 807), on which date an Agreement on the Establishment of Diplomatic Relations was concluded (*ibid*, p 1436). A preliminary step to the normalisation of relations between the two German states was the conclusion by the FRG in 1970 of treaties with the Soviet Union and with Poland, on which see Bretton, AFDI, 16 (1970), pp 125–43, and 17 (1971), pp 171–203.

In their dealings with each other, including the conclusion of agreements, the GDR regarded itself and the FRG as separate independent states in international law. The FRG, however, did not so regard the GDR, treating itself and the GDR rather as two states in a still-existing 'Germany', forming part of one single German nation. The FRG regarded itself as in principle the successor to the pre-war State of Germany, although its territorial authority was for the time being limited to the territory of the FRG; the GDR was seen as another part of Germany to which the provisions of the FRG's Basic Law did not yet apply. See also § 59, n 8. Thus there remained a single German nationality (see § 383, n 3), and relations between the FRG and GDR

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[32] 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,[33] and pending its entry into force on 15 March 1991, were

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: ILM, 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 150, 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 49. In *Re Honecker* (1984), ILR, 80, p 365, the Federal Supreme Court appears to have treated the GDR as a foreign state. As to the legal nature of trade agreements concluded between the FRG and GDR in the earlier stages of their separate existence, see Joetze, YB of World Affairs, 16 (1962), pp 172–96. See generally on relations between the FRG and the GDR, Gascard, *Jahrbuch für Int Recht*, 15 (1971), pp 339–69; Koenig, AFDI, 19 (1973), pp 147–70; Ress, *Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 2 Dezember 1972* (1978); Loeber and Brückner (eds), *The Federal Republic of Germany and the German Democratic Republic in International Relations* (3 vols, 1979); Arndt, AJ, 74 (1980), pp 122–33.

The final Act of the Conference on Security and Cooperation in Europe, signed at Helsinki in 1975 (ILM, 14 (1975), p 1292) was not inconsistent with the possibility of eventual German reunification, or with existing Four Power rights and responsibilities in relation to Germany as a whole and Berlin: see Russell, AJ, 70 (1976), at pp 249–53, 257–9.

[32] 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, Oeter, Giegerich, Stein and Wilms, and selected documents, in ZöV, 51 (1991), pp 333–528.

[33] Cm 1230; ILM, 29 (1990), p 1186. In addition to the arrangements made with respect to the termination of Four Power rights and responsibilities, other arrangements needed to be made between the Federal Republic of Germany on the one hand, and the Western Allies on the other, to adapt to the new situation earlier arrangements between them. Accordingly those states signed in Bonn on 25 September 1990 an Agreement on the Settlement of Certain Matters relating to Berlin; exchange of notes on the Presence of Foreign Forces Convention; an exchange of notes on the Status of Forces Agreement, Supplementary Agreement and related Agreements; and an exchange of notes on the Stationing of UK, US and French Forces in Berlin: on 27–28 September 1990 they signed an exchange of notes terminating the Relations Convention of 1952 and much of the Settlement Convention 1952 (see n 27); and on 9 October 1990 they signed an exchange of notes concerning civil aviation to and from Berlin. Germany and the Soviet Union also signed a series of agreements.

suspended by a Declaration by the Four Powers signed on 1 October 1990.[34] The result, accordingly, was that Germany united on 3 October 1990 with no restrictions on its sovereignty, those restrictions which flowed from the Four Powers' rights and responsibilities having been suspended pending their formal termination on the entry into force of the Final Settlement Treaty.

Although for many years the situation of Germany was for most practical purposes resolved on the basis of there being two German states, Berlin remained a special case.[35] Upon the surrender of Germany in 1945 Greater Berlin was jointly occupied by the Four Allied Powers as a special area distinct from the four zones of occupation in Germany. The Greater Berlin area was divided into four sectors, one occupied by forces of each of the powers under a commandant.[36] An Inter-Allied Governing Authority (Kommandatura) was established to direct jointly the administration of Greater Berlin, and this was composed of the four sector commandants.[37] In 1948 the Soviet Union withdrew from the Allied Kommandatura, and the Soviet Sector of Berlin was thereafter in practice administered separately from the three Western Sectors. The Allied Kommandatura, while in law still the supreme authority for the whole of Berlin, had since 1948 been able to give effect to its decisions only in the Western Sectors.[38] The arrangements made by the three Western powers in relation to the emerging Federal Republic of Germany did not apply to Berlin, but parallel steps were taken to ensure the development of the Western Sectors of Berlin in a

[34] See Cm 1246, p 14.

[35] See generally on Berlin, in addition to works cited at § 40, n 19, many of which refer also to the position of Berlin, Monier, RG, 51 (947), pp 48–64; Simpson, ICLQ, 6 (1957), pp 83–102; Wright, AJ, 55 (1961), pp 959–65; Mampel, *Der Sowjetsektor von Berlin* (1963); Lush, ICLQ, 14 (1965), pp 742–87; Doehring and Ress, *Staats- und völkerrechtliche Aspekte der Berlin-Regelung* (1972); Doeker, Melsheimer and Schröder, AJ, 67 (1973), pp 44–62; Schiedermair, *Der völkerrechtliche Status Berlins nach dem Viermächte-Abkommen vom 3 September 1971* (1975); Catudal, ICLQ, 25 (1976), pp 766–800; Zivier, *The Legal Status of the Land Berlin* (1980; English trans of *Der Rechtsstatus des Landes Berlin* (3rd ed 1977), which itself was published in a 4th ed, 1987); Hendry and Wood, *The Legal Status of Berlin* (1987); Heidelmeyer, Hindrichs and Mahnke (eds), *Dokumente zur Berlin-Frage 1944–66 and 1967–86* (2 vols, 1987).

[36] See n 21.

In *US v Tiede and Ruske*, ILM, 19 (1980), p 179, the US Court for Berlin, established as part of the US administration for its sector of Berlin, held that it was an American court and the US Constitution applied to proceedings before it. For the circumstances giving rise to this case, see RG, 83 (1979), pp 480–81. For a trial by a French military court in Berlin in 1969, also arising out of the hijacking of an aircraft see Ruzie, AFDI, 15 (1969), pp 784–92. In 1984 the British Government certified to a court that Germany was a state and that the Allied Kommandatura 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 Lennox* [1985] 2 All ER 368 (with comment by Crawford, BY, 56 (1985), pp 311–15; see also Heidelmeyer, ZöV, 46 (1985), pp 519–36; Mann, *Foreign Affairs in English Courts* (1986), pp 19, 50: the terms of the certificate are given in UKMIL, BY, 55 (1984), p 525). For proceedings before the European Commission of Human Rights (the *Vearncombe Case*) see Nolte, ZöV, 49 (1989), pp 499–519, and F A Mann, ICLQ, 39 (1990), pp 669–71.

[37] See Art 7 of the Tripartite Agreement of 14 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.

[38] 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 administered separately by the Soviet Union, was allowed by the Soviet Union to become the capital of the German Democratic Republic after it was established in the Soviet zone of occupation in Germany.[41] Serious tensions over the situation in and access to Berlin led in 1971 to the conclusion of the Quadripartite Agreement on Berlin,[42] in which the four Powers reaffirmed their individual and joint rights and responsibilities, and agreed to a number of detailed arrangements relating to Berlin and in particular concerning the ties (including communications) between the Western Sectors and the Federal Republic of Germany. The Agreement, taken together with the underlying rights, powers and responsibilities assumed by the Four Powers on the surrender of Germany as well as the relevant wartime and post-war agreements and decisions, continued to govern the status of the city and the position of the Four Powers in relation to it. The legal status of Berlin remained the subject of differences of view between the three Western powers on the one hand and the Soviet Union on the other. The former maintained that the whole of Berlin remained in law under Four Power

[39] See the Statement of Principles for Berlin, 14 May 1949 (Cmnd 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 (Cmnd 1552, p 159); Letter of 26 May 1952 from the three Western High Commissioners to the Federal Chancellor, as amended on 23 October 1954 (Dept of State, *Documents on Germany 1944–85*, 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 358); 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 Hanseatic Corporation v Federal Republic of Germany* (1960), ILR, 34, p 270. See also *AB v HHB* (1975), ILR, 74, p 113. The Quadripartite Agreement of 3 September 1971 (see n 42) provides that 'the ties 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 n 26.

[42] ILM, 10 (1971), p 895; TS No 111 (1972). See Schiedermair, AFDI, 19 (1973), pp 171–87.

occupation,[43] and that no part of Berlin formed part of the FRG[44] 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]

Vietnam Vietnam[48] was formerly part of the French territories in Indo-China. In 1945 the Democratic Republic of Vietnam (DRV), controlling only the northern part of the country, declared itself independent.[49] In 1946 France recognised the DRV as a free state within the French Union,[50] but serious differences led to fighting between them. As an alternative to the DRV, in 1948 and 1949 France concluded agreements for a different independent State of Vietnam within the French Union;[51] this state, although purporting to comprise all parts of the country, in fact controlled only the southern part. In February 1950 France ratified these agreements, and several states (including the United Kingdom)[52] thereafter recognised the State of Vietnam; other states recognised the DRV.[53]

[43] It also remains subject to a special demilitarised status imposed on Germany as a whole at the Potsdam Conference 1945: Cmnd 1552, p 49.

[44] See n 40.

[45] See eg the letter of the three Western powers to the UN Secretary-General on 14 April 1975: UN Doc A/10078 and Corr 1 Dept of State, *Documents on Germany 1944–85*, p 1277.

[46] See Wengler, AFDI, 24 (1978), pp 217–36; Hütte, YB of European Law, 3 (1983), pp 1–23.

[47] See nn 32, 33; and Wilms, ZöV, 51 (1991), pp 470–93.

[48] See Thierry, AFDI, 1 (1955), pp 169–74; Misra, AJ, 55 (1961), pp 398, 413–22; Pinto, *Mélanges offerts à Henri Rolin* (1964), pp 252–62; Memorandum of Law submitted by the US Department of State to the Senate, March 1966, ILM, 5 (1966), pp 565–80; American Lawyers' Committee on Vietnam, *Vietnam and International Law* (1967); Fried, *Vietnam and International Law* (1967); Hull and Novogrod, *Law and Vietnam* (1968); Falk (ed), *The Vietnam War and International Law* (vol 1, 1968, especially pp 173–8, 216–21, 238–43 and 277–80; vol 2, 1969, especially pp 76–81 and 911–18; and vol 3, 1972 (all three volumes contain collections of the principal articles on events in Vietnam)); Schick, ICLQ, 17 (1968), pp 953, 982–7; Weber, *Der Vietnam-Konflikt – bellum legale?* (1970); *Documents relating to British Involvement in the Indo-China Conflict 1945–65* (Cmnd 2834); Corbett in *The International Law of Civil War* (ed Falk, 1971), pp 348–404; Isoart, AFDI, 12 (1966), pp 50–88; Frowein, ZöV, 27 (1967), pp 1–21; Nguyen-Huu-Tru, *Quelques problèmes de succession d'états concernant le Vietnam* (1970); Cameron (ed), *Vietnam Crisis* (vol 1 (1940–56), 1971); Moore, *Law and the Indo-China War* (1972); and n 18. See also § 74, n 5; and § 130, n 7, as to the question of intervention in Vietnam.

[49] For the text see Falk (ed), *The Vietnam War and International Law*, (vol 2, 1969), p 1239.

[50] See BFSP, 149 (1947), iii, pp 657–8; see also further agreements in Falk (ed), *The Vietnam War and International Law*, pp 1234 and 1236. As to the nature of the French Union, see § 74, n 5.

[51] See BFSP, 152 (1948), iii, p 414, and 155 (1949), iii, pp 472–87.

[52] The UK's recognition on 7 February 1950 cautiously reflected the true status of Vietnam, as an Associated State within the French Union: Cmnd 2834, p 56. The US recognised Vietnam on the same day as an independent state within the French Union: *ibid*, p 11; and see Whiteman, *Digest*, 2, pp 234–8 and Myers, AJ, 55 (1961), pp 714–15. See also Misra, *ibid*, pp 413–22; Kiss,

The DRV continued to fight against France to establish control over Vietnam. The Geneva Conference of 1954,[54] at which both the State of Vietnam and the DRV were represented,[55] 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'.[56] 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.[57] This was acknowledged, approved

Répertoire, 3, pp 16–17. In *Gugenheim v State of Vietnam* a French court held the State of Vietnam to be an independent sovereign state: ILR, 22 (1955), p 224. The UK recognised the Republic of Vietnam (which the State of Vietnam became in 1955) as the single state in Vietnam, the only government recognised in that state being the government with its seat in Saigon: *Parliamentary Debates (Commons)*, vol 684, col 106 (written answers, 20 November 1963).

53 Thus the People's Republic of China recognised the DRV on 18 January 1950, and the Soviet Union on 31 January 1950: Cmnd 2834, p 11. See also Kiss, *Répertoire*, 3, pp 33, 37–8.

54 Much of the literature cited in n 48 refers to the Geneva Conference and its results; see in particular Randle, *Geneva 1954: The Settlement of the Indochinese War* (1969), Hannon in *The Vietnam War and International Law* (ed Falk, vol 2, 1969) pp 874–963, and *Foreign Relations of the United States, 1952–54* (vol XVI: The Geneva Conference, 1981). For texts of the agreement and Final Declaration, see Cmnd 9239, pp 27–40, 9–11 respectively. The State of Vietnam and the USA did not subscribe to the Final Declaration; but the USA stated that it would refrain from the threat or use of force to disturb the cease-fire agreements, and would view any renewal of aggression in violation of them with grave concern: Cmnd 9239, pp 6–7.

55 Other states represented were Cambodia, France, Laos, the People's Republic of China, the Soviet Union, the UK, and the USA. The resolution of the Foreign Ministers of France, the UK, the USA, and the Soviet Union, meeting in Berlin in February 1954, regarding the holding of the Geneva Conference stated that 'neither the invitation to, nor the holding of, the above-mentioned Conference shall be deemed to imply diplomatic recognition in any case where it has not already been accorded': Cmnd 2834, p 65; see also Kiss, *Répertoire*, 3, p 36.

56 The questions of recognition which have arisen in the context of Vietnam since 1954 have included whether the DRV and the Republic of Vietnam are states; if so, whether they are so regarded in respect of the whole of Vietnam or only in respect of their respective parts of the country; whether, if one of them is regarded as a state covering the whole of Vietnam, the other is to be regarded as an insurgent or belligerent authority; and whether the National Liberation Front is to be regarded as the Government of the Republic of Vietnam, or as an insurgent or belligerent authority in arms against the Republic of Vietnam. These questions have assumed particular importance in relation to the legal status of the hostilities in Vietnam and the legal position of the USA in affording extensive military assistance to the Government of the Republic of Vietnam. Although the DRV was not recognised at the time by France as a state, a French court held that its existence as a state was undeniable and it could accordingly plead sovereign immunity: *Clerget v Banque Commerciale pour L'Europe du Nord* (1969), ILR, 52, p 310.

57 ILM, 12 (1973), p 48. See also *ibid*, p 976. The arrangements for signing the Paris agreements were complicated by the Republic of Vietnam's unwillingness to sign the same documents as the other two Vietnamese parties, while nevertheless ensuring that all parties were bound by the agreed text. The solution adopted was to have an agreed substantive set of articles, signed on one final page by the USA and the Republic of Vietnam and on a separate page by the DRV and the provisional Revolutionary Government, together with a separate agreement containing the identical substantive terms signed by the USA and DRV: see eg ILM, 12 (1973), pp 60–61.

and supported by the Act of the International Conference on Vietnam, signed in Paris in March 1973,[58] 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.[59] 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[1] 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 the 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.[2] Similarly, where the authorities organising a secessionist movement establish a provisional government for the prospective new state,[3] perhaps in exile in a friendly state,[4]

58 TS No 39 (1973); ILM, 12 (1973), p 392. See also RG, 77 (1973) pp 1193–211; Isoart, AFDI, 18 (1972), pp 101–21. The signatories to the Act included the Governments of the DRV and Republic of Vietnam, and the Provisional Revolutionary Government of the Republic of South Vietnam: Art 9 of the Act provided that signature of the Act did not constitute recognition of any party in any case in which it had not previously been accorded. The other signatories were Canada, the People's Republic of China, France, Hungary, Indonesia, Poland, the UK, the USA and the Soviet Union. The conclusion of the Paris Conference led to increasing recognition of the DRV: the UK recognised the DRV in July 1973 (*Parliamentary Debates (Commons)*, vol 860, col 93 (written answers, 17 July 1973)). GA Res 3067 and 3104 (XXVIII) (1973), inviting the DRV to certain international conferences, were regarded as 'unequivocal indications' that the Assembly considered the DRV to be a state: UN Juridical YB (1974), p 158. See also Duy-Tan, AFDI, 22 (1976), pp 405–19.

59 The UK recognised the new régime in South Vietnam in May 1975.

1 See § 49 and vol II of this work (7th ed), §§ 76, 76a.

2 See § 129. See generally on precipitate recognition Teuscher, *Die Vorzeitige Anerkennung in Völkerrecht* (1959). As to such recognition of the Nationalist authorities in the Spanish Civil War by Germany, Italy and some Latin American states, see Thomas and Thomas, *International Law of Civil War* (ed Falk, 1971), pp 160–61. In 1981 France and Mexico issued a joint declaration in which they recognised the alliance between two opposition groups in Salvador as a representative political force, with the corresponding rights and obligations: the declaration has been regarded as an intervention in Salvador's internal affairs (Rousseau, RG, 86 (1982) pp 395–8).

3 Similar considerations will apply where a government in exile is set up simply as a rival to an existing government of the state, without any question of creating a new state.

4 See § 42, n 4; and also § 49, nn 6–8 as to national liberation movements.

The DRV continued to fight against France to establish control over Vietnam. The Geneva Conference of 1954,[54] at which both the State of Vietnam and the DRV were represented,[55] 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'.[56] 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.[57] This was acknowledged, approved

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55 Other states represented were Cambodia, France, Laos, the People's Republic of China, the Soviet Union, the UK, and the USA. The resolution of the Foreign Ministers of France, the UK, the USA, and the Soviet Union, meeting in Berlin in February 1954, regarding the holding of the Geneva Conference stated that 'neither the invitation to, nor the holding of, the above-mentioned Conference shall be deemed to imply diplomatic recognition in any case where it has not already been accorded': Cmnd 2834, p 65; see also Kiss, *Répertoire*, 3, p 36.

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57 ILM, 12 (1973), p 48. See also *ibid*, p 976. The arrangements for signing the Paris agreements were complicated by the Republic of Vietnam's unwillingness to sign the same documents as the other two Vietnamese parties, while nevertheless ensuring that all parties were bound by the agreed text. The solution adopted was to have an agreed substantive set of articles, signed on one final page by the USA and the Republic of Vietnam and on a separate page by the DRV and the provisional Revolutionary Government, together with a separate agreement containing the identical substantive terms signed by the USA and DRV: see eg ILM, 12 (1973), pp 60–61.

and supported by the Act of the International Conference on Vietnam, signed in Paris in March 1973,[58] 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.[59] 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[1] 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 the 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.[2] Similarly, where the authorities organising a secessionist movement establish a provisional government for the prospective new state,[3] perhaps in exile in a friendly state,[4]

58 TS No 39 (1973); ILM, 12 (1973), p 392. See also RG, 77 (1973) pp 1193–211; Isoart, AFDI, 18 (1972), pp 101–21. The signatories to the Act included the Governments of the DRV and Republic of Vietnam, and the Provisional Revolutionary Government of the Republic of South Vietnam: Art 9 of the Act provided that signature of the Act did not constitute recognition of any party in any case in which it had not previously been accorded. The other signatories were Canada, the People's Republic of China, France, Hungary, Indonesia, Poland, the UK, the USA and the Soviet Union. The conclusion of the Paris Conference led to increasing recognition of the DRV: the UK recognised the DRV in July 1973 (*Parliamentary Debates (Commons)*, vol 860, col 93 (written answers, 17 July 1973)). GA Res 3067 and 3104 (XXVIII) (1973), inviting the DRV to certain international conferences, were regarded as 'unequivocal indications' that the Assembly considered the DRV to be a state: UN Juridical YB (1974), p 158. See also Duy-Tan, AFDI, 22 (1976), pp 405–19.

59 The UK recognised the new régime in South Vietnam in May 1975.

1 See § 49 and vol II of this work (7th ed), §§ 76, 76a.

2 See § 129. See generally on precipitate recognition Teuscher, *Die Vorzeitige Anerkennung in Völkerrecht* (1959). As to such recognition of the Nationalist authorities in the Spanish Civil War by Germany, Italy and some Latin American states, see Thomas and Thomas, *International Law of Civil War* (ed Falk, 1971), pp 160–61. In 1981 France and Mexico issued a joint declaration in which they recognised the alliance between two opposition groups in Salvador as a representative political force, with the corresponding rights and obligations: the declaration has been regarded as an intervention in Salvador's internal affairs (Rousseau, RG, 86 (1982) pp 395–8).

3 Similar considerations will apply where a government in exile is set up simply as a rival to an existing government of the state, without any question of creating a new state.

4 See § 42, n 4; and also § 49, nn 6–8 as to national liberation movements.

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 by then firmly established.[5] 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 Pakistan 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.[6]

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.[7] 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.[8] 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; Whiteman, *Digest*, 2, pp 167–9. It may be noted that as the UK had at that time given up its former Mandate 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 favouring 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 8th ed of this vol, 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 Rosenne, *Israel Year Book on Human Rights*, 13 (1983), pp 295–330.

[6] Eg by the UK on 4 February 1972. For an appraisal of India's action in recognising Bangladesh see Mehrish, *Indian Political Science Review*, April–Sept 1973, pp 131–42; and see generally Chowdhury, *The Genesis of Bangladesh* (1972). Pakistan recognised Bangladesh in February 1974: ILM, 13 (1974), p 501, especially paras 3 and 7. See also n 8, and § 85, n 31.

[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, iii, § 344, pp 46 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 final stages of the controversy, see Jones, *The Caribbean since 1900* (1936), pp 314–38.

The recognition of Biafra 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 Ijalaye, *Proceedings of the Nigerian Society of International Law* (1969), and AJ, 65 (1971), pp 551–9.

[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 ILM, 13 (1974), p 1244;

territory is struggling to attain its independence against the will of the parent state, foreign states may be faced with an apparent conflict between the duty not to intervene in the internal affairs of the parent state and the need to acknowledge the principle of self-determination of peoples.[9] This principle is sometimes said to carry with it a duty on the part of foreign states to afford all possible assistance to the peoples in question in their endeavour to attain independence. Whether or not such a duty exists and can afford a justification for what would otherwise be considered unlawful intervention,[10] it would not seem to require or to justify recognition as a state of a community which is not yet sufficiently well established to meet the requirements for recognition.

Of course, recognition of the new state by the parent state constitutes an admission of the new state's independence, and the parent state cannot thereafter complain that recognition of the new state by third states is premature.[11] But just as recognition by the parent state does not necessarily prevent third states recognising the new state, so recognition by the parent state does not conclusively determine for third states that the conditions for recognition of the new state are satisfied. So the Transkei, although created in 1976 by South Africa as an independent state, was not regarded as truly independent by other states which have accordingly withheld recognition of it.[12]

In certain cases a territory may with the consent of the parent state achieve a considerable degree of international status before becoming formally independent, and in such cases the grant of an appropriate degree of recognition would not be unlawful. This occurred with, for example,[13] India, which had been a

and § 53, n 18. See also *Deutsche Continental Gas Gesellschaft v Poland*, AD, 5 (1929–30), No 5. 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 *Re Law Relating to the Consequences of the Self-Determination of the Comoros Islands* (1975), ILR, 74, p 91.

[9] See Wright, *AS Proceedings* (1954), pp 23–37; and Hag R, 98 (1959), iii, pp 171–95. And see Thomas, *International Law and the Use of Force by National Liberation Movements* (1988), pp 105–17 (as regards premature recognition).

[10] See generally § 49.

[11] 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 precipitate. 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 Gibbs, *Recognition: A Chapter from the History of the North American and South American States* (1863), Moore, i, §§ 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 Robertson, *France and Latin-American Independence* (1939).

As to some early instances of recognition of sovereignty in the case of former dependent territories, see Frowein, AJ, 65 (1971), pp 568–71.

[12] See § 55, n 21.

[13] 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

separate member of the League of Nations before formally attaining full independence in 1947,[14] and the Philippines, which became an original member of the United Nations in 1945 although not formally independent until the following year.[15]

§ 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.[1] If a foreign state refuses to recognise 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[2] 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.[3]

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.[4]

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

14 See § 78, n 9. As to pre-independence dealings between India and the USA, see Myers, AJ, 55 (1961), pp 711–12; *Muraka v Bachrack*, ILR, 20 (1953), p 52; Whiteman, *Digest*, 2, pp 161–5.

15 See Myers, AJ, 55 (1961), p 707; Whiteman, *Digest*, 2, pp 211–13. See also § 83, n 3.

1 See § 44, n 8, and § 56, nn 4–8. If recognition of a new title of an old state is refused, the only consequence is that the latter cannot claim as against the recognising state any privileges connected with the new title (see § 115). See also § 50, n 10, as to possible implications of recognition from the use of a new title incorporating a reference to recently acquired territory.

2 As to what dealings are possible without recognition being necessarily implied, see § 50.

3 Eg it may be recognised as an insurgent authority (see § 49), or as a *de facto* government of that part of the state's territory which it controls (see § 46, n 6), or as an agency of another state which is recognised (see § 38, n 3). See Marek, *Identity and Continuity of States in Public International Law* (1954), p 318, as to British recognition in 1941 of the Czechoslovak Government while maintaining reservation about the continuity of the Czechoslovak State.

4 See generally Whiteman, *Digest*, 2, pp 467–86, and 6, pp 66–76, 354–78; McNair and Watts, *Legal Effects of War* (4th ed, 1966), pp 424–46; and § 137, n 26, as to governments in exile during the Second World War. In *Varga v Credit Suisse* (1958), ILR, 26, p 70, the 'National Hungarian Government in Exile', not being recognised by the USA, was held to lack capacity to sue in the USA. See also, as to the official acts of a government in exile, *Szalatnay-Stacho v Fink* [1947] KB 1, and comment by Kuhn, AJ, 42 (1948), pp 108–11, and King, *ibid*, pp 811–31. But a self-constituted government-in-exile may not be able to give lawful authority for the printing of

A revolutionary government established outside the territory over which it claims authority and before it has acquired sufficient control in the territory to enable it to be established there will never have demonstrated that effective control of territory which is one of the requirements for recognition; and where the government in exile represents a rebel community which is trying to break away from an existing state in order to form a new state, there will not yet be a state of which it can be the government. Recognition of such a revolutionary government in exile as the government of a state will often be premature,[5] and may constitute intervention against the parent state.[6] Thus a number of states recognised the Algerian provisional government upon its being set up in Tunis in 1958, and well before the attainment of independence by Algeria in July 1962:[7] even the *de jure* recognition of that government by the Soviet Union in March 1962 immediately upon the announcement of a cease-fire with France evoked a strong protest by France, whose ambassador in Moscow was withdrawn.[8]

§ 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.[1]

currency notes purporting to be those of the state in question: *United States v Grosh* (1965), ILR, 35, p 65. For consideration of the status of the South West Africa People's Organisation (SWAPO) as a government in exile, see *Shipanga v Attorney-General* (1978), ILR, 79, p 18. The French government in exile during the 1939–45 war, established in London and Algiers in 1944, was accepted as the government of France in *Grandval v Lefin* (1974), AFDI, 21 (1975), p 1002; RG, 79 (1975), p 861. As to the treaty-making authority of governments in exile see Blix, *Treaty-Making Power* (1960), pp 147–94.

5 See § 41.

6 See § 129.

7 See Fraleigh in *The International Law of Civil War* (ed Falk, 1971), pp 211–13.

8 See RG, 66 (1962), pp 623–33; and 67 (1963), pp 118, 121–6; and Whiteman, *Digest*, 2, pp 74–5. See generally on the Algerian civil war, Charpentier, AFDI, 5 (1959), pp 799–816; Flory, *ibid*, pp 817–44; and Fraleigh in *The International Law of Civil War* (ed Falk, 1971), pp 179–243. Governments in exile are often established, perhaps only provisionally, in states which they 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 (1986), p 215; and § 402, as to territorial asylum.

1 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.[1] 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 not, however, one which needs to be formally or publicly announced, and a number of states,[2] including since 1980 the United Kingdom,[3] 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.[4] In deciding whether formally to recognise a new government, or whether the circumstances are such that relations with it should be those which are 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

[1] See generally on recognition of revolutionary authorities, Bundu, ICLQ, 27 (1978), pp 18–45.

[2] See as to France, the statements made in June 1965 after a *coup d'état* in Algiers, RG, 69 (1965), pp 1097–9: see also RG, 83 (1979), at p 808. As to Belgium see *Rev Belge*, 7 (1971), p 319. As to US practice tending to de-emphasise and avoid the use of recognition in cases of changes of governments, see § 45, n 2. As to New Zealand see *Attorney-General for Fiji v Robert Jones House Ltd* (1988), ILR, 80, p 1. See generally on the policy of not expressly recognising governments, Peterson, AJ, 77 (1983), pp 31–50.

[3] See *Parliamentary Debates (Commons)*, vol 983, cols 277–9 (written answers, 25 April 1980); *ibid*, vol 985, col 385 (written answers, 23 May 1980); and see also *Parliamentary Debates (Lords)*, vol 448, cols 342–4 (15 February 1984). The statement of 25 April 1980 is reproduced in UKMIL, BY, 51 (1980), p 367. See Warbrick, ICLQ, 30 (1981), pp 568–92. In circumstances where, under the former practice, recognition would have been accorded it has now become usual for the British Government to state, if asked, that it deals with the new government on a normal government-to-government basis. Even before 1980 recognition was, in British practice, often the result of informal actions such as instructing an Ambassador to make suitable, friendly, contact with the new administration: see eg UKMIL, BY, 50 (1979), p 294.

[4] See *Parliamentary Debates (Commons)*, vol 985, col 385 (written answers, 23 May 1980). See § 50 as to implied recognition.

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,[5] 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.[6] The Government of the People's Republic of China did not receive general recognition until 1971, when its representatives were admitted as the representatives of China in the United Nations.[7]

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

[5] As to the status of Formosa (or Taiwan) see Green, ILQ, 3 (1950), pp 418–22; Colliard, AFDI, 1 (1955), pp 67–84; O'Connell, AJ, 50 (1956), pp 405–16; Jain, AJ, 57 (1963), pp 25–46; Dai, Can YBIL, 3 (1965), pp 290–305; Morello, *The International Legal Status of Formosa* (1966); Lung-chu Chen and Lasswell, *Formosa, China and the United Nations* (1967); Kirkham, Can YBIL, 6 (1968), pp 144–63; Li, *De-Recognizing Taiwan* (1977); Crawford, *The Creation of States in International Law* (1979), pp 143–52; Manin, AFDI, 26 (1980), pp 141–74. See also *Sheng v Rogers* (1959), AJ, 54 (1960), p 189; *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 All ER 769; *Reel v Holder* [1981] 3 All ER 321.

[6] For a list of the states which, in 1972, had diplomatic or other relations with one or other of the two governments, see ILM, 11 (1972), pp 571–3. See generally, out of an extensive literature, Fenwick, AJ, 47 (1953), pp 658–61; Wright, AJ, 49 (1955), pp 320–28; State Department Memorandum of 1958, *State Department Bulletin*, 1002, pp 285–90 (and comment by Fawcett, BY, 35 (1959), pp 246–50); Misra, AJ, 55 (1961), pp 398–403; Rousseau, RG, 68 (1964), pp 488–500; Clubb and Seligman, *The International Position of Communist China* (1965); Dai, Can YBIL, 3 (1965), pp 298–305; Whiteman, *Digest*, 2, pp 90–110. See also § 53, n 8, as to Chinese representation in the UN. Amongst many judicial decisions see *Civil Air Transport Inc v Central Air Transport Corp* [1953] AC 70 (especially the replies given by the Foreign Office to questions put by the court, at pp 86–9); *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 QB, 552; *Republic of China v Pang-Tsu Mow*, ILR, 18 (1951), No 26; *Bank of China v Wells Fargo Bank & Union Trust Co* (1950), Whiteman, *Digest*, 2, pp 620–26; *National Union Fire Ins Co v Republic of China*, ILR, 26 (1958), p 72; *Re Nepogodin's Estate*, ILR, 22 (1955), p 90.

[7] See § 53, n 11. The USA in December 1978 announced that it would recognise the government of the People's Republic of China as the sole legal government of China, and would withdraw its recognition of the Nationalist Government on Formosa, as from 1 January 1979: see ILM, 18 (1979), pp 272–5. See also the Taiwan Relations Act 1979 (*ibid*, p 873; and see AJ, 73 (1979), pp 669–77, and Harty, Harv ILJ, 20 (1979), pp 731–8), and the USA–China Joint Communiqué on Taiwan, 17 August 1982 (ILM, 21 (1982), pp 1147–57). On the 1980 agreement between the American Institute in Taiwan and the Coordination Council for North American Affairs according certain privileges and immunities to the two bodies, see Gray, Harv ILJ, 22 (1981), pp 451–7; RG, 85 (1981), pp 388–9. Following withdrawal of recognition of the government on Formosa the USA gave notice of termination of the USA–China Mutual Defence Treaty 1954, concluded with that Government: this action was unsuccessfully challenged in *Goldwater v Carter*, ILM, 19 (1980), p 239: see Henkin, AJ, 73 (1979), pp 647–54, and Char, Harv ILJ, 21 (1980), pp 567–79. See generally as to the effect of the US Government's change of recognition on treaties with the Nationalist Government, Scheffer, Harv ILJ, 19 (1978), pp 931–1009; and contributions by Oliver, Swan and Moore, *AS Proceedings* (1979), pp 137–56. See also, as to the change in recognition generally, contributions by Cohen, Chiu, Theroux and Hyndman, *AS Proceedings* (1978), pp 240–653; Rousseau, RG, 83 (1979), pp 488–93; US Practice (1979), pp 142–72; RG, 88 (1984), pp 214–15. For the UK–China communiqué of 13 March 1972 see *Parliamentary Debates (Commons)*, vol 833, col 35.

rate, from existing treaty obligations; though it involves an interruption in that state's ability to exercise its legal capacity for international purposes.[8]

§ 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 Jurists in the Aaland Islands question, Off J, Special Suppl, No 3, p 18. See also, for decisions asserting the continued effect of treaties notwithstanding the non-recognition of the current government, the *Russian Roubles (Attempted Counterfeiting) Case*, AD, 1 (1919–22), No 15; *Shipoff v Elte*, AD, 6 (1931–32), No 17; *Re Lepeschkin*, AD, 2 (1923–24), No 189; *Ardoff v Boda, Clunet*, 48 (1921), p 229; *Tsourkanienko v Battier, Clunet*, 50 (1923), pp 833–5. As to the treaty-making authority of revolutionary governments see Blix, *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 estoppel against 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 rebels in Chile did not prevent them from being held entitled to exercise rights conferred by a concession upon 'the government of Chile': *Central and South American Telegraph Co v Chile* (1984), Moore, *International Arbitrations*, 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 to power unconstitutionally '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); vol 811, col 850 (written answers, 19 February 1971); and vol 890, col 664 (18 April 1975).

The practice of the USA has been summarised as follows:

> 'In fairly recent years 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 assent or consent of the people, without substantial resistance to its authority, ie, 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*, 1002, pp 285–90, and comment by Fawcett, BY, 35 (1959), pp 246–50). For the practice of the USA on recognition of governments, see Whiteman, *Digest*, 2, pp 68–119, 242–486; Galloway, *Recognising Foreign Governments: The Practice of the United States* (1978). Note also the Senate Resolution of 25 September 1969 stating that recognition by the USA of a foreign government implies nothing as regards approval of the form, ideology or policies of that government: AJ, 64 (1970), pp 172–3. In 1977 the Department of State said that in 'recent years, US practice has been to de-emphasise and avoid the use of recognition in cases of changes of governments and to concern ourselves with the question of whether we wish to have diplomatic relations with the new governments': Department of State *Bulletin*, 77 (1977), pp 462–3, cited in *US Digest* (1977), pp 19–21; and see *National Petrochemical Co of Iran v The M/T Stolt Sheaf*, AJ, 83 (1989), p 368, for implications of that attitude.

In time of war there is often a tendency to shape the practice of recognition with the view to making it conform with belligerent requirements. Thus, for instance, in 1944 Great Britain and the USA declined to recognise the Argentinian Government on account of its failure to adopt a policy in keeping with that of other American republics: see Whiteman, *Digest*, 2, pp 66–7, 81–2, 245–53, 257–60. But see Kunz, AJ, 38 (1944), pp 436–41, who regards the refusal of recognition in this case as corroborating the view that recognition is never due as a matter of legal duty. The Committee of Jurists on the Aaland Islands felt constrained to observe that the experience of the First World War 'shows that the same legal value cannot be attached to recognition of new States in war time, especially to that accorded by belligerent powers, as in normal times; further, neither were such recognitions [of Finland] given with the same object as in normal times': Off J, Special Suppl No 3, p 8.

[3] Jefferson to Gouverneur Morris, 7 November 1792; Moore, i, p 120.

[4] The requirement was, however, again expressly stated to be 'the usual practice' of the UK Government, in connection with the refusal to recognise the Albanian Government in 1924: H Lauterpacht, *Recognition in International Law* (1947), p 123. As to French practice in the matter see Kiss, *Répertoire*, 3, pp 44–9. Apart from the unrepresentative character of a government being invoked as a reason for withholding recognition of it, such a character may justify other states in taking other action, such as breaking off diplomatic relations: see in this connection GA Res 39 (I) (1946) regarding the alleged unrepresentative character of the Government of Spain, and para 11 of GA Res 3151 G (XXVIII) (1973) about the Government of South Africa.

[5] Many governments which are generally recognised have assumed power in a revolutionary manner and have been generally recognised without first having taken any steps to secure overt evidence of freely expressed popular consent. But see § 51, n 3, as to certain requirements in this respect in the situation in certain countries at the end of the Second World War.

Acceptance of the adequacy of the apparent acquiescence of the population may be illustrated by the recognition in 1930 by the USA of new governments in Peru, Bolivia and Argentina on the basis of evidence that the new governments in these countries 'are *de facto* in control of their respective countries and that there is no active resistance to their rule': AJ, 25 (1930), p 121; Hackworth, i, p 223. This constituted a departure from the practice of recognition as previously pursued by the USA. For although the USA had always rejected the principle of legitimacy as a test of recognition, it adhered to the requirement of subsequent legitimation by an adequate expression of popular approval of the revolutionary change. This was so in particular during the administration of President Wilson, which in this matter was essentially in keeping with the principles enunciated by Jefferson (see n 3). But see the statement of the Secretary of State Stimson made in 1931: Latin-American Series, No 4 (1931), p 8. See, generally, Goebel, *The Recognition Policy of the United States* (1915); Cole, *Recognition Policy of the United States since*

That principle has been interpreted in the sense that the new government must be supported by the 'will of the nation, substantially declared',[3] and that there must be evidence of popular approval, adequately expressed, of a revolutionary change. After the First World War no such evidence was required in most cases.[4] Although 'popular consent' may still be taken into account indirectly as a factor contributing to effectiveness, nowadays the exercise of power, with the apparent acquiescence of the population, is considered to be sufficient proof of effectiveness.[5] However, a government which is in control only by virtue of

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

1901 (1928); MacCorkle, *American Policy of Recognition towards Mexico* (1933); McMahon, *Recent Changes in the Recognition Policy of the United States* (1934); H Lauterpacht, *Recognition in International Law* (1947), pp 87–174; Neumann, *Recognition of Governments in the Americas* (1947); Noel-Henry, RG, 35 (1928), pp 201–67; Dennis, *Foreign Affairs* (USA), 9 (1931), pp 204–21; Hackworth, i, pp 47–51, and *AS Proceedings* (1931), pp 120–31; Rie, *Archiv des Völkerrecht*, 11 (1964), pp 265–85; Wright, *American Support for Free Elections Abroad* (1964); Galloway, *Recognising Foreign Governments: The Practice of the United States* (1978).

6 See *Parliamentary Debates (Lords)*, vol 200, col 423 (21 November 1956) and Whiteman, *Digest*, 2, pp 398–400 as regards the Hungarian Government in 1956 (and generally on that situation see § 53, n 14), and § 40, 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: *Parliamentary Debates (Commons)*, vol 975, col 760 (6 December 1979), and *ibid*, vol 50, col 305 (7 December 1983). As to the dependence of the regime in Afghanistan on occupying Soviet troops, see *ibid*, vol 83, col 294 (written answers, 19 July 1985) and cols 580–1 (written answers, 24 July 1985).

7 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 Serbian Government following upon the assassination of the Serbian King and Queen.

8 AJ, 2 (1908), Suppl, p 229, and 17 (1923), Suppl, p 118. See Woolsey, AJ, 28 (1934), pp 325–9. In 1932, Costa Rica and in 1933 Salvador denounced the Treaty of 1923.

9 AJ, 25 (1931), Suppl, p 203. See also Jessup, AJ, 25 (1931), pp 719–23; Nervo, RI (Paris), 7 (1931), pp 436–45; and Whiteman, *Digest*, 2, pp 85–9.

10 AJ, 60 (1966), p 460. See Cochran, AJ, 62 (1968), pp 460–4.

11 *Semble*, a government in actual control, not necessarily one which has received recognition as a *de facto* government.

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

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 at p 497; *Republic of Peru v Dreyfus 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.

It may be noted that questions of constitutionality may well play a considerable part in the view taken by the state in which a revolution has taken place, and, in the case of a secessionist movement, may well affect the parent state's recognition of the breakaway area even after it has been recognised by other states. See § 55, n 7, as to judicial attitudes in the UK and Southern Rhodesia in the circumstances of the latter's rebellion against the former in 1965; and, as to similar problems of constitutional legitimacy in relation to events in Grenada 1979–83, see *Mitchell v DPP* [1986] LRC (Const) 35, and Smart, ICLQ, 35 (1986), pp 950–60. See also *Uganda v Commissioner of Prisons, ex parte Matovu* (1967), ILR, 39, p 1, for the decision of the Uganda High Court upholding the validity of the constitution introduced following a *coup d'état* in 1966. See also *Attorney-General of the Republic v Mustafa Ibrahim* (1964), ILR, 48, p 6 (as to Cyprus); *Thomas v Johnson and Thomas* (1969), ILR, 55, p 50 (as to Sierra Leone); *Nigerian Union of Journalists v Attorney-General of Nigeria* [1986] LRC (Const) 1 (as to Nigeria). And for a discussion of questions of legality in relation to the *coup* in Fiji in 1987, see Kiwanuka, ICLQ, 37 (1988), pp 961–75; on the *coup* see also RG, 91 (1987), pp 1353–4. With a revolution the legal problems for the authorities (including the judicial authorities) of the state in question is to find a legal basis for a transition from the previous constitutional order to the new one resulting from the revolution. Theories of 'effectiveness' and 'necessity' often play a significant role in this process.

13 Thus the Canadian Government stated in 1963 that the undertaking of the Government of the Republic of Vietnam to observe international obligations entered into by its predecessors was one of the considerations leading to the recognition of that government by Canada: Dai, Can YBIL, 3 (1965), p 297. The resolution adopted in 1965 by the Second Special Inter-American Conference recommended that in recognising a *de facto* government its agreement to fulfil the government's international obligations should be one of the factors to be given due consideration: see n 10. See generally, Whiteman, *Digest*, 2, pp 78–81; Kiss, *Répertoire*, 3, pp 49–57. The continued commitment to its international obligations on the part of the new government in Afghanistan in 1978 was a factor in the US Government's readiness to maintain diplomatic relations with Afghanistan: AJ, *72* (1978), pp 879–80.

14 See § 51, n 4, and § 122, n 16. On the recognition of the Soviet Government by the USA in 1933 see *Documents* (1933), pp 459–72; Kleist, *The Völkerrechtliche Anerkennung Sovjetrusslands* (1934); Houghton, *International Conciliation* (Pamphlet No 247, February 1929); Dickinson, Mich Law Rev, 30 (1931–32), pp 181–96; Korovin, Iowa Law Rev, 19 (1933–34) pp 259–71.

15 GA Res 498 (V) (1950).

apparent unwillingness to observe international obligations, was a major factor in the refusal of many states to recognise it.[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;[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 fact of its 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.[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[19] – is contrary to international law.

§ 46 *De facto* recognition States granting recognition often distinguish between *de jure* recognition and *de facto* recognition.[1] These terms are convenient

[16] See literature cited at § 44, n 6; and Kiss, *Répertoire*, 3, p 57.

[17] See § 56, nn 4–6.

[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 Whiteman, *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.

[19] See § 51.

[1] On *de facto* recognition and the status of governments recognised *de facto* see (in addition to the bibliography to this section, at p 126) Spiropoulos, *Die* de facto *Regierung im Völkerrecht* (1926); Noël-Henry, *Les gouvernements de fait devant le juge* (1927); Hervey, *The Legal Effects of Recognition in International Law* (1928), pp 13–18; Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (1928), pp 50–53, 132–69; Stille, *Die Rechtstellung der* de facto *Regierung in der englischen und amerikanischen Rechtsprechung* (1932); Schlüter, De facto *Anerkennung im Völkerrecht* (1936); Hackworth, i, §§ 27–29; Hershey, AJ, 14 (1920), pp 499–518; Larnaude, RG, 28 (1921), pp 457–503; Podesta Costa, *ibid*, 29 (1922), pp 47–59; Dickinson, Mich Law Rev, 22 (1923), pp 29–45, 118–34, and AJ, 19 (1925), pp 263–72, 753–56; Baty, Yale LJ, 31 (1922), pp 469–88; Houghton, Minn Law Rev, 14 (1929–30), pp 251–69; Lauterpacht, BY, 22 (1945), pp 164–90; O'Connell, RG, 67 (1963), pp 5, 15–24; Jennings, Hag R, 121 (1967), ii, pp 354–65. It must be noted that both *de facto* and *de jure* recognition are legal acts.

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 *ius* to which recognition *de jure* refers.[2] The distinction between *de jure* and *de facto*[3] 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.[4]

[2] It is probably the constitutional law of the recognised state or government which is of principal importance; the grant of *de jure* recognition after a revolutionary change of government thus shows that the recognising state acknowledges the new constitutional legal order in place of the old. See the *Georges Pinson Award* (1928), RIAA, 5, pp 327, 422ff.

[3] Confusingly, a state or government is sometimes referred to as existing *de facto* in the sense of being in actual existence rather than of being granted recognition as a *de facto* state or government. This descriptive use of the term '*de facto*' must be distinguished from its use as a term of art in connection with recognition. *De facto* recognition is also to be distinguished from informal dealings with an unrecognised community; but such dealings may (but do not necessarily) imply recognition of that authority as a government, in which case it is necessary to inquire whether the recognition implied is as a *de jure* or *de facto* government. A state may acknowledge the existence in practice of an administration without thereby recognising it *de facto*. Thus, with reference to the Turkish administration set up in part of Cyprus after the invasion of that island by Turkish forces, the Foreign Ministers of Greece, Turkey and the UK, in para 5 of their Declaration of 30 July 1974, 'noted the existence in practice in the Republic of Cyprus of two autonomous administrations, that of the Greek Cypriot community and that of the Turkish Cypriot community' (ILM, 13 (1974), p 1278); yet in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] 1 QB 205 the Foreign and Commonwealth Office stated to the court that the British Government 'do not recognise the administration established under the name of the "Turkish Federated State of Cyprus"' and 'do not recognise such administration as being the government of an independent *de facto* sovereign state'. See also § 55, n 15.

For similar acknowledgement of the existence in practice of regimes not at the time recognised by the state in question see the statement by the US Secretary of State about the Communist Government of China quoted in Whiteman, *Digest*, 2, pp 104–5, and the statement by the British Foreign and Commonwealth Secretary about the rebel regime in Rhodesia, *Parliamentary Debates (Commons)*, vol 946, col 1498 (22 March 1978). See also *Clerget v Banque Commerciale pour l'Europe du Nord* (1969), ILR, 52, p 310, as regards the Democratic Republic of Vietnam.

[4] Thus in *The Gagara*, the Foreign Office informed the court that His Majesty's Government had 'for the time being provisionally, and with all necessary reservations as to the future, recognised the Esthonian National Council as a *de facto*, independent body, and accordingly has received a certain gentleman as the informal representative of the provisional Government': [1919] P 95.

Other instances of *de facto* recognition being granted by the UK include the Italian occupation of Abyssinia and the Spanish Nationalist Government of Spain (see n 6), the Communist Government of China (see *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70, 88) and Israel's occupation of part of Jerusalem (see *Arab Bank Ltd v Barclay's Bank DC & O* [1954] AC 495; *R v Governor of Brixton Prison, ex parte Schtraks* [1964] AC 556. In 1944 the USA 'recognised the French *de facto* authority established in Paris as the Provisional Government of the French Republic': Whiteman, *Digest*, 2, p 376. As to *de facto* recognition granted to the Provisional Government of Israel by the USA in 1948, see § 41, n 5.

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[5] 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.[6] Such recognition will often in time be replaced by the grant of *de jure* recognition.[7] 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.[8]

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 *de facto* recognition is liable to be withdrawn.[9] Recognition *de facto* is indistinguishable from *de jure* recognition insofar as the legislative and other internal measures of the authority recognised *de facto* are, before the courts of the recognising state, treated on the same footing as those of a state or government recognised *de jure*.[10] Similarly, a state or

[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 Taracouzio, *The Soviet Union and International Law* (1935); Toynbee, *Survey* (1924), pp 228–62.

[6] See eg *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch 513, 519; *The Arantzatzu Mendi* [1939] AC 256, 258; *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70, 86–9.

[7] Thus 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, n 41ff 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 Sagor* [1921] 3 KB 532. The rule laid down in this case 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 Liguori* 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 Sancha and Rey*, 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.

government recognised *de facto* enjoys jurisdictional immunity in the courts of the recognising state,[11] and a state's international responsibility for wrongful acts remains the same whether it is ruled by a *de facto* or a *de jure* government.[12]

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.[13] The legal position underwent a change in this respect after the annexation of Abyssinia had been recognised *de jure*.[14] 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;[15] 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.[16] 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.[17]

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;[18] but as a matter of political choice such dealings and visits may be kept to a minimum or avoided altogether.

[11] *The Gagara* [1919] P 95. In *The Arantzatzu 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 jurisdictional 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, MLR, 3 (1939–40), pp 1–20, and Briggs, AJ, 33 (1939), pp 689–99. See also Baty, AJ, 45 (1951), pp 166–70.

[12] YBILC (1974), ii, pp 285–6 (para 12).

[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 Krassin* (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 representative 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[1] 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:[2] (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 the absence of a recognised government have been temporarily impossible, will (within limitations which are far from clear) again become fully operative;[3] (3) it thereby acquires the right, which, at any rate according to English law, it did not previously possess, of suing in the courts of the recognising state;[4] (4) it thereby

state recognised as having *de facto* authority over the territory will, if a more extensive degree of recognition is to be avoided, have to be consistent with that continuing *de jure* recognition.

1 Subject to any limitations appropriate to the particular case.

2 See also § 57.

3 See British Note to Russian Soviet Government: Toynbee, *Survey* (1924), p 491. See also § 57, n 5. A state whose government for the time being is not recognised is not thereby released from its treaty obligations, and if a treaty's provisions may be given effect without any action on the part of the government being necessary, non-recognition of the government will not prevent the treaty from being applied: see § 44, n 8.

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 now no-longer recognised, but still effective, authorities in Formosa (Taiwan): see Scheffer, Harv ILJ, 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 is the 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.

4 *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 Spiropoulos, *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 Cibrario* (1923) 235 NY 255; *Government of France v Isbrandtsen-Moller Co*, AD, 12 (1943–45), No 113; *Republic of China v Pang-Tsu 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[5] – an immunity which, according to English law at any rate, it does not enjoy before recognition;[6] (5) it also becomes entitled to demand and receive posses-

Suisse (1957–58), ILR, 26, p 70; *Federal Republic of Germany v Elicofon*, ILM, 12 (1973), p 1163 and 14 (1975), p 806; *Republic of Vietnam v Pfizer*, AJ, 72 (1978), p 152; *Pfizer 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 Corpn v Trust Bank of Africa Ltd* [1986] 3 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 recognised. See also n 6, where some of the American literature is cited. Note, however, *Diggs v Dent*, ILM, 14 (1975), p 797, where a US court held that the plaintiffs, who included the South West Africa 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 considered. In *National Petrochemical Co of Iran v The M/T Stolt Sheaf*, AJ, 83 (1989), p 368, a US Court of Appeals concluded that, in view of the lesser emphasis now given to 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: *Banco Nacional de Cuba v Cuba* (1964) 376 US 398. Nor does absence of diplomatic relations: see *Republic of Cuba v Mayan Lines SA* (1962), ILR, 33, p 36; *P & E Shipping Corpn v Banco Para el Comercio Exterio de Cuba* (1962), ILR, 33, p 41 and (1964), ILR, 35, p 57; *Transportes Aereos de Angola v Ronair Inc*, ILM, 21 (1982), p 1081; *National Oil Corpn v Libyan Sun Oil Co*, ILM, 29 (1990), p 716; cf *Dade Drydock Corpn v The M/T Mar 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 Corpn*, 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 Campuzano*, AD, 9 (1938–39), No 27 (Norway); *Cibrario 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 Spiropoulos, RI (Geneva), 5 (1927), pp 35–45. And see *Cyprus 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.

5 See § 109.

6 A fair inference from *The Jupiter* [1924] P 236. See also *The Annette, The Dora*, LR [1919] P 105. See also *Rousse et Maber v Banque d'Espagne*, RG, 46 (1939), pp 427–8 (France); *Spanish Government v Campuzano*, AD, 9 (1938–40), No 27 (Norway). But in *Clerget v Banque Commerciale pour l'Europe du Nord* (1969), ILR, 52, p 310, a French court granted immunity from execution notwithstanding that France did not recognise the Democratic Republic of Vietnam.

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 *Wulfsohn v Russian Socialist Republic* (1923) 234 NY 372, 138 NE 24; *Underhill v Hernandez* (1897) 168 US 250; *Nankivel v Omsk All Russian Government*, AD, 2 (1923–24), No 70; *Voevodine 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; Dickinson in Mich Law Rev, 22 (1923), p 131 and AJ, 19 (1925), pp 263–72. In the Protection of Diplomats Act 1971 the USA provides for the protection of foreign officials and property 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;[7] (6) its executive and legislative acts will, in the courts of the recognising state, be entitled – as before recognition they usually are not[8] – to the acceptance which is due to another state's official acts;[9] 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,[10] treated as valid.[11]

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, pt 1, pp 330–2.

7 Eg ***land***; see Answers in the House of Commons on 12 and 14 May 1924; *Parliamentary Debates (Commons)*, vol 173, col 878, 1312. ***Movable property***: *Kunstsammlungen Zu Weimar v Elicofon*, ILM, 21 (1982), p 773, reversing an earlier, pre-recognition, decision in 1973 in the same proceedings, at ILR, 61, p 143. ***State archives***: *Union of Soviet Socialist Republics v Belaiew* (1925) 42 TLR 21; *Union of Soviet Socialist Republics v Onou* (1925) 69 *Solicitors Journal* 676, *The Times* (London), 14 May 1925, cf *Campuzano v Spanish Government*, AD, 11 (1919–42), No 43. ***Merchant ships***: *The Jupiter* [1924] P 236. ***Choses in action***: *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] Ch 182. ***Warships***: see Kiss, *Répertoire*, 3, pp 73–5.

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 § 50, 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 *Chang 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 3–37.

8 But see § 56, n 27ff, as to the legal consequences of laws of unrecognised authorities.

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

See generally on the effects of recognition on application of foreign law, Lipstein, *Grotius Society*, 35 (1950), pp 157–88; Stevenson, Col Law Res, 51 (1951), p 710; and comment in *University of Chicago Law Review*, 19 (1951), p 73; Kopelmanas, *Comunicazioni e studi*, 9 (1958), pp 1–45. See also n 3. See generally as to the so-called 'act of state' doctrine, and the limits upon giving effect to foreign legislation, § 112.

10 See § 48.

11 See eg *Luther v Sagor* [1921] 3 KB 532; *Williams v Bruffy* (1877) 96 US 176; *US v Trumbull* (1891) 48 Fed 94, Scott, *Cases*, p 322; *Oetjen v Central Leather Co* (1917) 246 US 397, Scott, *Cases*, p 70; *Ricaud v American Metal Co* (1917) 246 US 304; *Tillman v US* (1963), ILR, 34, p 16; *Banque Commerciale Arabe 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 Soviet Government by various states after the 1917 revolution.

§ 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.[1] The retroactivity of recognition, for which there appears to be no direct international authority, is a rule of convenience rather than of principle.[2] 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.[3]

§ 49 Recognition and civil wars: recognition of belligerency and insurgency Although a rebellion will involve a breach of the law of the state

1 *Luther v Sagor* [1921] 3 KB 432; *White, Child & Beney Ltd v Eagle Star and British Dominions Insurance Co Ltd* (1922) 38 TLR 616; *The Jupiter* [1927] P 122, 250; *Lazard Brothers & Co v Midland Bank* [1933] AC 289, 297; *Bank of Ethiopia v National Bank of Egypt and Liguori* (1937) 53 TLR 751; *Oetjen v Central Leather Co* (1918) 246 US 297; *Ricaud v American Metal Company* (1918) 246 US 304; *United States v Belmont* (1936) 301 US 324; AJ 31 (1937), p 537 (and comment thereon by Jessup, *ibid*, pp 481–84); *Boguslawski v Gdynia-Ameryka Linie* [1950] 1 KB 157; [1950] 2 All ER 355; [1953] AC 11, where the court distinguished the case from *Luther v Sagor*, both on the facts and on the wording of the certificate of the Foreign Office; *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70 (and comment thereon by Johnson, BY, 29 (1952), pp 464–70); *Tillman v US* (1963), ILR, 34, p 16. French practice in the matter is divided: Kiss, *Répertoire*, 3, pp 70–3. For the decision of a Japanese tribunal see *The Santa Fé* (1959), ILR, 32, pp 601, 621–2. For a criticism of the doctrine of retroactivity, see Hervey, *The Legal Effects of Recognition in International Law* (1928), pp 66, 101, 110; Mervyn Jones, BY, 16 (1935), pp 42–55; Nisot, Can Bar Rev, 21 (1943), pp 627 *et seq*; de Visscher, *Theory and Reality in Public International Law* (revised ed, trans Corbett, 1968), p 243.

2 See the observations of the PCIJ in the case of *Certain German Interests in Polish Upper Silesia* (1926), Series A, No 7, pp 28, 29, 84, and of Erich, Hag R, 13 (1926), iii, pp 499–502. And see 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.

3 See *Civil Air Transport Inc v Central Air Transport Corpn* [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 848; 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

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

[2] See generally on civil war in international law Wehberg, Hag R, 63 (1938), i, pp 7–123; Castren, *Civil War* (1966); Pinto, Hag R, 114 (1965), i, pp 455–551; Falk (ed), *The International Law of Civil War* (1971); Falk in *International Aspects of Civil Strife* (ed Rosenau, 1964), pp 185–248; Marek, *Identity and Continuity of States in Public International Law* (1954), pp 24–73; Whiteman, *Digest*, 2, pp 486–523; Zorgbibe, *La Guerre civile* (1975); Green, RG, 66 (1962), pp 5–33; Higgins in *The Future of the International Legal Order* (eds Black and Falk, vol 3, 1971), pp 81–121; Moore (ed), *Law and Civil War in the Modern World* (1974); Farer, Hag R, 142 (1974), pp 291–406; and, with particular reference to questions of human rights in civil wars, Dinstein, Israel YB on Human Rights, 6 (1976), pp 62–80; Meron, *Human Rights in Internal Strife: Their International Protection* (1987). As to questions of state responsibility which arise in cases of insurrection and civil war, see § 167.

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 (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406; and § 460.

[3] See above, § 46, n 6.

[4] See generally Belkharroubi, *Revue Egyptienne de Droit International*, 28 (1972), pp 20–43; Ronzitti, *Le Guerre di liberazione nazionale e il diritto internazionale* (1974); Ronzitti, Ital YBIL, 1 (1975), pp 192–205; Klein, ZöV, 36 (1976), pp 618–52; Barberis, Hag R, 179 (1983), i, pp 239–68; Shaw, in *Third World Attitudes to International Law* (eds Snyder and Sathirathai, 1987), pp 141–55. For the view that national liberation movements have a unique degree of international personality derived from the basic right to self-determination, which in turn may legitimise their recognition as a government (or provisional government) in circumstances which might otherwise be premature, and removes wars in which they are engaged from the traditional category of civil wars, see Wilson, *International Law and the Use of Force by National Liberation Movements* (1988), pp 103–27.

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 Bassiouni and Nanda, vol 1, 1973), pp 198–237; and § 130, at nn 16–19, and § 122.

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 contending 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[7] and attendance at certain conferences convened by the United Nations[8] (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;[9] and also recognised the South

[5] See § 41, and § 42.

[6] 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 specifically 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.

[7] 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 (1974), pp 149–56, 167–71; UN Juridical YB (1975), pp 164–7; Lazarus, AFDI, 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.

[8] 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 states.

[9] 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 position of the PLO observer mission to the UN see the statement by the UN Legal Counsel, 28 November 1988 (UN Doc A/C 6/43/7); *United*

West Africa People's Organisation as the 'authentic representative of the Namibian people'.[10] The General Assembly has requested the specialised agencies to enable representatives of duly recognised national liberation movements to participate in their work,[11] and some of them have done so.[12]

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.[13]

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 circumstances. The hostilities may be such as to require that both sides be recognised to have belligerent rights; but, as with the Spanish Civil War,[14] even extensive fighting may not be accompanied by any recognition of the contending parties as belligerents.

Even a rebel regime not recognised as a *de facto* government may acquire a degree of international status, involving international rights and obligations as regards other states, as a result of the intensity of the hostilities in which they are engaged.[15] This will occur when the facts are such as to call for recognition of belligerency or of insurgency. The distinction between the two is not sharp, and it is sometimes doubted whether any legal distinction properly exists.[16]

Recognition of belligerency

This brings about the normal operation of the rules of war proper (account being taken of contemporary restraints in international law on the use of armed force).[17] Briefly, it is appropriate where there is a civil war accompanied by general hostilities; occupation and a measure of orderly administration of a substantial part of national territory by the rebels;[18] observance of rules of warfare by the rebel forces acting under a responsible authority; and the practical necessity for third states to define their attitude to the civil war. The result of recognition of belligerency is that both the rebels and the parent government are entitled to exercise belligerent rights, and are subject to the obligations imposed on belligerents, and that third states have the rights and obligations of neutrality.

Recognition of insurgency

The practice of states has recognised that in some situations it is not appropriate for third states which have[19] to take up a position as regards the status of rebels to

States v Palestine Liberation Organisation, ILM, 27 (1988), p 1055; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ Rep (1988), p 12 (on which cases see Sicault, RG, 92 (1988), pp 881–927; Reisman, AJ, 83 (1989), pp 519–27; Yale ILJ, 14 (1989), pp 412–32; Rosenberg, *Rev Belge*, 21 (1988), pp 451–95; Fitscher, Germ YBIL, 31 (1988), pp 595–620; Stern, AFDI, 34 (1988), pp 165–94; Reza, Harv ILJ, 30 (1989), pp 536–48).

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 recognising state's continued recognition of Israel. It seems probable that such recognition of the PLO acknowledges it in a limited, and *sui generis*, capacity (perhaps going no further than its representative role in relation to the people of Palestine, as acknowledged in UN resolutions), in addition in some cases to conferring on it certain privileges of an official or quasi-diplomatic kind in the recognising state. See eg RG, 84 (1980), p 422 (as to 'recognition' by Turkey), p 1077 (Austria; on which see also Benedek, ZöV, 40 (1980), pp 841–57), p 1140 (India), p 1146 (Nepal) and p 1152 (Senegal); RG, 85 (1981), pp 416–17 (Switzerland, declining recognition) and p 906 (Japan); RG, 86 (1982), p 376 (Greece) and p 406 (Soviet Union). For a list of states which accorded diplomatic status to the local office of the PLO in early 1982 see UKMIL, BY, 53 (1982), pp 356–7. A request by the PLO for a person's extradition has been refused on the ground that it is not a state: RG, 84 (1980), p 421. As a result of the declaration of a State of Palestine in 1988 (§ 40, n 2), the PLO observer mission to the UN was redesignated as the Palestine observer mission (GA Res 43/177).

10 Eg GA Res 3111 (XXVIII) (1973), 31/146 (1976) and 39/50A para 7 (1984). Such resolutions are not binding on the member states: thus the UK did not accept the description of SWAPO as the sole and authentic representative of the Namibian people: *Parliamentary Debates (Commons)*, vol 414, col 749 (3 November 1980).

11 See eg GA Res 2918 (XXVII) (1972), 3118 (XXVIII) (1973), 3151G (XXVIII) (1973).

12 Eg Art 2.3(k) of the Standing Orders of the Conference of the ILO; Res 17.2, 17.3, 18.1 and 18.2 adopted by the General Conference of UNESCO on 25 October 1974; the decision of the Council of ICAO on the Report of the Executive Committee at the 1974 Assembly of ICAO (Doc No 9113); Res 27.37 and 28.43 of the Assembly of the WHO, 21 May 1974 and 28 May 1975 respectively.

13 Thus the 1973 Agreements on Vietnam (see § 40, nn 57, 58) were preceded by several rounds of negotiations, mainly in Paris, involving the USA and the various Vietnamese parties, not all of whom recognised all the others. Similarly, during the Rhodesian rebellion there were several meetings between the UK and the rebel regime, some at Prime Minister and Foreign Secretary level (eg on board HMS *Fearless*, off Gibraltar, in 1968; and in Geneva in 1977); while in 1978 the British and US Secretaries of State visited Rhodesia for talks with the rebel regime. Those meetings involved no recognition of that regime.

14 See generally on the Spanish Civil War, Garner, AJ, 31 (1937), pp 66–73, and BY, 18 (1937), pp 197–8; Smith, *ibid*, pp 17–31; O'Rourke, AJ, 31 (1937), pp 398–413; McNair, LQR, 53 (1937), pp 471–500; Walker, *Grotius Society*, 23 (1937), pp 177–210; Padelford, AJ, 32 (1938), pp 264–79, and *International Law and Diplomacy in the Spanish Civil Strife* (1939); Briggs, AJ, 34 (1940), pp 47–57; Thomas and Thomas in *The International Law of Civil War* (ed Falk, 1971), pp 111–78; Whiteman, *Digest*, 2, pp 492–501, 507–17. See also n 23, nn 35 and 36, and § 130, n 16.

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.

16 Eg O'Connell, *International Law* (2nd ed 1970), pp 151–2.

17 It is therefore discussed more fully in vol ii (7th ed), §§ 55, 76 and 76*a*. See also McNair, *International Law Opinions* (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 27ff.

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[20] 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.[21] 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.[22] When that happens the rebels possess as against third states the status of insurgents.[23]

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,[24] and Protocol II to those 1949 Conventions concluded in Geneva in 1977,[25] certain basic humanitarian provisions apply to 'armed conflicts not of an international character'. Furthermore, 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' are, under the 1977 Protocol I to the Geneva Conventions, assimilated to international armed conflicts, although they might otherwise appear to be essentially civil wars.[26]

Rebels who have been recognised as a *de facto* government will for that reason be accepted as having powers of government and administration in the area under their control,[27] including any appurtenant territorial sea. But even rebels who have received no recognition of any kind may be regarded to some extent as having such powers. Although the existing government will usually remain the

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 Corpn*, 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, § 5*a*; Lawrence, § 142; Hyde, i, § 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' instituted 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 *Tatem v Gamboa* [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 §.

24 UNTS, 75, pp 31, 85, 135, 287. See generally vol II of this work (7th ed), § 126; see also Wilhelm, Hag R, 137 (1972), iii, pp 317–414, and § 436, n 8. As to the status of rebels under the Geneva Conventions, see Rubin, ICLQ, 21 (1972), pp 472–6; and, with particular reference to the conflict in Vietnam, Levie in *The Vietnam War and International Law* (ed Falk, vol 2, 1969) at pp 369–73, and Hooker and Savasten, *ibid*, pp 421–7.

The ICJ regarded the conflict between the 'contras' forces and those of the Government of Nicaragua as an armed conflict not of an international character, to which the relevant provisions of the Geneva Conventions applied: *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 114.

25 ILM, 16 (1977), p 1442 (with Protocol I at p 1391); AJ, 72 (1978), p 502. And see § 436, n 8. Article 1(2) of Protocol II excludes from its scope situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature. See generally on the 1977 Protocols and their application to civil wars and wars of national liberation, Bothé, RG, 82 (1978), pp 82–102; Forsythe, AJ, 69 (1975), pp 77–91, and AJ, 72 (1978), pp 272–95; Salmon, *Rev Belge*, 12 (1976), pp 27–52, and 13 (1977), pp 353–78; Bothé, Ipsen and Partsch, ZöV, 38 (1978), pp 1–84; Schindler, Hag R, 163 (1979), ii, pp 133–52; Abi Saab, Hag R, 165 (1979), iv, pp 353–446; Dinstein, YB of World Affairs, 33 (1979), pp 265–83; Salmon in *The New Humanitarian Law of Armed Conflict* (ed Cassese, 1979), pp 55–112; Cassese, ICLQ, 30 (1981), pp 416–39; Bothé, Partsch and Solf, *New Rules for Victims of Armed Conflicts* (1982), pp 36–52, 622–9; Wortley, BY, 54 (1983), pp 143, 149–53 (with particular reference to declarations made by the British Government on signing the Protocols); Murray, ICLQ, 33 (1984), pp 462–70) (with particular reference to the conflict in South Africa); Gasser, AJ, 81 (1987), pp 912–25 (with particular reference to the US decision – at pp 910–12 – not to ratify Protocol I); Levie (ed), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions* (1987); Int Committee of the Red Cross, *Commentary on the Additional Protocols* (1987); Bretton, AFDI, 33 (1987), pp 540–57; Wilson, *International Law and the Use of Force by National Liberation Movements* (1988); Koening, *Der nationale Befreiungskrieg im modernen humanitären Völkerrecht* (1988).

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 Charter 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).

27 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)[28] as competent to perform local acts of administration, such as levying taxes and imposing customs duties,[29] 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.[30] Representations may be made to them where the rights of third states and their nationals in the territory under rebel control are affected,[31] 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.[32]

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,[33] 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

[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; *Baldy 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: *Oguebie v Odunwoke* (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 protested 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 Whiteman, *Digest*, 2, pp 645–7. See also the *Guastini Case* (1903), RIAA, 10, p 561; *Santa Clara Estates Co Case* (1903), *ibid*, 9, p 455; *Bilang v Rigg* (1971), ILR, 48, p 30. See E Lauterpacht, BPIL, 1965–II, 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 Whiteman, *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), pp 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 Nieswand: *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, 55 (1961), pp 426–8; Goyard, RG, 66 (1962), pp 123–42.

establish an effective blockade in order to do so,[34] as must the insurgents if they wish to close ports under the control of the incumbent government[35] (although establishing an effective blockade meeting the requirements of international law would transform the situation into one of belligerency rather than mere insurgency,[36] 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.[1] 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[2] 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.[3]

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

[34] See Dickinson, AJ, 24 (1930), pp 69–78, and the *Oriental Navigation Company Case* (1928), RIAA, 4, p 341. Because of the provisions of the Chicago Convention of 1944 the situation in respect of airports in areas under the control of an unrecognised regime may be different: see UKMIL, BY, 51 (1980), p 367.

[35] During the Spanish Civil War the insurgent Nationalist authorities announced a blockade of ports under Republican control, but it was not maintained effectively. As the belligerent status of the Nationalists was not recognised the blockade was not regarded as a blockade in the legal sense.

[36] As happened in the American Civil War. In the Spanish Civil War the Republican Government announced that it was establishing a blockade of ports under the control of the Nationalist authorities, thus apparently impliedly recognising the belligerent status of the parties to the conflict: but other states refused to accept the lawfulness of the blockade, and thus also the belligerent status of the parties: see literature cited at § 49, n 14. During the Algerian civil war France intercepted many foreign ships on the high seas off the coast of Algeria, but nevertheless maintained that the 'war' was an entirely internal matter: see the *Abdellah Berrais Case*, RG, 65 (1961), pp 624–6, with note by Rousseau; and *Re Soc Ignazio Messina* (1966), ILR, 47, p 164. See also Fraleigh in *International Law of Civil War* (ed Falk, 1971), pp 203–4. See generally on the Algerian civil war § 42, n 8.

[1] On the question of modes of recognition generally see Temperley, v, pp 157–62; Hackworth, i, § 32; Fauchille, §§ 206–8; Spiropoulos, *Die* de facto *Regierung in Völkerrecht* (1926), pp 14–19; Gemma, Hag R (1924), iii, pp 369–78; Whiteman, *Digest*, 2, pp 48–68.

[2] 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).

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

[3] See § 44, 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 *de facto* recognition.[4] 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;[5] in the conclusion of a multilateral treaty to which that authority is a party,[6] or even of a bilateral

[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 Whiteman, *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: Cmnd 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 1961 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 Cmnd 2834, p 28, para 81), while at the Geneva Conference of 1959 on matters affecting Germany, the two German delegations sat at tables separate from the main conference table and had the status of advisers to the principal delegations (Whiteman, *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. However, on other occasions no such declaration has been deemed necessary; see Hudson, AJ, 23 (1929), p 130. See also Hackworth, i, p 353; Whiteman, *Digest*, 2, pp 53–9, 560, and 563–5; 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 reservation as to non-recognition being more appropriate with the former in order to avoid any implication of recognition: see Whiteman, *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: Whiteman, *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.

agreement with that authority for limited purposes;[7] in the retention (as distinguished from fresh appointment) of diplomatic representatives for an interim period;[8] in the retention, replacing, and (probably) sending and reception of consuls (especially if the latter is not accompanied by a request for or issue of an exequatur);[9] in the fact and manner of communication with foreign authorities,[10]

[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 Whiteman, *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': Whiteman, *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 (Taiwan) after 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 252–9.

[8] 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 authority 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 Whiteman, *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–I), 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 Whiteman, *Digest*, 2, pp 525–6. In relation to Afghanistan the UK, which did not recognise the purported government of that state after 1979, withdrew its ambassador at that time, but left in Kabul an embassy headed by a *chargé d'affaires*, which continued to have dealings with the authorities in Kabul on routine consular, 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).

[9] 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, i, §§ 30, 72, and v, § 698; Hackworth, iv, pp 684ff; and Whiteman, *Digest*, 2, pp 62–3, 584–90. See also *Harv Research, Consuls* (1932), Art 6, pp 238–41; Kiss, *Répertoire*, 3, pp 77–8, 105; and Zourek, 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

recognition: Off J, 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 15 and 18 (2 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: as to Formosa see BPIL (1964–I), p 25, and as to North Vietnam see BPIL, 1965–II, pp 123–5. Spain maintained a Consulate-General in Israel while not at the time recognising Israel: *Kendal v Consul-General of Spain in Jerusalem*, ILR, 24 (1957), p 532, especially 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 consequent upon an obligation to withhold recognition, as in connection with Namibia and Southern Rhodesia, § 56, nn 16 and 18. The performance of notarial acts by US consuls in Moscow in relation to documents originating in Lithuania was not regarded by the USA as implying recognition of the incorporation of that country into the Soviet Union: *US Digest* (1975), p 255.

[10] Thus, for instance, on 2 December 1929, in the course of the conflict between Russia and China, the Government of the USA, which at that time did not recognise the Soviet Government of Russia, addressed identical notes to the two states engaged in the dispute reminding them of their obligations under the General Treaty for the Renunciation of War: *Documents on International Affairs* (1929), p 277. For various examples of precautions taken to obviate the suggestion of implied recognition following upon intercourse with unrecognised authorities see Hackworth, i, pp 343 *et seq*. On the question of the possible implied recognition of the annexation of Abyssinia by Italy as the result of communications addressed to the 'King of Italy and Emperor of Abyssinia' see H Lauterpacht, BY, 21 (1944), pp 139, 140; Kiss, *Répertoire*, 3, pp 107–8 and Whiteman, *Digest*, 2, pp 63–4, 578. As to dealings by the USA with the Free French authorities prior to their recognition in 1944 see *ibid*, pp 371–6. See also the Note addressed by the British Consul-General in Peking to the unrecognised Chinese Communist authorities, and the comment by the Foreign Office on its significance: *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70, 88–9. As to continued dealings by the US Government with the authorities in Taiwan notwithstanding withdrawal of recognition from them see President Carter's Memorandum of 30 December 1978 to all government departments (ILM, 18 (1979), p 275), the Taiwan Relations Act 1979 (*ibid*, p 873) and the US–China Joint Communique on Taiwan, 17 August 1982 (ILM, 21 (1982), p 1147); and see also § 44, n 7. Even in the absence of recognition of the relevant authorities, the UK has had contacts with the rebel authorities, UNITA, in Angola, on humanitarian matters (UKMIL, BY, 55 (1984), p 421), and with the Turkish Cypriot authorities in the northern part of Cyprus, in connection with the protection of the interests of British nationals (UKMIL, BY, 49 (1978), p 339, 54 (1983), p 384, 55 (1984), p 423, and 58 (1987) pp 514–15). However, in 1962 the British Government preferred to sell blankets for use in the Yemen to a private buyer nominated by the 'Yemen republican authorities' rather than sell direct to them lest this be taken to involve recognition of them as a government: *Parliamentary Debates (Commons)*, vol 669, cols 1253–4 (19 December 1962). Similarly in 1979 the British Government stated that it could only provide relief to recognised governments and organisations and accordingly, while unable to provide relief aid to the parties to a conflict in Eritrea, could give aid money to the International Committee of the Red Cross which was operating a relief programme benefiting both sides to the conflict: *Parliamentary Debates (Commons)*, vol 960, col 860 (written answers, 18 January 1979).

In some cases the intention not to accord recognition is made clear by having dealings with representatives of an unrecognised authority in their personal, rather than official, capacities: see Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 140–41. Recognition of the Vatican City State by the USA would be 'extremely difficult' to avoid if the President were to visit the Pope in the latter's capacity as Head of the Vatican City State (as opposed to a friendly, informal visit to him in his capacity as a spiritual leader): Whiteman, *Digest*, 2, pp 544–5; and see RG, 82 (1978), pp 282–3, for the appointment by the President of a 'personal representative' to the Holy See. Contacts between the UK Government and Palestinian leaders were stated as being in that capacity only and not as governmental representatives, so that 'such contacts do not and cannot affect our position of not 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.

including direct negotiations with them,[11] the establishment of representative offices with something less than full diplomatic character,[12] and even the exchange of visits of high ranking persons;[13] in the making of protests against an authority's actions affecting interests of the protesting state;[14] in the maint-

[11] 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 50–51, 550–55. Similarly with the talks in Paris from 1970–73 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 a government to negotiate with a body of people does not necessarily mean that that body is being treated as a government: governments may and do deal with private persons: see *Pan American World Airways Inc v Aetna Casualty and Surety Co*, ILM, 13 (1974), pp 1376, 1397.

[12] 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, including the setting up of FLN offices in certain countries (including Egypt and the USA), see Fraleigh 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 was granted certain privileges and facilities: see *Clerget v Représentation commerciale de la République démocratique du Vietnam, Clunet*, 95 (1968), p 55; (1969) ILR, 52, p 310. See similarly, as regards the Delegation General of the Democratic Republic of Korea, RG, 89 (1985), pp 418–19 and AFDI, 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.

[13] 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 its government was not recognised by the USA: for the joint communique 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, 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.

[14] See § 49, n 31. In its Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* the International Court of Justice stated that 'physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States' (ICJ Rep (1971), p 54). The UK, while recognising the incorporation of the Baltic States into the Soviet Union *de facto* but not *de jure* (see § 55, n 42), concluded an agreement with the Soviet Union relating to British claims which had arisen in respect of the Baltic States: see ICLQ, 10 (1961), pp 559–60; the UK–USSR Agreement of 5 January 1968, TS No 12 (1968); the Foreign Compensation Act 1969; Schwarzenberger, *Foreign Investments and International Law* (1969), p 47; Lillich, ICLQ, 21 (1972), pp 1–14; and *Parliamentary Debates (Commons)*, vol 168, col 403 (written answers, 5 March 1990), and vol 172, cols 171–3 (8 May 1990). See also, as to claims presented by the UK to the unrecognised authorities in Formosa, ICLQ, 6 (1957), pp 507–8. Similarly, claims by British nationals were presented to and approved by the unrecognised 'Turkish Cypriot authorities' in respect of damage to their property resulting from the Turkish invasion and occupation of part of Cyprus: *Parliamentary Debates (Commons)*, vol 957, col 247 (written answers, 8 November 1978).

enance of contact with the insurgents in a civil war and conducting negotiations with them;[15] or in admission, so far as states opposed to such admission are concerned, to an international organisation such as the United Nations.[16]

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;[17] (b) the formal initiation of diplomatic relations;[18] (c) probably, the issue of a consular exequatur;[19] (d) in the case of recognition of belligerency, a proclamation of neutrality or some such unequivocal act;[20] (e) sponsoring, or possibly voting for, the admission of a state to membership of an organisation which has statehood as one of the conditions of membership;[21] (f) further, recognition of a state's claim to territory may be implied from official communications from other states which knowingly treat the territory as within its sovereignty.[22]

§ 51 Conditional recognition Recognition, in its various aspects, is neither a contractual arrangement nor a political concession. It is a declaration of the existence of certain facts. This being so, it is improper to make it subject to conditions other than the existence – including the continued existence – of the requirements which qualify a community for recognition as an independent state, a government, or a belligerent in a civil war. In fact, the practice of states shows few examples, if any, of conditions of recognition in the proper sense, ie of stipulations the non-fulfilment of which justifies withdrawal of recognition. There are, however, occasional cases in which the recognising state obtains, as the price of recognition, promises and undertakings given for its particular advantage.[1] Such stipulations, which are contrary to the true function of recognition,[2] are a relatively rare occurrence.[3] They do not in any case constitute

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15 See § 49, n 13, and § 49, n 31. In connection with the *Trent* 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), p 8; *British Parliamentary Papers*, (1862), lxii, p 575. A similar right was claimed in 1792 by Jefferson for the purpose of 'reforming the unfriendly restrictions on our commerce and navigation': Moore, i, p 120. As to dealings between the UK and Soviet rebels in 1919, see *Luther v Sagor* [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 Whiteman, *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, nn 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 Ukraine's membership of the Security Council (*ibid*, vol 57, col 576 (written answers, 4 April 1984)); see also UKMIL, BY, 49 (1978), pp 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 Juridical YB (1975), p 82; and see the ILC's commentary on draft Art 79 for this Convention, which became Art 82, YBILC (1971), ii, pt 1, pp 330–32). Note also s 12 of the UN Headquarters Agreement with the USA: UNTS, 11, p 11; GA Res 169 (II), (1947).

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 recognition of 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 1825, 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 § 40, n 31. See as to the treaty of commerce signed in 1928 between the USA and China, Whiteman, *Digest*, 2, 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: see *Parliamentary Debates (Lords)*, vol 338, col 961 (6 February 1973). In *Murarka v Bachrack*, ILR, 20 (1954), p 52, it was held that an exchange of ambassadors between the USA and India in February and April 1947 'certainly amounted at least to *de facto* recognition, if not more', although India did not become formally independent until August 1947. But cf. n 12. And see § 528, n 3.

19 As distinguished from a request for the issue of an exequatur – a matter on which the practice of governments seems to be divided. See H Lauterpacht, BY, 21 (1944), pp 134–35. In 1939 the application by the UK for an exequatur from Germany in respect of the appointment of a consul in Prague was acknowledged to imply *de facto* recognition of the German absorption of Bohemia and Moravia: *Parliamentary Debates (Commons)*, vol 348, col 1786 (19 June 1939). See also *ibid*, vol 347, col 961 (15 May 1939), as to recognition of Slovakia. See also McNair, *Opinions* (vol 1, 1956), pp 133–7; Lee, *Consular Law and Practice* (2nd ed, 1991), pp 75–80, 104–11; and n 9, and § 553, n 3.

20 Such a recognition of belligerency does not necessarily involve any recognition of the belligerent authority as a state: see *The Fjeld*, ILR, 17 (1950), No 108; *The Flying Trader*, *ibid*, No 149. But see a decision of the Court of Paris in 1953, in respect of the Korean hostilities of 1950–53, that a state of war can only exist between recognised states: Kiss, *Répertoire*, 3, p 22. In the case concerning *Certain German Interests in Polish Upper Silesia* (1926) the PCIJ found that Poland and Germany could have concluded an armistice 'only on the basis of such recognition [ie of belligerency]': Series A, No 7, p 28. Recognition of belligerency is not implied from the imposition of a prohibition on the export of arms to rebels: see Whiteman, *Digest*, 2, pp 517–18.

21 Thus Canada regarded its affirmative vote for Israel in 1948 and the Republic of Korea in 1949 as members of the UN as involving recognition of those two states: see Dai, Can YBIL, 3 (1965), p 294.

22 See n 10, as to communications addressed to the King of Italy 'and Emperor of Abyssinia', after the Italian conquest of Abyssinia; see Whiteman, *Digest*, 2, pp 404–5, as to references to territory in Poland occupied by the Soviet Union. Because the UK did not recognise that the eastern part of Berlin was part of the German Democratic Republic although it had made it the capital of the state, the British Embassy in East Berlin was the Embassy 'to' the German Democratic Republic, not 'in' that state; and see *Parliamentary Debates (Commons)*, vol 849, cols 922–3 (29 January 1973). See also § 55, n 51, as to Jerusalem as the capital of Israel.

1 See § 45, n 18.

2 When during the Peace Conference in 1919 it was suggested by some states that the recognition of Finland be made dependent upon the acceptance of certain undertakings relating to the military situation in the Baltic, especially with regard to Soviet Russia, the representatives of the USA objected to the proposal on 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.

3 See Hackworth, i, 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.

After 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,[4] 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[1] be withdrawn or discontinued.[2] 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.[3] As a rule, however, it

representative character of the new government which was being established in effect without any continuity with the previous Nazi regime): see Whiteman, *Digest*, 2, pp 115–16 and 423ff (Romania), 130–32 (Poland), 338–42 (Bulgaria), and 322–7 (Albania).

4 Thus, for instance, when in 1933 the USA recognised the Soviet Government, the governments of both states gave mutual understandings and explanations with regard to their future policy in such matters as religious freedom and the protection of economic rights. It was with reference to these various undertakings that the Supreme Court of the USA referred, somewhat widely, to conditional recognition: *United States v Pink* (1942) 315 US 203, 229. See also Whiteman, *Digest*, 2, pp 120–29. As to French 'reservations' attached to recognition of the Soviet Government by France in 1924 see Kiss, *Répertoire*, 3, pp 40–1, 54–7, 58–64.

See generally on so-called conditional recognition, H Lauterpacht, BY, 22 (1945), pp 185–87.

1 But see §§ 54, 55, for the refusal in certain cases to recognise a change in the state of affairs notwithstanding the fact that a change has taken place.

2 Articles of the Montevideo Convention of 1933 on the Rights and Duties of States provided that 'Recognition is unconditional and irrevocable': LNTS, 165, p 19. The Institute of International Law, while laying down, in a resolution adopted in 1936, that recognition *de jure* of a state is irrevocable, in effect qualified that rule by adding that such recognition ceases to have effect in case of a definite disappearance of one of the essential elements of statehood obtaining at the moment of recognition (Art 5): AJ, 30 (1936), Special Suppl, p 180. Hyde, i, § 38, and Fauchille, § 213, consider recognition to be capable of withdrawal. For the withdrawal of the recognition of Finland by France in 1918, see Temperley, vi, p 289; Fauchille, § 167[4]. Probably this was a case of withdrawal of recognition from a particular government. See H Lauterpacht, BY, 22 (1945), p 180.

See also § 55, nn 3–6 and 31–40, for the withdrawal of recognition of certain situations occurring just prior to the Second World War.

3 See, as to the withdrawal of the USA recognition of Montenegro, the communication addressed in 1921 by the Acting Secretary of State to the Montenegrin Consul-General in charge of the Legation: *US Foreign Relations* (1921), ii, p 946. As to the withdrawal of recognition from the various representatives of the former Russian regime subsequent to the recognition of the Soviet Government by the USA in 1933, see AJ, 28 (1934), Suppl, p 13. On 6 January 1950, when the UK recognised the Government of the People's Republic in China, concurrently with the recognition of that government she withdrew her recognition of the Nationalist Government and informed the Chinese Ambassador in London accordingly: *The Times*, 7 January 1950. For the complicated details of that recognition see Johnson, BY, 29 (1952), pp 464–68, and 'Aristeides', ILQ, 4 (1951), pp 159–77; and see also the certificate from the Foreign Office in *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70. As to the withdrawal of recognition in 1945 from one Polish Government upon its grant to another, see Whiteman, *Digest*, 2, pp 412, 416–17, and *Boguslawski v Gdynia-Amerika Linie* [1951] 1 KB 162. As to the UK's withdrawal of recognition of the Pol Pot Government of Kampuchea in 1979, without at the same time recognising any other authority as its successor, see Warbrick, ICLQ, 30 (1981), pp 234–46. See also AFDI, 26 (1980), pp 888–9, for the similar position of France.

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 another. Thus the United Kingdom withdrew in 1938 its recognition of Abyssinia as an independent state by recognising *de jure* the annexation of that country by Italy;[4] 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,[5] 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.[6]

§ 53 Recognition and participation in the United Nations[1] Among the requirements of Article 4 of the Charter for admission to membership of the United Nations is that the new member must be a 'state'.[2] 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 recognition of the new member as a state by a central organ of the international community.[3] Admission to the United Nations secures a new member a place in

4 See Toynbee, *Survey* (1938), i, pp 158–63. See also *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] Ch 182; and *Azazh Kebbeda 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.

5 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 *de jure*: see *Re Feivel Pikelny's Estate*, BY, 32 (1955–56), pp 288–95. While the grant of *de facto* recognition does not necessarily involve the withdrawal of the *de jure* recognition previously accorded to a different authority, that consequence may nevertheless result if the recognising state so intends.

6 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 Corpn v Banco Para el Comercio Exterior de Cuba* (1964), ILR, 35, p 57.

1 See generally Graham, *The League of Nations and the Recognition of States* (1933); Schachter, BY, 25 (1948), pp 109–15; H Lauterpacht, *Recognition in International Law* (1947), pp 400–3; Jessup, *A Modern Law of Nations* (1949), pp 43–51; Aufricht, AJ, 43 (1949), pp 679–704; Rosenne, BY, 26 (1949), pp 437–47; Wright, AJ, 44 (1950), pp 548–59; Briggs, *AS Proceedings* (1950), pp 169–81; Chen, *The International Law of Recognition* (1951), pp 211–16; Yuen-Li Liang, AJ, 45 (1951), pp 689–707; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 130–66; Alexy, ZöV, 26 (1966), pp 495–597; Jennings, Hag R, 121 (1967), ii, pp 352–4; Crawford, *The Creation of States in International Law* (1979), pp 129–41; Dugard, *Recognition and the United Nations* (1987). As to the observer status of certain national liberation movements, see § 49, nn 7–12.

2 See *Conditions of Admission Case*, ICJ Rep (1948), at p 62.

3 See n 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 concurring 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[4] 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,[5] as where a *coup d'état* 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 claim simultaneously to be 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,[6] 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

[4] As opposed to sponsorship of a community for membership of an organisation one of the conditions of membership of which is statehood, or perhaps even an affirmative vote for membership; see § 50, n 21. But cf n 5. Note also n 9, as to the absence of any implication of recognition where a state votes for the admission of the representatives of a *government* to represent a member state in the organisation.

[5] But note that in certain circumstances even an uncontested regime's representatives may be rejected, but more as a form of sanction than as a result of doubts about recognition: see n 14.

[6] See the memorandum prepared by the UN Secretariat in 1950, Doc S/1466: see n 9. For a contrary view see Kelsen, *The Law of the United Nations* (1950), p 79.

The Commercial Tribunal of Luxemburg held in 1935 that the admission of Soviet Russia to the League of Nations implied the recognition of the Soviet Government by Luxemburg: *Union of Soviet Socialist Republics v Luxemburg and Saar Company*, AD, 8 (1935–37), No 34. See also, to the same effect, Scelle, RG, 27 (1921), pp 122–38; Fauchille, pp 334, 335; Anzilotti, *Corso di diritto internazionale* (3rd ed, 1928), p 172. See also Schücking und Wehberg, pp 267–69; Rougier, RG, 28 (1921), pp 222–42; Coucke, RI, 3rd series, 2 (1921), pp 325–29; Graham, *The League of Nations and Recognition of States* (1933). Some members of the League, such as Switzerland and Belgium, asserted their right to continue in their refusal to recognise the Government of Soviet Russia after the admission of that country to the League. See Makarov, ZöV, 5 (1935), pp 58–9.

Formosa whose territorial status was doubtful)[7] and claimed to represent the State of China in the United Nations.[8] At that time that government was recognised only by a minority of the members of the United Nations. The General Assembly, after prolonged study of the matter,[9] adopted a resolution 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'.[10] 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.[11]

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

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

[8] Literature on the question of Chinese representation in the UN is extensive, but see in particular, Liang, AJ, 45 (1951), pp 689–707; Briggs, *International Organisation*, 6 (1952), pp 192–209; Fitzmaurice, YB of World Affairs (1952), pp 36–55; Singh, *Termination of Membership of International Organisations* (1958), pp 147–74; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 152–8; Schick, ICLQ, 12 (1963), pp 1232–50; Brohi, Hag R, 102 (1961), i, pp 194–210; McDougal and Goodman, AJ, 60 (1966), pp 671–727; Dai, Can YBIL, 5 (1967), pp 217–28; Lung-chu Chen and Lasswell, *Formosa, China and the United Nations* (1967); Chiu and Edward, AJ, 62 (1968), pp 20, 33–40; Ko-Yung Tung, Harv ILJ, 12 (1971), pp 478–94; Green, YBIL, 10 (1972), pp 102–36; Focsaneanu, AFDI, 20 (1974), pp 115–52; Bailey, *The Procedure of the UN Security Council* (2nd ed, 1988), pp 150–7. See also the literature cited at § 44, n 6.

[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 fulfilment of the obligations of membership – 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 could 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.

[10] GA Res 396 (V). See also, Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 146–50.

[11] GA Res 2758 (XXVI) (1971). For consequential action taken in some specialised agencies, see ILM, 11 (1972), pp 561–71 and 12 (1973), pp 1526–7; as to the IMF, IBRD, and other financial institutions, ILM 20 (1981), pp 774–81; as regards succession to the financial obligations owed to the UN by China, see ILM, 11 (1972), p 653, and Bissell, AJ, 69 (1975), pp 628–33; as to the IAEA and ILO, see RG, 88 (1984), pp 215–16; as regards the position of China in relation to the GATT, from which the former (Nationalist) Government notified its withdrawal in 1949 but which purported withdrawal was not recognised as valid by the People's Republic of China, see Chung-chou Li, *Journal of World Trade Law*, 21 (1987), pp 25–48 and as regards discontinuance of the accreditation at the UN of the government-controlled Nationalist Chinese news agency, see UN Juridical YB, 1972, pp 152–6. See also n 20.

the state. Both the General Assembly and Security Council, like most international organisations and major international conferences, have established a Credentials Committee to examine the credentials of representatives.[12] Although the committee is primarily concerned with checking that credentials are, as documents, formally in order and signed by an appropriate person, credentials issued by a person or body whose authority to act for the member state in question is not recognised by many states or is otherwise in serious doubt may be questioned.[13] Somewhat different is the rejection of credentials primarily as a mark of disapproval, as happened to Hungary[14] in 1956 and for several subsequent years, and to South Africa in 1970 and subsequently, leading in 1974 to the decision to bar that state from participation in the work of the General

[12] GA Rules of Procedure, r 27; SC Rules of Procedure, r 13.

[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 ILJ, 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; 52 (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).

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 234–46. See generally on the situation of Kampuchea, Isoart, 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 Panamian 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.

[14] See Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 158–9. On the events in Hungary in 1956 see generally, Szikszóy, *The Legal Aspects of the Hungarian Question* (1963); Whiteman, *Digest*, 2, pp 398–400. Although primarily a mark of disapproval of the Hungarian Government, the rejection of Hungarian credentials was not at the outset divorced from legitimate doubts about recognition of it: see § 45, n 6.

In 1946 the General Assembly recommended that the Spanish Government be debarred from membership of the UN agencies until a new and acceptable government was formed in Spain: GA Res 39 (I), reversed by GA Res 386 (V) (1950).

Assembly.[15] A representative to whose credentials objection is made is 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.[16]

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.'[17]

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.[18] 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,[19] and its decision in 1971 'to recognise the representatives of [the Government of the People's Republic of China] as the only legitimate representatives of

[15] See Ciobanu, ICLQ, 25 (1976), pp 351–81; UN Juridical YB (1973), p 140, paras 8 and 9, and *ibid* (1975), p 167; see also *ibid* (1974), p 183, as to consequential action in specialised agencies; Abbot, Augusti, Brown and Rode, Harv ILJ, 16 (1975), pp 576–88; Halberstam, AJ, 78 (1984), pp 179, 184–91. See also § 22, n 13.

[16] GA Rules of Procedure, r 29; SC Rules of Procedure, r 17. See also UN Juridical YB (1973), p 140, para 8.

[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 Seder, Harv ILJ, 15 (1974), pp 482–95. 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 Cmnd 5568, pp 16 and 57.

[19] GA Res 195 (III): see § 40, n 16.

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

[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.

[22] *Répertoire of the Practice of the Security Council 1946–51*, pp 117–18, 121–2; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 50–51; see also pp 51–52, and Eagleton, AJ, 44 (1950), pp 277–302, regarding Hyderabad in 1948; and Rosenne, *Israel Year Book on Human Rights*, 13 (1983), pp 295–330, regarding Israel in 1948. But non-recognition has been the basis for not inviting a community to participate: see eg the discussion in 1968 concerning the German Democratic Republic, *ibid*, *Supplement 1966–68*, pp 63–4. As an alternative to participation on the basis of Art 32 of the Charter, representatives of unrecognised communities have sometimes been able to participate in Security Council discussions under r 39 of its Rules of Procedure, which allows for attendance by persons acting in some individual capacity to assist the Council in its discussions. This provision frequently makes consideration of questions of recognition unnecessary, but not always: see eg the discussion in 1971 about the possibility of inviting representatives from Bangladesh, *ibid*, *Supplement 1969–71*, pp 41–3. As to the legally controversial decisions of the Security Council in 1975 and 1976 to invite the Palestine Liberation Organisation to participate in certain meetings, see Gross, AJ, 70 (1976), pp 470–91.

[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.

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[1] 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,[2] or where to grant it would be inconsistent with particular international obligations binding upon the non-recognising state.[3]

Recognition may also be withheld where a new situation originates in an act which is contrary to general international law. The principle *ex iniuria ius non*

[24] See UN Juridical YB (1964), p 237; *ibid* (1966), p 239; *ibid* (1974), p 157; *ibid* (1975), p 202; *ibid* (1976), p 186.

[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.

[1] On the doctrine of non-recognition see Hill, *Recent Policies of Non-recognition* (International Conciliation Pamphlet, 1933) No 293, pp 37–44; Graham, *In Quest of a Law of Recognition* (1933), pp 19 *et seq*; Wild, *Sanctions and Treaty Enforcement* (1934), pp 160–79; Sharp, *Non-recognition as a Legal Obligation* (1934), pp 152–72, and *Geneva Special Studies*, v, (1934), No 4; H Lauterpacht, *Legal Problems in the Far Eastern Conflict* (1941), pp 129–56, and *Recognition in International Law* (1947), pp 395–400 and ch 21; Borchard and Morrison, *Legal Problems in the Far Eastern Conflict* (1941), pp 157–78; Langer, *Seizure of Territory, The Stimson Doctrine and Related Principles* (1947); Wright, AJ, 26 (1932), pp 342–48, and *ibid*, 27 (1933), pp 39–61; McNair, BY, 14 (1933), pp 65–74; Fischer Williams, *Grotius Society*, 18 (1933), pp 109–29, in Hag R, 44 (1933), ii, pp 263–309, and HLR, 47 (1934), pp 776–794; Middlebush, *AS Proceedings* (1933), pp 40–55; Chailley, RI (Paris), 13 (1934), pp 151–74; Herz, RI, 3rd series, 17 (1936), pp 581–90; Scelle, Hag R, 55 (1936), i, pp 126–35; Wehberg, *Krieg und Eroberung im Wandel des Völkerrecht* (1953), pp 88–115, and in *Festschrift für Jean Spiropoulos* (1957), pp 433–43; Bierzanek, AFDI, 8 (1962), pp 117–37; Brownlie, *International Law and the Use of Force by States* (1963), ch XXV; Zivier, *Die Nichtanerkennung im modernen Völkerrecht* (1967); Blix, Hag R, 130 (1970), ii, pp 652–77; Crawford, *The Creation of States in International Law* (1979), pp 120–28; Dugard, *Recognition and the United Nations* (1987), pp 24–40, 81–163. See also nn 6 and 12.

[2] See § 40, n 11.

[3] See eg § 38, n 5.

oritur is well established in international law,[4] and according to it acts which are contrary 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.[5] There is, however, no settled view[6] 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.

To grant recognition to an illegal act or situation will tend to perpetuate it and to 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 the covenants and obligations of the Treaty of Paris of August 27, 1928'.[7]

This was nothing less than a declaration, that the United States would not in the future do anything to legalise by recognition the illegal act and its presumably invalid results. By that declaration the United States did not assume any legally binding obligation not to grant recognition in the future.

The development from such a unilateral declaration of policy to an international 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

[4] The ICJ has repeatedly held that a unilateral act which is not in accordance with law cannot confer upon a state a legal right. See the Order of 6 December 1930, in the case of the *Free Zones of Upper Savoy and the District of Gex* (2nd phase), PCIJ, Series A, No 24; the Order of 3 August 1932, concerning the *South-Eastern Territory of Greenland*, *ibid*, Series A/B, No 48, p 285; the Advisory Opinion of 3 March 1928, in the case of the *Jurisdiction of the Courts of Danzig*, *ibid*, Series B, No 15, p 26; the Judgment of 5 April 1933, in the case of the *Legal Status of Eastern Greenland*, *ibid*, Series A/B, No 53, pp 75, 95; and the Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Rep (1971), pp 46–7. For an apparent but not real exception see the Judgment of 24 June 1932, concerning the *Interpretation of the Statute of Memel* (jurisdiction), *ibid*, Series A/B, No 47, p 336.

[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Rep (1971), at p 54.

[6] The matter is discussed by Verzijl, RI (Paris), 15 (1935), pp 284–339; Guggenheim, Hag R, 74 (1949), i, pp 195–263; Marek, *Identity and Continuity of States in Public International Law* (1954), pp 553–87; Jennings, *Cambridge Essays in International Law* (1965), pp 64–87; Cahier, RG, 76 (1972), pp 645–91. See also literature cited at n 1.

[7] See AJ, 26 (1932), p 342; *Documents* (1932), p 262. See also Dugard, *Recognition and the United Nations* (1987), pp 24–40.

illegality of an act and any consequential invalidity of its results may, in general,[8] be wholly or partially cured by an individual or collective act of other states who, by an express act of recognition, may henceforth treat as valid the new situation, notwithstanding the initial illegality of the act on which it is based. Such express recognition has also often been sought and given when the validity of the title claimed by a state has been doubtful or controversial.[9] In such cases recognition, to the extent to which it is given[10] (including the extent, if any, to which it is retroactive), amounts to an express waiver of claims conflicting with the right thus recognised.

A gradual change in this attitude may be discerned with the development of rules of international law proscribing war as an instrument of national policy, 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'.[11] 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 in which members of the League agreed to guarantee the existing territorial integrity and political independence of other members of the League.[12]

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

[9] 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: Hertslet's *Commercial Treaties*, xxix, 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.

[10] 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 to 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 Sverdrup Island.

[11] 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 representative: 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.

[12] 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 Toynbee, *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'.[13] 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.[14] 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'.[15] 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.[16] 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* and *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.

Position et les droits du Japon en Mandchourie (1933); Mong, *La Position juridique du Japon en Mandchourie* (1933); *Geneva Special Studies*, v (1934), No 3; Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp 516–35; ZöV, 4 (1934), pp 72, 73; Chailley, RI (Paris), 13 (1934), pp 151–74; Cavaré, RG, 42 (1935), pp 5–99.

13 Article 3: LNTS, 163, p 393. See also Art 11 of the Montevideo Convention on the Rights and Duties of States 1933: LNTS, 165, p 19.

14 The resolution, after reiterating previous American declarations on the subject of non-recognition, declared, as a fundamental principle of the public law of America, that the occupation or acquisition of territory as the result of conquest by force has no legal effect. It was declared that the pledge of non-recognition was an obligation which could not be avoided either unilaterally or collectively: AJ, 34 (1940), Suppl, p 197. And see Gutierrez, *La doctrina del non-reconocimiento de la conquista en América* (1938). In July 1940, at the meeting of the Ministers of Foreign Affairs of the American Republics, a convention was adopted providing, in view of the principle of non-recognition of transfers of territory brought about by force, for provisional administration of the territories in question, situated in the Western Hemisphere, by one or more American states on lines approaching substantially those of the mandate system under the Covenant of the League: AJ, 35 (1941), Suppl, p 28.

15 AJ, 46 (1952), Suppl, p 47.

16 GA Res 2625 (XXV), 1st principle; see also GA Res 2734 (XXV) (1970), para 5, and Art 11 of the draft Declaration on the Rights and Duties of States, prepared by the ILC in 1949 (YBILC (1949), p 288). See also § 263.

Certain instances[1] of this state practice may be mentioned, involving, first, the creation of a new state,[2] second the absorption of one state by another, and third the seizure or occupation of foreign territory.

(1) Creation of new states

In March 1939 Germany invaded Czechoslovakia[3] and set up an independent State of Slovakia in part of the country, while making Bohemia and Moravia a Protectorate forming part of Germany. These events were generally protested against, and regarded as 'devoid of any basis of legality'.[4] Nevertheless, the situation prescribed by Germany was effectively established, and was in due course recognised by most European states.[5] However, with the outbreak of the Second World War in September 1939 a gradual withdrawal of recognition of the German-established state of affairs took place, accompanied by re-recognition of the former Republic of Czechoslovakia with a government in exile in London.[6]

An obligation to refrain from granting recognition clearly arose after the government of the British colony of Southern Rhodesia on 11 November 1965 declared Rhodesia an independent state.[7] The Security Council the following

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 territory); § 113 as to 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 283–330. See § 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 961), and gave *de facto* recognition to the position in Bohemia and Moravia in June 1939 (*ibid*, vol 348, col 1786). As to the position of Australia, see *Anglo-Czechoslovak & Prague Credit Bank v Janssen*, AD, 12 (1943–45), No 11; and as to France see Kiss, *Répertoire*, 3, p 106, and *Jellinek v Lévy* (1940), RG, 51 (1947), p 250; and as to the USA, see Whiteman, *Digest*, 2, pp 346–52. See also AJ, 33 (1939), pp 570, 761; AJ, 34 (1940), p 133; *Re Larwin'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 *Slouzak Minority in Teschen (Nationality) Case* (1940), AD, 11 (1919–41), No 93; *German Nationality (Annexation of Czechoslovakia) Case*, ILR, 19 (1952), No 56; *Sarl 'Koh-I-Noor-L et C Hardtmuth' v SA Agebel et al* (1959), ILR, 47, p 31. See also *Land Registry of Waldsassen v The Towns of Eger (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':[8] 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.[9] 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: *Madzimbamuto v Lardner-Burke* (1966–68), ILR, 39, p 61; *R v Ndhlovu* (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 temporarily 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: *Madzimbamuto v Lardner-Burke* [1969] AC 645; *Adams v Adams* [1970] 3 WLR 934; *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 Rigg* (1971), ILR, 48, p 30. See also § 49, nn 27–31. In *Shyu Jeng Shyong v Esperdy* (1969), AJ, 63, p 828, a US court held that the USA recognised the UK as the legitimate government for Southern Rhodesia; and see *Ngai Chi Lam v Esperdy* (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 Oosthuizen* (1976), ILR, 68, p 3.

As to the constitutional aspects of the Rhodesian rebellion see Lang, Rhodesia LJ (1965), pp 65–108; Marshall, ICLQ, 17 (1968), pp 1022–34; Welsh, LQR, 83 (1967), pp 64–88; Eekelaar, MLR, 30 (1967), pp 156–75; Palley, *ibid*, pp 263–87; Dias, CLJ (1967), pp 5–10; Wharam, *ibid*, pp 189–213; Honoré, *ibid*, pp 214–23; Le Roux, Rhodesia LJ, 1969, pp 40–81.

[8] SC Res 216 (12 November 1965). See generally Fawcett, BY, 41 (1965–66), pp 103–21, especially 109–16; Fischer, AFDI, 11 (1965), pp 41–69; Zacklin, *The United Nations and Rhodesia* (1974); Barbier, RG, 81 (1977), pp 735–771; Nkala, *The United Nations International Law and the Rhodesian Independence Crisis* (1985); Dugard, *Recognition and the United Nations* (1987), pp 90–8.

As to sanctions against Southern Rhodesia, see SC Res 217 (1965), 221 (1966) (authorising a blockade of the Mozambique port of Beira), 232 (1966) and 253 (1968); and Fawcett, BY, 41 (1965–66), pp 103–21; Cryer, Aust YBIL, 1966, pp 85–98; Hopkins, CLJ, 1967, pp 1–5; Halderman, ICLQ, 17 (1968), pp 672–705; McDougal and Reisman, AJ, 62 (1968), pp 1–19; Howell, AJ, 63 (1969), pp 771–82; Cadoux, AFDI, 26 (1980), pp 9, 22–9; Willaert, Rev Belge, 18 (1984–85), pp 216–45. Sanctions ended in 1979 (see SC Res 460), falling away automatically, in the view of the UK, with the return to legality of the colony (see UK statement in the Security Council on 21 December 1979).

[9] SC Res 217. In the same resolution the Security Council called on all states not to entertain any diplomatic 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 shall immediately sever 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: *Kangai v Vance*, AJ, 73 (1979), p 297.

'Member 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'.[10] States generally observed these obligations to withhold recognition.[11] The situation was regularised at the Constitutional Conference held at Lancaster House, London, from 10 September to 15 December 1979,[12] which led to the resumption of constitutional authority by the United Kingdom[13] and then, after elections in Rhodesia, to independence for that country in 1980 under the name of Zimbabwe.[14]

The proclamation of a Turkish Cypriot State in the northern part of Cyprus 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.[16] Although the only effective administration in that part of Cyprus, that state and its

[10] SC Res 277 (18 March 1970). See also SC Res 288 (17 November 1970) and GA Res 2946 (XXVII) (1972). After the illegal regime had in 1978 reached an 'internal settlement' with certain other elements in Rhodesia regarding the future of the country, the Security Council declared any such settlement 'illegal and unacceptable' and called upon all states 'not to accord any recognition to such settlement': SC Res 423 (14 March 1978).

[11] The Security Council established a Committee to keep under review the implementation of the various sanctions adopted by the Council: SC Res 253 (1968). The Committee was dissolved by SC Res 460 (1979).

[12] Cmd R.ZR.3–1980; ILM, 19 (1980), pp 387–408. The Security Council endorsed the Lancaster House Agreements in SC Res 460 (1979) and 463 (1980), and called for states to terminate the measures taken against Southern Rhodesia pursuant to earlier resolutions. See Rousseau, RG, 84 (1980), pp 413–18.

[13] Southern Rhodesia Act 1979; Southern Rhodesia Constituted (Interim Provisions) Order 1979 (SI 1979 No 1571).

[14] Zimbabwe Act 1979; Zimbabwe Constitution Order 1979 (SI 1979 No 1600). And see Cadoux, AFDI, 26 (1980), pp 9–29.

[15] See generally Coussirat-Coustère, AFDI, 20 (1974), pp 437–55; RG, 79 (1975), pp 1109–11; Tornaritis, *The Turkish Invasion of Cyprus and Legal Problems Arising Therefrom* (1975); contributions by Wolfe, Jacovides, Tamkoc and Wimetz, *AS Proceedings* (1984), pp 107–32; Necatigil, *Our Republic in Perspective* (1985), and *The Cyprus Question and the Turkish Position in International Law* (1989); Dugard, *Recognition and the United Nations* (1987), pp 108–11. See also § 131, n 41.

The activities of Turkish forces in Cyprus gave rise to proceedings brought by Cyprus against Turkey before the European Commission of Human Rights. The Commission regarded the Government of the Republic of Cyprus as competent to institute the proceedings, notwithstanding its non-recognition by Turkey; and held the Turkish Federated State of Cyprus not to be an entity exercising jurisdiction in northern Cyprus. See *Cyprus v Turkey*, YBECHR, 18 (1975), pp 82, 112–20, and YBECHR, 21 (1978), pp 100, 226–34.

[16] This state was not, however, proclaimed as a sovereign independent state but as an autonomous state within a federation – the federation in question not then existing, but being envisaged as a federal state of Cyprus, the other constituent part of which would be a Greek Cypriot State. In September 1975 the Turkish Cypriot Assembly authorised the declaration of the Turkish Cypriot part of Cyprus as a fully independent state.

governing authorities have not been generally recognised.[17] 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.[18] In November 1983 the 'Turkish Republic of Northern Cyprus' was proclaimed as an independent state, which has been recognised only by Turkey;[19] the Security Council regarded the proclamation as 'invalid'[20] (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.[21] 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 independence of the Transkei to be 'invalid' and called on governments 'to deny any form of recognition to the so-called independent Transkei'.[22] South Africa has subsequently purported to establish further similar independent states – Bophuthatswana (1977),[23] Venda (1979)[24] and Ciskei (1981)[25] – 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:[26] although these various resolutions are not binding, states have in practice complied with them.[27]

[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 Kyprianou': *Parliamentary Debates (Lords)*, vol 394, col 984. See also *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] 1 QB 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.

[20] SC Res 541 (19 November 1983).

[21] See ILM, 15 (1976), pp 1136, 1175. See generally Fischer, AFDI, 22 (1976), pp 63–76; Crawford, *The Creation of States in International Law* (1979), pp 222–7; Klein, ZöV, 39 (1979), pp 469–94; Dugard, *Recognition and the United Nations* (1987), pp 98–108.

[22] GA Res 31/6A (1976), endorsed by the Security Council in SC Res 402 (1976) and 407 (1977). For comment see Witkin, Harv ILJ, 18 (1977), pp 464–7 and 605–27. See also the OAU resolution of July 1976: ILM, 15 (1976), p 1221.

[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; see also the statement made by the President of the Security Council, on behalf of the Council, on 15 December 1981 (S/PV 2315). See also *GUR Corpn 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 no 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 348–50; Beck, *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 Juridical YB, 1979, pp 180–1.

(2) Absorption of one state by another

The total absorption of an existing state by another state results in the disappearance of the former and at the same time the enlargement of the latter's territories and the alteration of its boundaries.[28] The usual way in which the disappearance of the former community is acknowledged is by recognising the successor's title to the newly acquired territory *de jure*.[29] Non-recognition of that title because the circumstances of its acquisition involved a violation of international law will thus normally leave intact the previous recognition of the state which has in fact disappeared. Situations of this kind occurred, for example,[30] with the incorporation of Abyssinia into Italy in 1935, of Austria into Germany in 1938, and of the Baltic States of Latvia, Lithuania and Estonia into the Soviet Union in 1940. On each of these occasions the practice of other states as regards non-recognition of the absorption has varied. Although the Abyssinia situation[31] was considered in the League of Nations, there was no disposition on the part of the members of the League to enforce any obligation to withhold recognition of Italy's seizure of Abyssinia.[32] Many states eventually withdrew recognition of Abyssinia as an independent state and recognised Italy as the *de jure* sovereign of the country;[33]

[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), § 166ff.

[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; Whiteman, *Digest*, 2, pp 321–7; and § 72, n 2.

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.

As to the annexation by Germany of the Free City of Danzig in September 1939, see *US ex rel Zeller v Watkins*, ILR, 15 (1948), No 51; *Re Kruger*, ILR, 18 (1951), No 68 and *Re Nix*, *ibid*, No 69; *British and Polish Trade Bank AG v Handelmaatschappij Albert de Bary and Co*, ILR, 21 (1954), p 485; *Re Wetzel*, ILR, 24 (1957), p 434; and see generally § 83, n 1(2).

[31] 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* (1938); Marek, *Identity and Continuity of States in Public International Law* (1954), pp 263–82; § 46, nn 13, 14; and § 265, n 2.

[32] Thus, although in the course of the Italo–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 (§ 54, 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 the light of 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 1938: *Parliamentary Debates (Commons)*, vol 334, col 1099. And see Rousseau, *La Conflit Italo-Ethiopien devant le droit international* (1938), pp 251 *et seq*.

[33] 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,[34] and this was confirmed in the Peace Treaty with Italy.[35]

As regards Austria,[36] Germany's absorption of Austria was initially widely recognised and Austria was regarded as having ceased to exist as a separate state.[37] 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 *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] 1 Ch 182. See also § 50, n 10, as to credentials addressed to 'the King of Italy and Emperor of Abyssinia'.

34 See, as to the UK, *Parliamentary Debates (Commons)*, vol 362, col 139 (3 July 1940); *Azazh Kebbeda Tesema 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 when 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 (Cmd 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 (Cmd 6584, Ethiopia No 1 (1945)). See also Bentwich, BY, 22 (1945), pp 275–78.

35 See Arts 33–38. The treaty also provided for Italy to pay reparations to Ethiopia of $25,000.000: Art 74B.

36 See generally Marek, *Identity and Continuity of States in Public International Law* (1954), pp 338–68; Whiteman, *Digest*, 2, pp 327–36; Toynbee, *Survey* (1938), i, pp 179–259; Klinghoffer, *Les Aspects juridiques de l'occupation de l'Autriche* (1943); Herbert Wright, AJ, 38 (1944), pp 621–35; Reut-Nicoluss, *Grotius Society*, 39 (1953), pp 119–31; Clute, *The International Legal Status of Austria, 1938–45* (1962); Seidl-Hohenveldern, *Die Überleitung von Herrschaftsverhältnissen an Beispiel Österreichs* (1982) and in *Staatliche Kontinuität* (eds Meissner and Zieger, 1983), pp 61–72. On the question of the continuity of Austria subsequent to her annexation by Germany in 1938 see Verosta, *Die internationale Stellung Österreichs* (1947). As to Austria's present position generally, see § 98.

37 Thus a few days after the laws were passed providing for Austria's incorporation into Germany, the British Foreign Secretary stated in Parliament that the British Government 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 in accordance with international law Germany should succeed to the duties and obligations of Austria, and considered the US–Austrian Extradition Treaty to be extinct whilst the US–German Extradition Treaty was extended 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, later decisions accepted Austria's incorporation into Germany: *Land Oberösterreich v Gude*, *ibid*, No 34; *US ex rel Zdunic v Uhl*, AD, 10 (1941–42), No 164; *US ex rel D'Esquiva v Uhl*, AD, 12 (1943–45), No 8; *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: *Eck v Nederlandsch Amerikaansche Stoomvaart*, AD, 13 (1946), No 13; *Seery v US*, ILR, 22 (1955), p 398. See also a French case, *Nemec v Etablissements LAB*, *ibid*, p 100, holding the annexation null and void; also *Infringement of Copyright (Austria) Case*, ILR, 18 (1951), No 19, holding Austria to have continued as a state. However, Austria's annexation has been recognised *de jure* in the Netherlands: *Re Ten Amsterdam Oil Companies*, AD, 13 (1946), No 20; and *Veenendaal v Pommeranz*, AD, 15 (1948), No 55.

changed, and in the Moscow Declaration of 1 November 1943[38] 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 continued to exist as a state.[39] In 1945 a number of states, including the major powers, recognised the Austrian Government; and in Article 1 of the Austrian State Treaty 1955[40] the Allied Powers recognised that Austria is 're-established as a sovereign, independent and democratic 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 appearance of a voluntary union, but which in reality amounted to a forced absorption by the Soviet Union, scarcely distinguishable from annexation.[41] Some countries, including the United Kingdom,[42] 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;[43] others such as the United States of America,[44] refused all recognition of their incorporation into

38 BFSP, 161 (1954), p 288.

39 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 59; *Austro-German Extradition Case*, ILR, 23 (1955), p 364. But cf *Loss of Nationality (Germany) Case* (1965), ILR, 45, p 353.

40 TS No 58 (1957).

41 See generally, Marek, *Identity and Continuity of States in Public International Law* (1954), pp 369–416; Kavass and Sprudzs (eds), *Baltic States* (1972) (Report of the US House of Representatives, 1954); Timmermans, Neth ILR, 32 (1985), pp 289–94; Meissner, in *Staatliche Kontinuität* (eds Meissner and Zieger, 1983).

42 See eg *Parliamentary Debates (Lords)*, vol 448, col 345 (15 February 1984). See also *A/C Tallina Laevauhisus v Tallina Shipping Co* (1946) 79 Lloyd's Rep 245; (1947) 80 Lloyd's Rep 99; *Re Feivel Pikelny Estate* (1955), BY, 22 (1955–56), pp 288–95; ILR, 22 (1955), p 97. Persons who were diplomatic and consular representatives of the Baltic States in the UK in 1940 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, 56 (1985), pp 389–90.

43 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), p 180, and 22 (1955), p 230, and the view of the Federal German Government cited in AJ, 51 (1957), pp 126–7. The Netherlands also appears to recognise the incorporation: *Poortensdijk Ltd v Soviet Republic of Latvia* (1942), AD, 11 (1919–42), No 75; *Lesser v Rotterdamsche Bank*, ILR, 20 (1953), p 57, and *Kling v Lesser and Rotterdamsche 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 Elise*, AD, 15 (1948), No 50, and the comment thereon in BY, 26 (1949), pp 427–30. See also the decision of a Belgian court in *Pulenciks v Augustovskis*, ILR, 18 (1951), No 20; and of an Irish court in *The Ramava*, AD, 10 (1941–42), No 20.

44 See the cases cited at § 56, n 27. See also *Gerbaud v Meden*, ILR, 18 (1951), No 82, for a similar decision of the French Cour 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.[45]

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.[45a]

(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 Strip[48] 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]

For rejection of the view that the Final Act of the Conference on Security and Cooperation in Europe, signed at Helsinki in 1975 (ILM, 14 (1975), p 1292) might have had the effect of recognising the Soviet Union's sovereignty over the Baltic States, see Russell, AJ, 70 (1976), at pp 249–53, and UKMIL, BY, 50 (1979)), p 293.

45 See § 40, n 3; and RG, 94 (1990), pp 774–82.

45a See generally § 127, n 44.

46 Israel's declaration of statehood applied to the area allocated to a Jewish State under the partition plan recommended by the UN (but never given effect) in 1947; that plan allocated other territory, including the West Bank and the Gaza Strip, to an Arab State, and envisaged Jerusalem having an international status. The territorial position reached at the end of the Arab–Israeli hostilities which began in 1948 were, with only minor changes, recorded in the territorial demarcation lines incorporated in the armistice agreements concluded in 1949, although those lines were expressly denied political significance (but in practice they lasted until the 1967 hostilities).

47 ILM, 18 (1979), p 362, and see also p 530.

48 As to the position in the Gaza Strip, see *Weiss v Inspector-General of the Police*, ILR, 26 (1958–II), p 210.

49 See generally Falaize, RG, 62 (1958), pp 618–54; Cattan, *Palestine and International Law* (1973); Gerson, Harv ILJ, 14 (1973), pp 1–49, and *Israel, the West Bank and International Law* (1978); contributions in *The Arab–Israeli Conflict* (ed Moore, vol 1, 1974), by Jones (pp 915–28), E Lauterpacht (pp 929–1009) and Pfaff (pp 1010–62); van der Craen, *Rev Belge*, 14 (1978–79), pp 500–38; Mallinson and Mallinson, *An International Law Analysis of the Major United Nations Resolutions concerning the Palestine Question* (1979) (UN Doc ST/SG/Series F/4), and *The Palestine Problem* (1986) (with at pp 188–204 consideration of the Palestinians as a 'people'); Dugard, *Recognition and the United Nations* (1987), pp 111–17; Roberts, AJ, 84 (1990), pp 44–103, 720–2; Rostow, *ibid.*, pp 717–20. Note also the possibility that the Gaza Strip and the West Bank might be considered non-self-governing territories: Arsanjani, ICLQ, 31 (1982), pp 426–50.

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]

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 occupant, not as a sovereign authority. At the 1974 Summit of Arab Heads of State they affirmed 'the right of the Palestine people to establish an independent national authority, under the leadership of the PLO in its capacity as the sole legitimate representative of the Palestine 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 amounts to a formal renunciation of Jordanian sovereignty. It did, however, pave the way for the declaration of an independent State of Palestine in November 1988: see § 40, n 2.

50 See RG, 85 (1981), pp 182–3; Crane, Harv IJL, 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.

51 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; the UK's consular post is based on the city's international status, and no exequatur or other authority for its establishment is sought or obtained from Israel. Notwithstanding Egypt's non-recognition in 1977 of Israel, or of Israel's rights in Jerusalem, President Sadat of Egypt officially visited Jerusalem in November of that year, and addressed the Israeli Parliament; similarly, in March 1979, President Carter of the USA visited Jerusalem and addressed the Israeli Parliament. The views of Egypt, Israel and the USA as to the status of Jerusalem were restated in exchanges of letters between their leaders at the time of the conclusion of the 'Camp David Agreement' in September 1978 (§ 40, n 12).

52 See *Arab Bank Ltd v Barclay's Bank DC & O* [1954] AC 495; *R v Governor of Brixton Prison, ex parte Schtraks* [1964] AC 556. See also *Re an Inquiry by the Italian Foreign Ministry* (1958), ILR, 26, p 68. For decisions of Israeli courts regarding the status of Jerusalem see *Avalon Hanzalis v Greek Orthodox Patriarchate Religious Court* (1969), ILR, 48, p 93; *Muhammad Abdullah Iwad and Zeev Shimson Maches v Military Court, Hebron District, and Military Prosecutor for the West Bank Region, IDF, ibid*, p 63.

In 1950 the British Government recognised Israel's *de facto* authority over West Jerusalem, and Jordan's *de facto* authority over East Jerusalem: *Parliamentary Debates (Commons)*, vol 474, cols 1137–9 (27 April 1950). After Israel's occupation of East Jerusalem in 1967, the British Government have recognised the rights of the Israeli authorities there to the rights, powers and obligations of a military occupant: see the certificate provided to a UK Court in 1987, cited by White, ICLQ, 37 (1988), p 986.

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.[54] 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.[55] 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';[56] the Assembly and Security Council have on several occasions referred, in relation to Jerusalem as well as to the other territories occupied by Israel, to the inadmissibility of the acquisition of territory by force;[57] 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;[58] 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',[59] and that Israel's decision in 1981[60] to impose its laws, jurisdiction and administration in the Golan Heights was 'null and void and without international legal effect'.[61]

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 states including, eventually, Portugal.[62] The United Nations in 1975 condemned armed attacks by Indonesia upon the neighbouring Portuguese territory of East Timor, but failed to condemn Indonesia's seizure of that territory the following year and its incorporation into Indonesia.[63]

54 See eg as to the view of the British Government, above, in the preceding note; and as to the views of the US Government, AJ, 72 (1978), pp 908–10. Many of the resolutions adopted by the General Assembly and Security Council in relation to these matters state or assume that the relevant rules of international law in the area are those appropriate to military occupation, including in particular the Fourth Geneva Convention 1949.

55 A committee to examine the situation relating to these settlements was established by the Security Council in 1979: SC Res 446.

56 See GA Res 2253 and GA Res 2254 (ES–V) (1967).

57 Eg SC Res 242 (1967), and SC Res 252 (1968), and SC Res 497 (1981).

58 GA Res 2949 (XXVII) (1972). As to action within the ICAO arising out of Israel's control of Jerusalem airport, see Meron, AJ, 72 (1978), at pp 551–7.

59 SC Res 465 (1980).

60 ILM, 21 (1982), p 163.

61 SC Res 497 (1981). See also Coussirat-Coustère, AFDI, 28 (1982), pp 185–214.

62 By an agreement concluded with India in 1974: RG, 79 (1975), p 837. See generally on the seizure of Goa, Wright, AJ, 56 (1962), pp 617–32; Flory, AFDI, 8 (1962), pp 476–91; and § 127, n 19. The British Government recognised the Government of India as the *de facto* government of Goa in 1963: *Parliamentary Debates (Commons)*, vol 708, col 31 (written answers, 31 March 1965).

63 See GA Res 3485 (XXX) (1975); SC Res 384 (1975) and 389 (1976); RG, 80 (1976), pp 640–3, 958–9. See also RG, 82 (1978), p 1085, for Australian recognition of East Timor as part of Indonesia. Consistently with that recognition Australia, in 1989, concluded with Indonesia an off-shore delimitation agreement relating to the maritime area between East Timor and Australia: ILM, 29 (1990), p 469. The UN still regards Portugal as the administering authority in relation to East Timor. See Guilhaudis, AFDI, 23 (1977), pp 307–24; § 85, n 23. In February 1991 Portugal instituted proceedings in the ICJ against Australia on issues arising out of Australia's dealings with Indonesia in respect of East Timor.

South Africa's presence in Namibia (formerly South West Africa)[64] 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.[65] This did not lead to South Africa vacating Namibia. The Security Council passed a number of resolutions[66] 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.[67] 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.[68] The Security Council and General Assembly accepted the Court's advice.[69] States generally refrained from recognising as lawful South Africa's presence in Namibia, which attained independence in 1990.

§ 56 Consequences of non-recognition The consequences of non-recognition[1] depend to some extent on the reason for non-recognition.[2] Certain consequences, however, apply generally. First, non-recognition alone does not

64 See generally § 88. See also Dugard, *Recognition and the United Nations* (1987), pp 117–22.

65 GA Res 2145 (XXI).

66 See in particular resolutions 264 and 269 of 1969, and 276 and 283 of 1970.

67 SC Res 284 (1970).

68 ICJ Rep (1971), p 16. As to the consequences to be drawn from the Court's conclusions, see below, pp 199–201.

69 SC Res 301 (1971) and GA Res 2871 (XXVI) (1971): see § 88.

1 On the position of unrecognised governments generally see Houghton, Indiana Law Rev, 4 (1928–29), pp 519 *et seq* and Minn Law Rev, 13 (1929), pp 216 *et seq*; Bushe-Fox, BY, 12 (1931), pp 63–75, and 13 (1932), pp 39–48; Wright, AJ, 26 (1932), pp 342–48; Kallis, Vir Law Rev, 20 (1933–34) pp 1 *et seq*; Makarov, ZöV, 4 (1934), pp 1–24; Doukas, *ibid*, 35 (1937), pp 1071–98; Erdmann, *Nichtanerkannte Staaten und Regierungen* (1966); Greig, LQR, 83 (1967), pp 96–145; Frowein, *Das de facto Regime im Völkerrecht* (1968); Verhoeven, Hag R, 192 (1985), i, pp 9–232. See also § 48, § 54, n 1, and this §, n 25.

Non-recognition of a rebel regime does not act as an estoppel against another state in presenting a claim to the parent state arising out of acts of the rebels: see § 44, n 8.

2 Non-recognition may arise from the illegality and invalidity of the situation, or from a particular obligation to withhold recognition, or from the failure of the community in question to satisfy the requirements for recognition, or from the withholding of recognition, either for reasons of policy or because of particular legal considerations, notwithstanding that the conditions of effectiveness normally calling for recognition are fully satisfied. Where the unrecognised situation involves a violation of international law or some particular obligation to withhold recogni-

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,[3] 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 be delayed until the government is recognised. Treaties will continue in force,[4] 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.[5] The non-recognised government will not be regarded by non-recognising states as competent to make its state a party to a multilateral treaty,[6] or to act on behalf of the state in legal proceedings;[7] and agents sent abroad by the non-recognised government will not have diplomatic, consular or other official status as regards a state withholding recognition.[8] 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,[9] treaties with it as still in force, and its diplomatic and consular officers as still entitled to act as such.[10]

tion, and the illegality of the situation is such that international law itself attributes invalidity to it, the lack of legal effect of that situation and consequences directly flowing from it results rather from the operation of international law than from the consequential non-recognition.

3 See n 28ff.

4 See § 44, n 8.

5 See *Zalcmanis v US* (1959), ILR, 28, p 95; *Re Nepogodin's Estate*, ILR, 22 (1955), p 90; *Re Eng's Estate* (1964), ILR, 35, p 235.

6 See eg, as to the refusal of the UK to regard the signature by the Nationalist Government of China of the International Sugar Agreements of 1953 and 1958 as a valid signature on behalf of China: Whiteman, *Digest*, 2, pp 53–4; and ICLQ, 6 (1957), pp 302–3, 508–9. See also ICLQ, 7 (1958), p 523, and 8 (1959), p 159. As to the effect of non-recognition of a government upon its state's membership of an international organisation, see § 53.

7 *Antuñez v Matte, Ross et Munroë et Cie, Clunet*, 20 (1893), p 824; *Sté des Forges et Chantiers de la Méditerrannée v Matte et Ross, Clunet*, 18 (1891), p 871; *Campuzano v Spanish Government*, AD, 11 (1919–42), No 43.

But the non-recognition of the applicant state by the respondent state may not preclude the institution of international proceedings: see *Cyprus v Turkey*, YBECHR, 18 (1975), pp 82, 112–16, and 21 (1978), pp 100, 224–30.

8 See eg UKMIL, BY, 54 (1983), p 384, as to the absence of any recognised government which can appoint diplomatic representatives for Latvia, Estonia and Lithuania. Informal and unofficial contacts with unrecognised authorities may still occur: see § 50, nn 10–13. Art 82 of the Vienna Convention on the representation of states in their relations with International Organisations of a Universal Character 1975 provides for the enjoyment of privileges and immunities despite non-recognition of the sending state or its government.

9 See *Republic of Latvia Case*, ILR, 20 (1953), p 180, and ILR, 22 (1955), p 230; *Zalcmanis v US* (1959), ILR, 28, p 95; *Nemec v Etablissements LAB*, ILR, 22 (1955), p 100.

10 See eg *Re Kovas' Estate* (1958), ILR, 26, p 76, and other cases cited below, n 27, concerning the non-recognition of the absorption of the Baltic States into the Soviet Union; *Gerbaud v Meden*, ILR, 18 (1951), No 82.

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,[11] 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,[12] 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[13] 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.[14]

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*.[15] 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

11 See *Re Harshaw Chemical Company's Patent* [1965] RPC 97 (and ILR, 41, p 15).

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 Cie 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 Whiteman, *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 I), p 5. As to the consequence that non-recognition involves refusal to accept passports issued by the unrecognised authorities, see *Parliamentary Debates (Commons)*, vol 606, col 26 (written answers, 3 June 1959), and E Lauterpacht, *Contemporary Practice of the UK* (1964 I), pp 27–8. Cf *Kangai 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 As to judicial appointments by an unrecognised state see *Krimtschansky v Offices de l'Etat Civil, Liège*, AD, 5 (1929–30), No 26; *Adams v Adams* [1970] 3 WLR 934; *Re James* [1977] 1 All ER 364. As to appointments of officials, see those cases cited at nn 27 and 28, relating to acts of notaries acting pursuant to the authority of an unrecognised regime; and also *Bilang v Rigg* (1971), ILR, 48, p 30. It is British practice not to accept passport or other travel documents issued by unrecognised regimes, nor to endorse entry clearances or visas on them, a separate declaration of identity made and authorised before the appropriate British authorised being the usual acceptable alternative: see Statement of Changes in Immigration Rules, 1990, para 10, and UKMIL, BY, 51 (1980), p 368, 53 (1982), p 356, and 54 (1983), p 385.

14 See § 47. In the case concerning *Certain German Interests in Polish Upper Silesia* (1926) the PCIJ 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 casu*, 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.

15 ICJ Rep (1971), p 16. See p 197 and § 88.

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.[16] 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.[17] 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.'[18] 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; thus 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

[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 recognition (see 55, nn 8–10). 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 § 50, n 9, as to the UK's consular relations with Southern Rhodesia in the early stages of its rebellion).

[17] ICJ Rep (1971), at p 55.

[18] See also SC Res 283 (1970). The last state to close its consulate in Windhoek did so in October 1977: RG, 82 (1978), p 626.

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).[19] In a later resolution[20] 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.[21] Furthermore, where the situation does not involve a violation of international law, non-recognition does not make it illegal and the principle *ex iniuria ius non oritur* 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.[22] 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,[23] or as a subordinate agency of another state which is duly recognised.[24] 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[25] towards the acts of an unrecognised

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

[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.

[21] 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 *Nemec v 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 from which certain consequences may flow: ILR, 22 (1955), p 100.

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

[23] See § 49, n 19.

[24] See § 38, n 3.

[25] See generally on the earlier judicial practice in the USA, Dickinson, AJ, 25 (1931), pp 214–37; Tennant, Mich Law Rev, 29 (1930–31), pp 708–41; Borchard, AJ, 26 (1932), pp 261–71. For a learned and trenchant although somewhat one-sided plea for an independent judicial treatment of these questions see Jaffe, *Judicial Aspects of Foreign Relations* (1933), and Mann, *Grotius Society*, 29 (1943), pp 143–70. See also Whiteman, *Digest*, 2, pp 604–65, and *Restatement (Third)*, i, § 205; Nedjati, ICLQ, 30 (1981), pp 388–415.

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.[26] In some cases the courts have rigidly followed 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.[27] In other cases, however, particularly where the issues before them concern ordinary matters of private law not affecting the public policy of the state,[28] courts have given preponderant

[26] See § 460.

[27] See *Luther v Sagor* [1921] 1 KB 456. In consequence of the refusal of the USA to recognise the annexation of the Baltic Republics by Soviet Russia in 1939 the US 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 Kotkas*, AD, 10 (1941–42), No 15; *The Signe*, *ibid*, Nos 16 and 19; *The Maret* (1944) F (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 Kovas' Estate* (1958), ILR, 26, p 76; *Re Mitzkel'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 Eire in *The Ramava*, AD, 10 (1941–42), No 20; of French courts in *Héritiers Bouniatian v Soc Optorg, Clunet*, 51 (1924), p 133, and *Jellinek v Lévy* (1940), RG, 51 (1947), p 250; and of a Moroccan court in *Attorney-General v Salomon Toledano* (1963), ILR, 40, p 40. See also *Johnson v Briggs Inc*, AD, 9 (1938–40), No 33, 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 Zeiss Stiftung v Rayner and Keeler* [1967] AC 853 Lord Wilberforce regarded it as still open to English courts to follow the approach of some US courts 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 recognition to the actual facts or realities found to exist in the territory in question' (at p 954).

In 1933, in *Salimoff v Standard Oil Company*, 262 NY 220; 186 NE 679; AD, 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 recognise it was due to reasons other than absence of effectiveness. 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 ordinary rules 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 absorption 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 Alexandravicus' 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 *Hausner* 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.

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.[29] 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.[30] They may also take judicial notice of the fact that an unrecognised authority is in control of a particular territory.[31] 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 which in the court's view do not require them to be interpreted in their strict and formal sense.[32]

[29] 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, 43–7. 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 30; *Oguebie v Odumwoke* (1979), ILR, 70, p 17. And see cases cited at § 49, n 28, and several decisions of Japanese courts cited by Tsutsui, ICLQ, 37 (1988), pp 325, 326–31, including the *Kokaryo* case (1982), on which see also Heuser, ZöV, 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 an applicant for asylum.

[30] See eg *Russian Reinsurance Co v Stoddard*, AD, 3 (1925–26), No 40; *Tcherniak v Tcherniak*, AD, 4 (1927–28), No 39; *Eck v Nederlandsch Amerikaansche Stoomvaart*, AD, 13 (1946), No 13; *Pulenciks v Augustorskis*, ILR, 18 (1951), No 20; *R v Governor of Brixton Prison, ex parte Schtraks* [1964] AC 556; *VEB Carl Zeiss Jena v Carl Zeiss Heidenheim* (1965), ILR, 72, p 550; *Stroganoff-Scherbatoff v Bensimon et Cie* (1966), ILR, 47, p 72; *Re Estate of Bielinis* (1967), AJ, 62 (1968), p 499; *Carl Zeiss Stiftung v VEB Carl Zeiss Jena* (1970), ILR, 61, p 36; *Warenzeichenverband Regekungstechnik EV v Ministry of Trade and Industry* (1975), ILR, 77, p 571; *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] 1 QB 205, 218 (*per* Lord Denning MR), although the House of Lords did not find it necessary to decide whether notice should be taken on the 'laws' passed by the non-recognised Turkish Federated State of Cyprus: [1979] AC 508 (and see comment by Shaw, LQR, 94 (1978), pp 500–5; Merrills, ICLQ, 28 (1979), pp 523–5). See generally on the relationship between recognition and the application of foreign laws at § 47, n 9. In that connection note the observation of Lord Wilberforce in *Carl Zeiss Stiftung v Rayner and Keeler* [1967] AC 853, that recognition of a law does not necessarily entail recognition of the law-maker as a government with sovereign power (at p 961); see also the *Levi Claim*, ILR, 24 (1957), pp 303, 311.

The decision of the House of Lords in *Arab 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.

[31] So as, for example, to be able to conclude that the consul of the established, and recognised, government cannot in fact transmit funds to the territory controlled by the unrecognised authority (*Re Yee Yoke Ban'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 Shaughnessy*, ILR, 21 (1954), p 225; *US ex rel Tom Man v Shaughnessy*, ILR, 23 (1956), p 397, affirmed (1959) ILR, 28, p 93).

[32] 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 Cechofracht Co Ltd* [1956] 2 All ER 769 (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

Hall, § 2 Hackworth, i, § 56 Fiore, i, §§ 321–32, and *Code*, §§ 124–46 Borchard § 84 Redslob, RI (Paris), 13 (1934), pp 445–83 Cansacchi, *Comunicazioni e studi*, 4 (1952), pp 25–97, and Hag R, 130 (1970), ii, pp 1–94 Marek, *Identity and Continuity of States in Public International Law* (1954) Kunz, AJ, 49 (1955), pp 68–76 McNair, *Law of Treaties* (1961), ch 37 Crawford, *The Creation of States in International Law* (1979) Meissner and Zieger (eds), *Staatliche Kontinuität unter besonderer Berücksichtigung der Rechtslage Deutschands* (1983).

§ 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[1] or belligerent occupation. Their territories may increase or decrease. Nevertheless, in spite of such changes a state remains the same international person.[2]

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[3] 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

that effect); *Reel v Holder* [1981] 3 All ER 321 (holding Taiwan to be a 'country' for purposes of the International Athletic Federation). The terms of statutes may assist in this respect, where they are drafted in terms of 'territories' or 'countries' rather than 'states': see eg Copyright Act 1956, s 48. See also § 414, n 5, as to the term 'country'.

1 See § 67. See also *Attorney-General of the Republic v Mustafa Ibrahim* (1964), ILR, 48, p 6.

2 See *Masinimport v Scottish Mechanical Light Industries Ltd*, 1976, SLT 245; ILR, 74, p 559, involving both constitutional change and territorial variation. See also the view of the General Assembly's Sixth Committee in 1947: 'That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the organization of the United Nations does not cease to be a Member simply because its constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.' (UNYB (1947–48), p 40.) This view was expressed in the context of the emergence of Pakistan out of territory formerly constituting India: see also § 64, n 3.

As to Yugoslavia as a continuation of the Kingdom of Serbia see § 34, n 1, para 5; as to the position of Austria after 1918, and again during and after the Second World War, see § 55, n 36, and § 59, n 7; and as to Germany after the same war, see § 59, n 8.

3 See § 43.

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 affect the state 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,[4] which hold it responsible for acts by a former government or Head of State,[5] or which require it to honour the public debt of a predecessor regime.[6] Similarly, a new regime is entitled to represent the state in international organisations of which it is a member,[7] litigation against the state begun under one government continues after a new government comes to power,[8] the previous regime's

4 See 47, n 3, and § 623. See also *Shehadeh v Commissioner of Prisons, Jerusalem*, AD, 14 (1947), No 16; *Re Nepogodin's Estate* (1955), AJ, 50 (1956), p 141; *M/V Francesco Corsi v M/S Gorakhram Gokalchand* (1958), ILR, 31, p 20; *Masinimport v Scottish Mechanical Light Industries Ltd* (1976), SLT, 245; ILR, 74, p 559; BY, 48 (1976–77), p 333; *US Diplomatic Staff in Teheran Case*, ICJ Rep (1980), p 3 (in which the revolution in Iran resulting in the Shah being deposed did not affect Iran's continuing obligations under treaties concluded before the revolution).

5 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 Ch D 348. It is believed that this responsibility exists, whether or not the former Head of State was recognised by the state demanding redress.

See also *Henke Claim*, ILR, 26 (1958–II), p 276; *Eis Claim* (1959), ILR, 30, p 116. Cf the *Tinoco Arbitration* (1923), RIAA, 1, p 369.

6 See *Riis Claim*, ILR, 26 (1958–II), 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 contributions to the ILO.

The repudiation 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 moneys 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 pp 178–9.

8 See eg *Lithgow and Others* (1984, 1986), ILR, 75, p 439, in which a new British Government continued 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.

contracts bind its successor,[9] and it is entitled to exercise proprietary rights over the state's property.[10]

§ 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[1] 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 states without interfering with their independence proper,[2] 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,[3] its character as an international person is affected. Again, if several hitherto independent states enter into a federal state,[4] 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.[5]

§ 59 Extinction of states A state ceases to be an international person when it ceases to exist.[1] 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 Serb–Croat–Slovene State after the First World War), or when two or more states merge to form a single new state[2] (as may happen upon the formation of a new federal state,[3] 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.[4] 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;[5]

(b) when a state breaks up so that its whole territory henceforth comprises two or more new states.[6] 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,[7] and after the defeat of Germany at the end of the Second World War;[8]

[9] See *Tietz v People's Republic of Bulgaria* (1959), ILR, 28, p 369.

[10] See § 47, n 7. See also RG, 85 (1981), pp 406–9, for the assertion by the Soviet Union of rights over the wreck of a former Tsarist warship (notwithstanding the Soviet Union's rejection of succession to the former Tsarist government in other respects: see eg n 6).

[1] See § 73.

[2] See §§ 120, 121 where different kinds of these restrictions are discussed.

[3] See § 81.

[4] See § 75.

[5] See § 34, n 9, as to the *Austro-German Customs Union Case* (1931), PCIJ, Series A/B, No 41; and § 77, as to membership of customs unions.

[1] See Raestad, RI, 3rd series, 20 (1939), pp 441–9. Crawford, *The Creation of States in International Law* (1979), pp 417–20.

[2] As eg when Tanganyika and Zanzibar united in 1964 to constitute the new State of Tanzania, or when the People's Democratic Republic of Yemen and the Yemen Arab Republic united in 1990 to form the Republic of Yemen.

[3] See generally, § 75.

[4] See § 55, nn 41–4.

[5] 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.

[6] See eg as to the break-up of the United Arab Republic in 1961, § 63, n 6.

[7] See, in favour of the view that the new Austrian Republic was a new state, Strupp, *Eléments*, § 5, p 110; *contra*, Temperley, iv, pp 417, 418, Soubbotitch, *Effets de la dissolution de l'Autriche-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 Anzilotti, p 86; Sack, *Les Effets des transformations des États*, etc (vol i, 1927); and Udina, *L'estinzione dell' imperio Austro-Ungarico nel diritto internazionale* (2nd ed, 1933); Marek, *The Identity and Continuity of States in Public International Law* (1954), pp 199–236.

The question has also arisen in connection with the old Ottoman Empire and the new Turkish Republic. In the *Ottoman Debt Arbitration* of 1925, it was held that the latter was not a new state, but a continuation of the former; RIAA, 1, p 529. See also Hall, p 116 (n); Hyde, i, § 129; Kelsen, Hag R, 42 (1932), iv, pp 294–97; Balladore Pallieri, p 147; Anzilotti, pp 177–86. As to the end of the Kingdom of Montenegro, see *Re Savini*, decided in October 1927 by the Court of Appeal of Rome: AD, 4 (1927–28), No 106. On the continuity of the Czechoslovak Republic in the years 1938–45 see § 55, nn 3–6; Keruča, *Bulletin de droit tchécoslovaque*, 5 (1947), pp 45–59; Vošta, *O právní kontinuité ceskoslovenské republiky* (1947); and Kojecky, *Ceskoslovensko ve sveile theorie mezindrodního práva a uznání* (1947).

[8] Courts in the Federal Republic of Germany have held the German Reich to continue in existence (but without institutional organs enabling it to act) and the Federal Republic of Germany to be a reorganisation of part of that Germany, and as such identical with it, so that eg treaties concluded by the Reich continue to bind the Federal Republic (see the decision of the Federal Constitutional Court of 26 March 1957, AJ, 52 (1958), p 357; *Trademark Registration Case* (1967), ILR, 59, p 490), although as regards eg territorial extent the identity is only partial (see the decision of the same court of 31 July 1973 in *Re Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic 1972*, ILR, 78, p 150. The relationship between the former Reich and the Federal Republic of Germany is thus in these cases seen as one of identity and continuity, rather than of state succession (*ibid*). The continuity of the Reich in the Federal Republic of Germany has been accepted in other countries: see eg *Re Swane* (1958), ILR, 26 (1958–II), p 577 (Netherlands); *Simon v Taylor* (1974), ILR, 56, p 40 (Singapore). The Federal Republic has similarly, in other respects, adopted the position that it is a continuation of the Reich, and has thus, eg accepted responsibility for the Reich's external debt: see § 63, n 10. See

(c) when a state breaks up into parts all of which become part of other – usually surrounding – states (as with the absorption of the old State of Poland by Russia, Austria and Prussia in 1795);
(d) formerly,[9] when a state has been subjugated, ie annexed by the victorious state after conquest in war (as when the Orange Free State and the South African Republic were absorbed by Great Britain in 1901).

SUCCESSION OF STATES

Barclay, Struycken, Kaufmann, *Studien zur Lehre von der Staatensukzession* (1923) Guggenheim, *Beiträge zur völkerrechtlichen Lehre vom Staatenswechse* (1925) Sayre, AJ, 12 (1918), pp 475–97, and 705–43 Hurst, BY (1924), pp 163–78 Cavaglieri, *Rivista* 3rd series, 3 (1924), pp 26–46, 236–71; *Annuaire*, 36 (1931), i, pp 185–255; RG, 38 (1931), pp 257–96; and RI, 3rd series, 15 (1934), pp 219–48 Kelsen, Hag R, 42 (1932), iv, pp 312–349 Udina, *ibid*, 44 (1933), ii, pp 667–772 Strupp, *ibid*, 47 (1934), i, pp 468–90 Monaco, *Rivista*, 26 (1934), pp 289–320, 462–502 Kaeckenbeeck, BY, 17 (1936), pp 1–18, and Hag R, 59 (1937), i, pp 325–54 Walz, ZV, 21 (1937), pp 1–18 Garner, AJ, 32 (1938), pp 421–38 Canasacchi, *Rivista*, 32 (1940), pp 133–93, 321–78, and *ibid*, 37 (1954), pp 19–71 Castren, Hag R, 78 (1951), i, pp 385–498 McNair, *Law of Treaties* (1961), chs 37–42 Jennings, Hag R, 121 (1967), ii, pp 437–51 O'Connell in *New Nations in International Law and Diplomacy* (ed O'Brien, 1965), pp 7–41; *State Succession in Municipal Law and International Law* (2 vols, 1967); and Hag R, 130 (1970), ii, pp 95–206; and *Grotian Society Papers 1972* (1972), pp 23–75 Bedjaoui, Hag R, 130 (1970), ii, pp 457–585 Verzijl, *International Law in Historical Perspective* (vol 8, 1974) UN Secretariat documents entitled 'Digest of decisions of international tribunals relating to succession of states and governments', with supplement (YBILC (1962), ii, p 131, and *ibid* (1970), ii, p 170; UN Docs A/CN 4/151, and A/CN 4/232), and 'Digest of decisions of national courts relating to succession of states and governments' (YBILC (1963), ii, p 95; Un Doc A/CN 4/157) UN Legislative Series, *Materials on Succession of States* (1967) (ST/LEG/SERIES B/14, and supplement, UN Doc A/CN 4/263) and *Materials on Succession of States in respect of Matters other than Treaties* (1978) (ST/LEG/SERIES B/17) ILC Draft Articles, and Commentary, on Succession of States in respect of Treaties and on Succession of States in respect of State Property, Archives and Debts, YBILC (1974), ii, pt 1, pp 174–269 and *ibid* (1981), ii, pt 2, pp 20–113 Meissner and Zieger (eds), *Staatliche Kontinuität unter besonderer Berücksichtigung der Rechtslage Deutschlands* (1983) Makonnen, Hag R, 200 (1986), v, pp 233–234 *Restatement (Third)*, i, pp 100–14 See also works cited at § 62, n 5; and § 62, n 23.

§ 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.[1] Such a

also several cases noted in AJ, 49 (1955), pp 421–2. But the issue is complex, and judicial decisions and state practice have not been wholly consistent. See generally § 40, n 19 ff, and § 63, n 4.

See also § 64, n 4, as to similar questions which arose on the independence of British India and its simultaneous partition into India and Pakistan.

9 Acquisition of title by conquest is nowadays not permissible: see § 263 ff.

1 This is the definition given in the 8th ed of this volume, p 157. Article 2 of the Vienna Convention on Succession of States in respect of Treaties 1978 and of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (see §§ 69, 70) defines 'succession of States' as meaning 'the replacement of one State by another in the responsibility for the international relations of territory'.

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 full 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 status and at the same time a new state emerging by a process akin to dismemberment or secession;[2] 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,[1] indeed, maintained that a succession of international persons never takes place. Their argument was that

2 It may be noted that the circumstances did not necessarily dictate that the remaining part of British India should be regarded as a continuation of the former British India while Pakistan should be regarded as a new state, since it would have been possible to regard the independent India and Pakistan as equally constituting new states without either of them being regarded as the continuation of the former British India; or even to regard Pakistan as the continuation of former British India and the independent India as the new state resulting from dismemberment or secession. The arrangements made on independence, however, were more consistent with the view expressed in the text. See also § 64, nn 2–4.

1 For instance, Garcis, *Das heutige Völkerrecht* (1879), pp 66–70; Cavaglieri, *La dottrina della successione di stato a stato* (1910); Focherini, *Le successioni degli stati* (1910).

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 1990[1] – or when a state has been subjugated by another state,[1a] 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 existing states merge to form a single state[2] – as Egypt and Syria did in 1958 to form the United Arab Republic,[3] and Tanganyika and Zanzibar did in 1964 to

[1] Developments 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 437–49.

[1a] As to the position of Austria following the *Anschluss* with Germany in 1938, see § 55, nn 36–40.

[2] 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.

[3] See generally Cotran, ICLQ, 8 (1959), pp 346–90; and n 18. See also § 63, n 6 and § 74, n 2.

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 hithero sovereign states combine to become a new federal state[4] (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 their consequences for various cateories of rights and duties may conveniently be set out in some detail, partly to serve as a point of reference when considering the consequences of other situations involving a succession of states.

(a) Treaties[5]

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 neutrality[7] or of any other political nature fall to the ground with 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 personal to it: their continued application, in respect of the successor state, would radically alter the assumptions underlying their operation.

[4] See Huber, *Die Staatensukzession* (1898), pp 163–70; Keith, *The Theory of State Succession* (1907), pp 92–98; and Schoenborn, *Staatensukzessionen* (1913), §§ 8 and 9.

[5] See generally, in addition to works cited in the bibliography preceding § 60, and at §§ 66, nn 5 and 69, de Muralt, *The Problem of State Succession with regard to Treaties* (1954); McNair, *Law of Treaties* (1961), pp 589–664; Wolf, AFDI, 7 (1961), pp 742–51; UN Secretariat documents entitled 'Succession of states in relation to general multilateral treaties of which the Secretary-General is the depositary' (YBILC (1962), ii, p 106; UN Doc A/CN 4/150), 'Succession of states to multilateral treaties' (YBILC (1968), ii, p 1; *ibid* (1969), ii, p 23, and *ibid* (1970), ii, p 61; UN Docs A/CN 4/200, A/CN 4/210, and A/CN 4/225), and 'Succession of states in respect of bilateral treaties' (YBILC (1970), ii, p 102, and *ibid* (1971), ii, pt 2, p 111; UN Docs A/CN 4/229, and A/CN 4/243 and Add 1); Mankiewicz, *Journal of Air Law and Commerce*, 29 (1963), pp 52–64; O'Connell, BY, 39 (1963), pp 54–132, and AJ, 58 (1964), pp 41–61; Kunugi, AJ, 59 (1965), pp 268–90; Herbig, *Staatensukzession und Staatenintegration* (1968); Onory, *La Succession d'états aux traités* (1968), and RG, 72 (1968), pp 565–655; Lung-Fong Chen, *State Succession Relating to Unequal Treaties* (1974); Schaffer, ICLQ, 30 (1981), pp 593–628.

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 later the German Reich, and the subsequent evolution of the German State after 1945, see E Lauterpacht, ICLQ, 5 (1956), pp 414–20; and also *Bertschinger v Bertschinger*, ILR, 22 (1955), p 141.

[6] YBILC (1974), ii, pt 1, p 167, para (49).

[7] On the effect of changes of sovereignty upon neutrality, see Jellinek, *Der automatische Erwerb und Verlust der Staatsangehörigkeit durch völkerrechtliche Vörgänge* (1951) and Graupner, *Grotius Society*, 32 (1946), pp 135–53.

As regards treaties of commerce, extradition[8] 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,[9] because such treaties, although they are non-political in a sense, possess some prominent political features.[10] However, in cases of unification there is support in state practice[11] 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 unification took place. Even as regards those multilateral treaties considered to reflect generally accepted rules of international

[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), ii, 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 unitarian state (at least) in the field of foreign affairs: AJ, 31 (1937), p 739, and comment thereon by Riesenfeld, *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 conclude that there has been succession to an extradition treaty. Thus where a territory to which a treaty has been extended attains its independence, the other party to the treaty will previously have had treaty relations extending to that territory (even if not to the authorities now governing it), and in cases of dismemberment the position will have been similar. In such situations courts have been ready to conclude, on the basis of conduct of the states in question or on other grounds, that extradition treaties continue to apply: see § 63, n 4 (second para), and § 66, n 17 (second para). See also comment by Rousseau, RG, 90 (1986), pp 1030–31, concerning the case of *Garcia-Henríquez* (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, *Law of Treaties* (1961), ch 37(A); 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 Maltese*, 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 Blumenthal* (1979), ILR, 66, p 350 (concerning the unification of Vietnam).

[11] See YBILC (1974), ii, pt 1, pp 254–8, paras (6)–(27), particularly as regards the uniting of Egypt and Syria in 1958 (paras (13)–(16)) and of Tanganyika and Zanzibar in 1964 (paras (17)–(23)). As to the former see also Waldock, YBILC (1971), ii, pt 1, pp 145–53, and (1972), ii, pp 272–7; and as to the latter see Seaton and Maliti in *International Law and African Problems* (Carnegie Endowment, 1968).

It may be that the establishment of a protectorate by one state over another will often have more in common with the creation of a union than with absorption, since the protected state continues to retain a separate identity (see § 81). Thus, in relation to France's protectorate over Morocco, the ICJ has held France to have been 'bound ... by all treaty obligations to which Morocco had been subject before the Protectorate and which have not since been terminated or suspended by arrangement with interested States': *United States Nationals in Morocco Case*, ICJ Rep (1952), at p 188.

law,[12] 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,[13] repairing of main roads, navigation on rivers, and the like, devolve on the successor state.[14] 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[15] 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,[16] 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.[17] In the case of a union of states, the new 'union state' will, subject to any special rules and procedures of the organisation in question, in its own name take over the previous membership of its component parts without having to apply for membership *de novo*. 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,[18] and when Tanzania did the same in 1964 in place of Tanganyika and Zanzibar.

[12] See Jenks, BY, 24 (1952), pp 105–44.

[13] See Starke, BY, 41 (1965–66), pp 411–16, and Aust YBIL (1966), pp 9–16; and see generally as to boundaries, § 226ff.

[14] See *Case Concerning the Free Zones of Upper Savoy and the District of Gex* (1930), PCIJ, Series A, No 24, p 17, and (1932), Series A/B, No 46, p 145; Commission of Jurists' Opinion on the Aaland Islands Dispute, Off J, Special Suppl, No 3 (1920), at p 18. See generally YBILC (1974), ii, pt 1, pp 196–206, paras (1)–(36).

[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 state 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 also generally, Aufricht, 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 183–211.

[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 it so wishes.

[18] See UNYB (1958), p 106; Cotran, ICLQ, 8 (1959), pp 346, 357–65; Aufricht, 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

[19] It is possible to regard this as not 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.

[20] See *US v Louisiana* (1960), ILR, 31, p 141; *Bonser v La Macchia* (1969), ILR, 51, p 39; *New South Wales v Commonwealth of Australia* (1975), ILR, 51, p 89.

[21] See eg *Temple of Preah Vihear Case*, ICJ Rep (1962), p 6; *Rann of Kutch Case* (1965), ILR, 50, p 2; *Guinea – Guinea-Bissau Maritime Delimitation Case* (1985), ILR, 77, pp 636, 666–75; *Burkino Faso/Mali Frontier Dispute Case*, ICJ Rep (1986), p 554.

[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 2, p 25.

[23] See generally, in addition to works cited in the bibliography preceding § 60 (including in particular the general discussion of the nature of state debts by the ILC in YBILC (1981), ii, pt 2, pp 72–9, paras (2)–(43)), Sack, *Les Effets des transformations des états sur leurs dettes publiques et autres obligations financières* (vol 1, 1927), *Succession aux dettes publiques d'état* (1929), Hag R, 23 (1928), iii, pp 145–321, and NYULQR, 10 (1932–33), pp 125–56, 341–58; Feilchenfeld, *Public Debts and State Succession* (1931); ILA, *Report of the 53rd Conference* (1968), pp 598, 603, and *Report of the 54th Conference* (1970), pp 105–50; H Lauterpacht, *International Law: Collected Papers* (vol 3, 1977), pp 121–37.

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 Feilchenfeld and Sack, cited above; YBILC (1981), ii, pt 2, pp 35–6, paras (22)–(29) and p 41, paras (17)–(23).

[24] 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 *de jure* is entitled to the assets of the former sovereign. See also *The United States v Prioleau* (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[27] 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[28] 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[29]

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.

[25] This is almost 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, paras (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; ILA, *Report of the 54th Conference* (1970), pp 92–150. 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 Sack, *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), PCIJ, 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 Dues for Reply Coupons Issued in Croatia*, ILR, 23 (1956), p 591.

[26] See *Shimshon Palestine Portland Cement Factory Ltd v Attorney-General*, ILR, 17 (1950), p 72; *Vinayak Shripatrao Patwardhan v State of Bombay* (1960), ILR, 49, p 468.

[27] This is the real portent of the judgment in the case of *Cook v Sprigg* [1899] AC 572, and in the case of *The West Rand Central Gold Mining Co v The King* [1905] 2 KB 391. Insofar as the latter judgment denies 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.

[28] See Martens, i, § 67; Heffter, § 25; Huber, *Die Staatensukzession* (1898), p 158.

[29] See generally on the effect of changes of sovereignty upon municipal law Rosenne, BY 27 (1950), pp 267–92; O'Connell, *State Succession in Municipal Law and International Law* (1967), chs 6

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.[30] In general, it would seem that a change of sovereignty does not of itself terminate private rights dependent on the previous sovereign's laws,[31] 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.[32]

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; *Sonarem v Genebrier* (1968), *ibid*, p 384.

30 See eg *Virendra Singh v State of Uttar Pradesh*, ILR, 22 (1955), p 131; *Indumati v State of Saurashtra*, ILR, 23 (1956), p 109; *Bapu and Bapu v Central Provinces* (1955), *ibid*, p 110; *Narasingh Pratab Singh v State of Orissa* (1960), ILR, 49, p 370; *Vinayak Shripatrao Patwardhan v State of Bombay* (1960), *ibid*, p 468; *Madhaorao Phalke v State of Madhya Bharat* (1960), ILR, 53, p 137; *Promod Chandra Deb v State of Orissa* (1961), ILR, 49, p 396 (on which see Agrawala, ICLQ, 12 (1963), pp 1399–407); *Re Chockalingam Chettier* (1960) 47 AIR (Madras) 548, AJ, 57 (1963), p 937; *State of Kerala v Rayi Varma* (1962), ILR, 49, p 374.

31 *Sopron-Köszeg Railway Case* (1929), RIAA, 2, p 961.

32 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 Rhodopia Case* (1933), RIAA, 3, p 1407; *Secretary of State for India v Sardar Rustam Khan*, AD, 10 (1941–42), No 21; *Hoani Te Heuheu Tukino v Aoeta District Maori Land Board* [1941] AC 308; *Raj Rajinder Chand v Mst Sukhi*, ILR, 24 (1957), p 74; *Dalmia Dadri Cement Co Ltd v Commissioner of Income Tax*, ILR, 26 (1958–II), p 79; *Thailendrakishoredas v State of Madhya Pradesh* (1958), ILR, 27, p 30; *Indulkar v State of Bombay* (1958), *ibid*, p 32; *State of Saurashtra v Memon Haji Ismail Haji Valimohammed* (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 obligations by enacting legislation either of a discriminatory character or nominally affecting all the residents of the territory.

As to the meaning of acquired rights, see Decamps, RG, 15 (1908), pp 385–400; Guggenheim, pp 122–37; Sack, *Les Effets des transformations des états sur leurs dettes publiques et autres obligations financières* (vol 1, 1927), pp 57–61; Hyde, i, §§ 132, 133; Kaeckenbeeck, BY, 17 (1936), pp 1–18; Szaszy, RI, 3rd series, 17 (1936), pp 406–20; Makarov and others, *Annuaire*, 43 (1950), i, pp 208–94; 44 (1952), i, pp 181–96; Bedjaoui, Hag R, 130 (1970), ii, pp 531–44; Ko Swan Sik, Neth IL Rev, 24 (1977), pp 120–42. See also the Second Report of the ILC's Special Rapporteur on Succession of States (Bedjaoui), 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.

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)[33]

There is a considerable body of authority in favour of the view that the absorbing state is bound by the contracts of the extinct state[34] – 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[35] or directly affecting public rights of the state[36] 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 that law after the absorption or the unification 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[37] (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).

33 See generally, in addition to works cited in the bibliography preceding § 60, O'Connell, BY, 27 (1950), pp 93–124; ILA, *Report of the 55th Conference* (1972), pp 654–60; and n 34 below.

34 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, LQR, 27 (1901), pp 392–401, 21 (1905), pp 335–39, and Westlake, i, pp 74–83; Castren, Hag R, 78 (1951), i, pp 458–484; and O'Connell, BY, 28 (1951), pp 204–19.

35 See *German Civil Service Case*, ILR, 22 (1955), p 943; *State of Madras v K M Rajagopalan*, ILR, 22 (1955), p 147; *Rajvi Amar Singh v State of Rajasthan*, ILR, 26 (1958–II), p 97.

36 See *Maharaja Shree Umaid Mills Ltd v Union of India* (1962), ILR, 49, p 349 (agreement granting exemption from income tax).

37 See *Dalmia Dadri Cement Co Ltd v Commissioner of Income Tax*, ILR, 26 (1958–II), p 79; *Thailendrakishoredas v State of Madhya Pradesh* (1958), ILR, 27, p 30.

(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.[38] 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.[39]

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;[40] but that, if compensation for breach had been agreed with the extinct state, the absorbing state ought to discharge that liability.

(h) Nationality[41]

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

[38] *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 *Hawaiian Claims* (1925), RIAA, vi, p 157. See also *Farid v Government of the Union of India*, ILR, 26 (1958–II), p 192; *Kishangarh Electric Supply Co Ltd v United State of Rajasthan* (1959), ILR, 49, p 365; *State of Saurashtra v Jamadar Mohamad Abdulla* (1961), ILR, 49, p 376 (both this and the previous case rejecting liability on 'act of state' grounds); *Jagannath Agarwala v State of Orissa* (1961), ILR, 45, p 19. But cf *Gajan Singh v Union of India*, ILR, 23 (1956), p 101, and *Collector of Sabarkantha v Shankarlal Kalidas Patel* (1959), ILR, 31, p 10, upholding the liability of the successor state. See generally on succession in matters of state responsibility, Monnier, AFDI, 8 (1962), pp 65–90. See also *Re Application No 245/57 (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; and *Re Application 256/57 (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 Baltic 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.

[39] For a denial of the obligation to take over liquidated damages in respect of railway accidents see a decision of the Polish Supreme Court in *Dzierzbicki v District Electrical Association of Czestochova*, AD, 7 (1933–34), No 38; see also *Indulkar v State of Bombay* (1958), ILR, 27, p 32. See Mosler, *Wirtschaftskonzessionen bei Änderung der Staatshoheit* (1948); O'Connell, BY, 27 (1950), pp 93–124. See also the decision of the Austrian Supreme Court in *Kleihs v Republic of Austria*, AD, 15 (1948), No 18.

As to the predecessor state's outstanding claims against third parties, see *Land Oberoesterreich v Gude*, AD, 9 (1938–40), 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 power in a manner acceptable to what our own government considers the principles of international law'.

[40] See *Collector of Sabarkantha 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.

[41] 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.

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.

§ 63 Dismemberment When a state breaks up into two or more parts which themselves become states,[1] or which are annexed by other (usually surrounding) states,[2] it becomes extinct as an international person.

There will, for reasons similar to those applicable in the cases of absorption and unification, be no succession as regards those treaties of the extinct state which were of a primarily political nature or otherwise depended upon its continued existence as a separate international person. On the other hand, those treaty rights and obligations attaching to particular parts of its territory will pass to whichever state assumes responsibility for the territory in question.[3] As regards other treaty rights and obligations, state practice does not provide a clear answer to the questions of succession which arise,[4] partly because most of such

[1] In some respects the creation of the Federal Republic of Germany and the German Democratic Republic on the territory formerly 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.

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).

[2] 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 Seidl-Hohenveldern, *Die überleitung von Herrschaftsverhältnissen am Beispiel österreichs* (1982); and § 55, n 36.

[3] See Sack, *op cit* at § 62, n 23, pp 205–18.

[4] 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; *Zschernig 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 USA–Germany Treaty of Friendship, Commerce and Consular Rights; *Trade Mark Registration Case* (1967), ILR, 59, p 490 (concerning the Madrid Agreement for the Registration of Trade Marks 1891); *Billerbeck and Cie v Berghau-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 1905). 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.

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.

relatively limited practice as there is relates to the dissolution of unions of states which, before their union, and even sometimes to a limited extent during it, existed separately as international persons. Nevertheless, that practice suggests[5] that in many cases it will be appropriate to regard the former component parts of the 'union state' as remaining bound by its treaties after its dissolution if those treaties were in force either for its whole territory or for that part of its territory which formed that component part. Where the states comprising the union were previously members of an international organisation, practice in the case of the break-up of the United Arab Republic in 1961[6] suggests that each state would resume its former membership (although the special circumstances of particular cases may dictate otherwise).

Succession also takes place with regard to the physical property of the former state, including its fiscal property and fiscal funds, which each of the several absorbing states finds on the part of the territory it absorbs.[7] Special considerations, however, apply to state archives, because of their frequent relevance to particular territory and its administration, while at the same time forming part of the historical record of the predecessor as well as of the successor state, and the historical and cultural value of protecting their indivisibility.[8] The international debts of the extinct state must be taken over.[9] But the case is complicated through the fact that there are several successors to the state's property, and the only rule which can be laid down is that proportionate parts of the debts must be taken over by the different successors.[10] As regards the property abroad of the former

[5] Practice relating to the dissolution of the United Arab Republic in 1961 was broadly consistent with the view expressed in the text; as was the view taken by Hungary on the dissolution of Austro-Hungary after the First World War, although Austria's position was different. See generally *YBILC (1974), ii, pt 1, pp 260–63, paras (2)–(11).* 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.

[6] See the communication by Syria to the President of the General Assembly (UN Doc A/4914), and the statements by the President on 13 October 1961 (UN Doc A/PV 1035 and 1036); UNYB (1961), p 168; YBILC (1974), ii, pt 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*, 32 (1967), pp 93–112, and in *Law, Justice and Equity* (eds Holland and Schwarzenberger, 1967), pp 152–67.

[7] 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.

[8] See examples of state practice given in YBILC (1981), ii, pt 2, pp 68–71, paras (2)–(14).

[9] 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 decline to pay debts incurred by it: *Re Dues for Reply Coupons Issued in Croatia* ILR, 23 (1956), p 591.

[10] 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 debt 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 dismemberment 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 Feilchenfeld, *Public Debts and State Succession* (1931), pp 431–755.

See also, as to the Italian Peace Treaty of 1947, Fitzmaurice, Hag R, 73 (1948), i, pp 286–304. After the Second World War questions relating to public debts 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 speaking, 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 dismemberment and in other cases, see Sack, *Succession aux dettes publiques d'état* (1929), particularly pp 219–599; YBILC (1981), ii, pt 2, pp 72–113.

state, the successor states should succeed to it proportionately[11] unless there are particular reasons why one only of them should succeed to it. While such succession in accordance with a principle of proportionality is a sound general guide to, for example, the distribution of the extinct state's international debts and its property abroad, it is difficult to apply in relation to particular debts or items of property in the absence of an agreement between the states concerned.

Since a state which has been dismembered ceases to exist, its nationality cannot continue to exist for purposes of international law, and, as in cases of absorption and unification, it will be for the various successor states to determine to what extent former nationals of the extinct state acquire their nationality. It will similarly be for each successor state to determine to what extent the former local law applying in the territory which has passed to it should continue to apply or should be replaced by the successor state's laws.[12] As regards contracts, their continued valdity will depend, as will other private law rights, on the applicable system of law; but subject thereto each successor state probably ought to be regarded as being bound by the contracts of the extinct state if they have a local character attaching to the territory which has passed to that successor.[13] No succession would seem to occur, other than by express agreement, in respect of the general, non-local, contracts of the extinct state, since no one of the successor

[11] 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); *Simon v Taylor* (1974), ILR, 56, p 40; *Kunstsammlungen Zu Weimar v Elicofon*, ILM, 21 (1982), p 773 (reversing an earlier decision in 1973, ILR, 61, p 143, given at a time when the successor state in question – the GDR – was not recognised).

[12] *R v Amihiya* (1964), ILR, 53, p 102; *Lufazema v Republic* (1967), *ibid*, p 178.

[13] See *Sopron-Köszeg Railway Case* (1929), RIAA, 2, pp 961, 967, affirming, *inter alia*, that change of sovereignty does not of itself terminate the contracts of the predecessor state.

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[1] 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[2] 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, recognised 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 by virtue of the

[14] See § 62, nn 38–40. See also *Schleiffer v Directorate of Finance for Vienna, Lower Austria and Burgenland*, ILR, 26 (1958–II), p 609, concerning non-liability for refunding wrongful taxes. But see *Unterstützungsanstalt 'Zur Humanität' Freimaurerloge zum Brunnen des Heils eV, Heilbronn v Land Baden-Württemberg*, ILR, 26 (1958–I), p 89, accepting liability in respect of confiscation of property. See also *Austrian Citizen's Entitlement to Compensation (Germany) Case* (1960), ILR, 32, p 153, upholding the successor state's enjoyment of the benefit of a third state's waiver of claims against the predecessor state.

[1] See YBILC (1974), ii, pp 263–4, paras (12)–(16).

[2] *Ibid*, pp 264, 266, paras (17)–(18), (27), regarding the creation of Pakistan on the partition of India and its accession to independence in 1947, the separation of Singapore from Malaysia in 1965 (as to which see also Green, Can YBIL, 4 (1966), pp 3–42; Jayakumar, ICLQ, 19 (1970), pp 298–423), 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, AJ, 58 (1964), pp 41–61. See also, as regards succession by Pakistan to treaties, the decision of the Supreme Court of Pakistan in *M/S Yangtze (London) Ltd v M/S Barlas Brothers (Karachi) & Co* (1961), ILR, 34, p 27, and comment by Fitzgerald, ICLQ, 11 (1962), pp 843–7; and see Hossain, BY, 36 (1960), pp 370–75, regarding succession by India and Pakistan to certain treaties formerly applicable to British India.

See also as to questions of treaty succession arising upon the creation of Jura on 1 January 1979 as a new canton of Switzerland, Lejeune, RG, 82 (1978), pp 1051–74; see also *ibid*, 88 (1984), p 287; *ibid*, 89 (1985), p 1054 (as to archives); *ibid*, pp 474–5 and *ibid*, 90 (1986), p 468 (as to property). See also §§ 75, 76, as to federal states generally.

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]

[3] See Schachter, BY, 25 (1948), p 107. For some Indian cases arising out of the separation of Pakistan from India, see Chako, Hag R, 93 (1958), i, pp 144–53; and see n 4, as regards membership of the UN.

For an elaboration of the view, substantiated to a limited extent by some practice, that multilateral instruments of a legislative character should be treated upon the analogy of treaty provisions creating local obligations and that they are binding upon new states in the same way as rules of customary international law, see Jenks, BY, 29 (1952), pp 105–44. There are however substantial difficulties in the way of the new state being automatically bound by such treaties, apart from their being bound by such of the rules they contain as have become customary international law (which, however, is a different matter from succession to the treaty as such). A right to accede to such treaties will often be possessed by the new state just like any other state, although there may be room for simplified accession procedures: see § 66, n 13.

[4] This outcome was in accordance with s 2 of the Schedule to the Indian Independence (International Arrangements) Order 1947. The UN Secretariat had previously expressed the legal opinion that the situation did not constitute the dismemberment of an existing state, but rather the breaking off of part of a state to become a new state. See generally Misra, Can YBIL, 3 (1965), pp 281–9; UNYB (1947–48), pp 39–40. See also § 67, n 2. As to the break-up of the United Arab Republic in 1961, see § 63, n 6. Similarly Bangladesh, after separating from Pakistan in 1971, was separately admitted to the UN in 1974: UNYB (1972), pp 215–20, and (1974), p 296.

[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, AJ, 43 (1949), pp 144–54, and Schachter, BY, 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 Paenson, *Les Conséquences financières de la succession des états* (1954).

As regards nationality,[6a] since the parent state continues to exist the possibility remains of its nationality being retained by those of its nationals who are inhabitants of the territory which constitutes the newly seceded state. Whether they do so, and whether they also or alternatively acquire the nationality of the new state, will in the first place be for the laws of those states to determine: it is usual for the new state to confer its nationality upon inhabitants of its territory, or on persons otherwise closely connected with it. The continued application in the new state of the local law formerly applying in its territory will be a matter for that state to determine.[7] Since the parent state still exists, there is no occasion for the new state to succeed to the general, non-local, contracts[8] of the parent state or to claims for damages against it;[9] but there would be justification for it to be bound by those contracts, or liable on those claims, having a local character attaching to the territory of the new state and which the parent state is therefore in no position to fulfil or meet.[10]

§ 65 Transfer of territory When by cession or otherwise, a part of a state's territory is transferred to another, a succession to certain rights and obligations associated with the transferred territory occurs.[1] More often than not a transfer

[6a] Austria's revival as an independent state in 1945 after the period of its annexation by Germany from 1938 to 1945 has in some respect been treated as a secession or separation from Germany. On the annexation of Austria, Germany enacted laws conferring German nationality in place of the former Austrian nationality; in 1945 Austria enacted laws depriving of their German nationality those who had acquired it as a result of the annexation, conferring on them in its place Austrian nationality. While courts in the Federal Republic of Germany have held that there were no clearly established rules of international law requiring the automatic loss of the former nationality on the part of those connected with a seceding territory (see *Nationality (Secession of Austria) Case*, ILR, 21 (1954), p 175), they have tended to treat the Austrian law as effective both to divest people of their former German nationality and to confer on them Austrian nationality, even if not in Austria at the time (see *Austrian Nationality Case*, ILR, 20 (1953), p 250; *Austrian Nationality Case*, ILR, 22 (1955), p 430; *Austro–German Extradition Case*, ILR, 23 (1956), p 364; *In re Feiner, ibid*, p 367; *Loss of Nationality (Germany) Case* (1965), ILR, 45, p 353). The Federal Republic of Germany enacted legislation in 1956 providing for loss of German nationality for those who had acquired it by virtue of the annexation of Austria, but with a right to retain (or regain) it for those who were permanently resident in Germany since 1945.

[7] See *Kumar Jagadish Chandra Sinha v Commissioner of Income Tax*, ILR, 23 (1956), p 112; *Abdul Ghani v Subedar Shoedar Khan* (1964), ILR, 38, p 3.

[8] See *Pakistan v Waliullah Sufyani* (1965), ILR, 53, p 129. This case, like others decided by courts in India and Pakistan in the context of the partition of former British India, turned on the provisions of the Indian Independence (Rights, Property and Liabilities) Order 1947, by virtue of which contracts concluded exclusively for purposes of what became Pakistan became the liability of Pakistan, and in all other cases were the liability of India.

[9] If proceedings against the state are begun before the secession in the courts of that part of its territory which subsequently secedes, and are continued after the secession, the defendant state, now being a foreign state, may be entitled to immunity from suit: see *Olofsen v Government of Malaysia* (1966), ILR, 55, p 409.

[10] See *Union of India v M/S Chaman Lal Loona and Co*, ILR, 24 (1957), p 62; *Union of India v Balwant Singh Jaswant-Singh* (1956), *ibid*, p 63; *State of West Bengal v Brindaban Chandra Pramanik* (1956), *ibid*, p 67; *Scindia Steam Navigation Co Ltd v Union of India* (1961), ILR, 53, p 112; *Federation of Pakistan v Dalmia Cement Co Ltd, Karachi and the Union of India*, AJ, 57 (1963), p 939. But as to contracts of employment in the public service of the predecessor state, see § 65, n 12.

[1] Very small territorial adjustments often do not in practice call for any succession to the rights and obligations of the ceding state, other than those which run with the territory itself. See generally as to cession of territory, § 244ff.

will take place in accordance with an agreement between the states concerned,[2] 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,[3] 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.[4] 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,[5] 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 transferor state, although territorially diminished, remains in principle bound by its treaties,[6] 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

[2] See eg the Agreement of 21 October 1954 between France and India concerning the transfer to the latter of the French territories of Pondicherry, Karikal, Mahé and Yanaon: BFSP, 161 (1954), p 533.

As regards the transfer to China of sovereignty over the British colony of Hong Kong, and the resumption of China's exercise of sovereignty over the Hong Kong 'leased territories', with effect from 1 July 1997, see the UK–China Joint Declaration on the Question of Hong Kong 1984 (TS No 26 (1985); ILM, 23 (1984), p 1366), and Ress, ZöV, 46 (1986), pp 647–99; Focsaneanu, RG, 91 (1987), pp 479–532; White ICLQ, 36 (1987), pp 483–503; and see § 84, n 25. For the Basic Law of the Hong Kong Special Administrative Region, to apply after 1 July 1997, see ILM, 29 (1990), p 1511.

[3] An agreement will often not have been entered into eg where territory of one state has been annexed by another (see generally § 263ff). See Fabri, *Effetti giuridici delle annessioni territoriali* (1931).

[4] For state practice in this sense see YBILC (1974), ii, pt 1, pp 208–9, paras (4)–(5). As to the arrangements to take effect on the transfer of Hong Kong to China in 1997, see sections IX and XI of Annex I, and paras 4 and 5 of Annex II, to the UK–China Joint Declaration 1984 (n 2 of this §).

Article 29 of the Vienna Covention on the Law of Treaties is relevant in providing that, unless a different intention is established, a treaty is binding upon a party in respect of its entire territory. See generally § 621. It is open to question whether Art 29 is to be interpreted as applying only in respect of the state's territory at the time the treaty was concluded and so exclude territory subsequently acquired.

[5] See § 62, nn 13, 14.

[6] See *Masinimport v Scottish Mechanical Light Industries Ltd*, holding that 'it is well-settled in public international law that the mere loss of territory has no effect upon the treaty rights and obligations of the State losing the territory'; 1976 SLT 245, 248; (1976) ILR, 74, p 559; BY, 48 (1976–77), p 333.

property[7] situated in the ceded territory, although as already noted in relation to the dismemberment of a state,[8] 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.[9] 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 33–6, 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 (1981), ii, pt 2, pp 54–60, 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 Tripoli, stipulated that Italy should take over a 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 correspond to that 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 Alsace-Lorraine (Art 255); 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. The 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 Wilkinson, *The American 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 Ottoman Public Debt among the various states which succeeded to portions of the Ottoman Empire or were created in territories formerly forming part of it. The courts of law of 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; as to Poland, see Ehrlich, *Prawo narodów* (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 Staatensukzession* (1898), §§ 125–35 and 205, where older treaties are enumerated. See also Schmidt, *Der Uebergang der Staatsschulden bei Gebietsabtretungen* (1913); Sibley, JCL, 3rd series, 7 (1925), pp 22–39; and Sack, *Succession aux dettes publiques d'état* (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 allow 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] contract[12] and damages[13] 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 secession;[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.[1] In more recent times,[2] however, under the influence of the principle of self-determination and the movement in favour of decolonisation associated with the United Nations Charter,[3] 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

[11] See *Settlers of German Origin in Territory ceded by Germany to Poland* (1923), PCIJ, Series B, No 6; *Emeric Kulin v Roumania, Recueil TAM*, 7 (1927), p 138; AD, 4 (1927–28), No 59; *Niedetstrasser v Polish State*, AD, 6 (1931–32), No 33; *Forests of Central Rhodopia Case* (1933), RIAA, 3, p 1407; *L and JJ v Polish State Railways* (1948), ILR, 24 (1957), p 77; *State of Madhya Bharat v Mohanlal Motilal*, ILR, 24 (1957), p 83; *Mercado e Hijos v Feliciano*, ILR, 26 (1958–II), p 553; *Leokadia K v Maria M* (1959), ILR, 47, p 107; *Re Coumarassamy-Vannier* (1963), ILR, 44, p 47; and see also *Fayaz Alkotob v Halil Iskander Shahin* (1971), ILR, 52, p 77 as regards limits to the continuing structure of the judicial system. In British practice, on the acquisition of overseas territory by cession the local law continues to apply until changed by whatever means may thereafter be constitutionally appropriate (as distinct from the acquisition of territory by settlement, in which case English law is considered to apply): see Roberts-Wray, *Commonwealth and Colonial Law* (1966), p 533.

Questions may arise as to whether a municipality in the transferred territory retains its corporate identity in view of changes in area, social structure and population accompanying the transfer: for two decisions upholding such continuity see *Polish Mining Corpn v District of Ratibor*, AD, 7 (1933–34), No 37, and *Land Registry of Waldsassen v The Towns of Eger (Cheb) and Waldsassen* (1965), ILR, 44, p 50.

[12] See *Lighthouses Arbitration (France/Greece) (Counterclaim No 1, and Claim No 8)* ILR, 23 (1956), pp 94, 79. The maintenance in force of concession contracts relating to the ceded territory may be provided for by treaty: see eg Protocol XII annexed to the Treaty of Lausanne with Turkey in 1923, and the *Mavrommatis Jerusalem Concessions Case* (1925), PCIJ, Series A, No 5. See Teyssaire, RG, 35 (1928), pp 447–65; Schiffner, ZöR, 9 (1929), pp 161–81. The successor state may not be bound by local contracts for employment in the public service of the ceding state: see *Hausen v Polish State*, AD, 7 (1933–34), No 40; *Re Kremer*, AD, 8 (1935–37), No 43; and § 62, n 35.

[13] See *Lighthouses Arbitration (France/Greece) Claims Nos 4, 11 and 12a)*, ILR, 23 (1956), pp 81, 106.

[14] See § 64, nn 7–10.

[1] As to which see § 64.

[2] See for recent discussion of questions of state succession generally in relation to the attainment of independence by dependent territories, in addition to works cited in the bibliography preceding § 60, Zemanek, Hag R, 116 (1965), ii, pp 187–300; Bardonnet, *La Succession d'états à Madagascar* (1970); O'Connell, Hag R, 130 (1970), ii, pp 95–206; Bedjaoui, *ibid*, pp 457–585; Dale, *The Modern Commonwealth* (1983), pp 83–7; Makonnen, Hag R, 200 (1986), v, pp. 140–218 (as to Namibia). See also n 5, in relation to succession to treaties.

[3] See § 85.

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.[4]

As regards treaties[5] 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'.[6] 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,[7] are excepted from

[4] India is a notable example: see § 78, n 9.

As to the international status of protected states see generally §§ 81, 82; and see also § 62, n 11 and n 8 of this §, and (as to Morocco and Tunis in particular) Flory, Fouilloux, Etienne and Santucci, *La Succession d'état en Afrique du Nord* (1968).

The position of former mandated territories, and trust territories (as to which see generally §§ 86–95) is subject to special considerations. As to Somalia, see § 62, n 2. Israel has regarded itself as not being a successor state to Palestine, formerly under British mandate, although in the interests of stability certain laws formerly applying in Palestine were continued in force as a transitional measure until an Israeli legal system could be established. See eg *Sifri v Attorney-General*, ILR, 17 (1950), No 22; *Shimshon Portland Cement Factory Ltd v Attorney-General*, *ibid*, No 19; *Pales Ltd v Ministry of Transport* ILR, 22 (1955), p 113; and the Government of Israel's statement at YBILC (1950), ii, pp 214–18. See also Green BY, 38 (1962), pp 457, 465–8.

[5] See generally as to succession by newly independent states in respect of treaties, in addition to works cited in the bibliography preceding § 60 and at n 2 of this §, O'Connell, BY, 38 (1962), pp 84–180; ILA, *The Effect of Independence on Treaties* (1965), and *Report of the 52nd Conference* (1966), pp 574–95, *Report of the 53rd Conference* (1968), pp 596–632, and *Report of the 54th Conference* (1970), pp 103–5; Keith, AJ, 61 (1967), pp 521–46; Onory, *La Succession d'états aux traités* (1968); Pereira, *Da Sucessao de estados quanto aos tratados* (1968); Marcoff, *Accession à l'indépendence et succession d'états aux traités internationaux* (1969); Goerdeler, *Die Staatensukzession in multilateralen Verträgen* (1970), with special reference to former French states; Nguyen-Huu-Tru, *Quelques problèmes de succession d'états concernant le Viet-Nam* (1970); Bokor-Szego, *New States and International Law* (1970); Okoye, *International Law and the New African States* (1972); Udokang, *Succession of New States to International Treaties* (1972); Lung-Fong Chen, *State Succession Relating to Unequal Treaties* (1974); YBILC (1974), ii, pt 1, pp 211–14, paras (3)–(17), pp 215–17, paras (3)–(12), and pp 236–40, paras (1)–(16).

See also, with particular reference to practice within the Commonwealth, O'Connell, BY, 26 (1949), pp 454–63, and ICLQ, 13 (1964), pp 1450–3; Fifield, AJ, 46 (1952), pp 450–63; Fawcett, *The British Commonwealth in International Law* (1963), pp 214–23; Lester, ICLQ, 12 (1963), pp 475–507, and *ibid*, 14 (1965), pp 262–4; Keith, *ibid*, 13 (1964), pp 1441–50; Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp 267–79; Lawford, Can YBIL, 5 (1967), pp 3–13; Dale, *The Modern Commonwealth* (1983), pp 83–7. For the practice of the UN Secretary-General see UN Juridical YB (1972), pp 195–9.

[6] See eg *Lorra and Tonya v Società Industria Armamenti* (1971), ILR, 71, p 48; *Lensing v HZA Berlin-Packhof* (1973), ILR, 53, p 153; *State v Oosthuizen* (1976), ILR, 68, p 3; *Re Bottali* (1980), ILR, 78, p 105. In *R v Director of Public Prosecutions, ex parte Schwartz* (1976), ILR, 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 (in those jurisdictions which give priority to statute law) be applied if in conflict with statutory provisions in force: *United States Government v Bowe* [1989] 3 All ER 315, 327–8. See *Re Burmanization of Import Trade* (1960), ILR, 31, p 341, for the continued validity of an agreement originally concluded between a state and its then dependent territory.

[7] See § 62, n 13, and n 21. In 1980 the Foreign and Commonwealth Office stated that all relevant

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,[8] 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 terriorial application clause.[9] 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.[10] As regards multilateral treaties[11] 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),[12] 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:[13] 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 subsisted, became the responsibility of the Government of Canada with the attainment of independence by Canada, at the latest in 1931: UKMIL, BY, 51 (1980), p 398. Judicial review of this decision was sought and denied in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892, on which see Crawford, BY, 53 (1982), pp 253–9; and see *Manuel v Attorney-General, Noltcho v Attorney-General* [1983] 1 Ch 77.

[8] See *United States Nationals in Morocco Case*, ICL Rep (1952), pp 176, 193–4. This case involved a former protected state, but the ICJ did not appear to attach weight in this context to the territory's particular status. See also *Ecoffard (Widow) v Cie Air France* (1964), ILR, 39, p 453.

[9] See Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), pp 225–6. See also *M/S Francesco Corsi v M/S Gorakhram Gokalchand*, ILR, 31 (1958), p 20; *Ecoffard (Widow) v Cie Air France* (1964), ILR, 39, p 453; *Veuve Mackinnon v Air France* (1964), ILR, 45, p 386; *Kassamali Gulamhusein & Co (Kenya) Ltd v Kyrtatas Brothers Ltd* (1968), ILR, 45, p 33. Cf *Ben Mohamed Ben Manaan Bachiri v NV Textiel-en Oliefabrieken, Afdeling Crock en Laan* (1971), ILR, 73, p 600.

[10] See also nn 17–22, and UN Juridical YB (1975), pp 199–202, and (1977), pp 235–8 as to the practice of the UN Secretary-General. There may also be forensic advantage in seeking the continued application of a treaty: in the *Case Concerning the Temple of Preah Vihear* Cambodia sought to rely, as a successor state to France, on certain Franco-Siamese treaties, but Thailand rejected that contention and the ICJ did not need to decide the question: ICJ Rep (1961), pp 17, 22–3, 35.

[11] See generally the UN Secretariat's documents relating to multilateral treaties cited at § 62, n 5, and the works there cited by Wolf (as regards international labour conventions), Mankiewicz (as regards air conventions) and Kunugi (as regards the GATT); and Jenks, BY, 29 (1952), pp 105–44 (as regards law-making treaties).

[12] See YBILC (1974), ii, pt 1, pp 218–19. The situation is more problematical where the parent state has merely signed the treaty subject to ratification: *ibid*, pp 220–21.

[13] When a former dependency of a party to a multilateral treaty of which the UN Secretary-General is the depositary becomes an independent state, the Secretary-General writes to it inviting it to confirm whether it considers itself to be bound by the treaty in question: see the Secretariat's memorandum 'Succession of states in relation to general multilateral treaties of which the Secretary-General is the depositary' (UN Doc A/CN 4/150, paras 133–34; YBILC (1962), ii, p 122). See also UN Juridical YB, cited in n 10.

structure of the treaty)[14] to be treated as a party[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.[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.[17] This practice has been followed in particular by the United Kingdom,[18]

[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, Eissen, BY, 41 (1965–66), pp 401–10, and 43 (1968–69), pp 190–92.

[15] As to the question whether the new state becomes a party subject to the reservations previously attaching to the parent state's participation in the treaty, see YBILC (1974), ii, pt 1, pp 222–6, paras (1)–(14).

[16] See *ibid*, pp 233–5, paras (2)–(6).

[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; Kawaley, 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 *Lansana 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 63. 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 Bowe* [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 Dabrowski*, AJ, 73 (1979), p 510; and *M v Federal Department of Justice and Police* (1979), ILR, 75, p 107.

[18] Eg the agreements with Iraq in 1931 (TS No 15 (1931)); with Malaya in 1957 (Cmnd 346); UNTS, 279, p 287); with Sierra Leone in 1961 (Cmnd 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 states include the agreements concluded in 1949 between the Netherlands and Indonesia (UNTS, 69, p 266); in 1954 between France and Vietnam (BFSP, 161 (1954), p 649 (Art 2)); and in 1962 between New Zealand and Western Samoa (UNTS, 476, pp 4, 6).

on the attainment of independence by its dependent territories. The legal effect of such an agreement is not altogether clear, but it would seem at least that 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,[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'.[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.[21] These declarations, while not by themselves definitively regulating treaty relations with other states, and allowing the new state to select which

[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 BPIL (1966), pp 72–3).

[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, therefore, the conclusion that a devolution agreement should be considered as 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 continuance in force of certain types of treaties. But neither successor States nor third 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 successor States to the treaties of their predecessor, should be considered as *res inter alios 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 Schwarz* (1979), ILR, 73, pp 44, 48.

[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 § 66, n 5, especially those dealing with practice within the Commonwealth, refer also to unilateral declarations of this kind. See also *Molefi v Principal Legal Adviser* [1971] AC 182, where the Privy Council treated a unilateral declaration by Lesotho as resulting in the multilateral treaty in 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 'optional 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

[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 Exchanges 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, pt 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, AFDI, 11 (1965), pp 889–915. See also certain decisions of the UN Tribunal for Libya, giving effect to GA Res 388 (V) (1950) 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–I), p 2; *Italy v Libya (General List No 2)* (1954), *ibid*, p 13; *Italy v Libya*, ILR, 22 (1955), p 103. Taxes payable to the state in respect of matters arising before independence have been held, after independence, to be payable to the new state: *Sree Rajendra Mills Ltd v Income Tax Office*, ILR, 26 (1958–II), p 100.

[24] See generally the considerations referred to at § 63, n 8, and the practice cited in YBILC (1981), ii, pt 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 precedents against, as well as cases of repudiation of such debts after they had been accepted'; YBILC (1981), ii, pt 2, p 94, para (13). See also Zemanek, Hag R, 116 (1965), iii, pp 255–70; *Re Marchi* (1965), ILR, 47, p 83; *Poldermans v State of the Netherlands* (1956), ILR, 24 (1957), p 69. But if the debt, although owed by the metropolitan government's representatives in the colonial territory, arose so long before independence as 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: *Russet* (1984), RG, 90 (1986), p 249.

[26] It should be noted that it might be possible to regard such a debt as being that of the former dependent territory rather than a debt of 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's practice on granting independence to former dependent territories:

'it would appear that borrowings of British colonies were made by the colonial authorities and were charges 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 raisings in the London and local stock market.'

YBILC (1981), ii, pt 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:

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 agreements 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 satisfactory[27] 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] contracts[30] and claims for

'World Bank considers – and the predecessor State which has guaranteed the loan does not in any way deny – that the legal effects of the contract of guarantee continue to operate after the territory has become independent, so that the Bank can at any time turn to the predecessor State if the successor State defaults'.

YBILC (1981), ii, pt 2, p 102, para (56).

[27] Hesitations based on the lack of full international status on the part of a dependent territory if it is such when the agreement is concluded are diminished by the extent to which a dependent territory has, as such, a degree of local governmental autonomy and international status even before attaining independence, and are avoided if after its independence it expressly or by its conduct implicitly affirms the agreement; any doubt arising from any alleged inequality of the parties to the agreement is a matter dependent on the particular circumstances, and the degree to which they reveal the possible exercise of duress.

[28] As to implications which a change of nationality on the creation of a new state has for the operation of the nationality of claims rule and the requirement that nationality must be continuously that of the claimant state, see O'Connell, *State Succession in Municipal Law and International Law* (vol 2, 1967), pp 537–41; Fitzmaurice, Separate Opinion in *Barcelona Traction Case (Second Phase)*, ICJ, Rep (1970), p 101. See also *Ministry of Home Affairs v Kemali* (1962), ILR, 40, p 191.

[29] Where independence is attained in an orderly manner, agreed provision will usually be made for the pre-existing law to continue unless and until repealed or modified pursuant to the new constitutional arrangements applying in the newly independent state; and in the absence of such a provision there may be a presumption that the local law continues to apply, at least temporarily and insofar as it is not inimical to the constitutional structure of the new state. See, dealing with various aspects of the continuation of local laws, *Director of Rationing and Distribution v The Corporation of Calcutta* (1960), ILR, 53, p 163; *Yangtze (London) Ltd v Barlas Brothers (Karachi) & Co* (1961), ILR, 34, p 27; *Public Prosecutor v Anthony Wee Boon Chye* (1964), ILR, 55, p 78; *Société Nationale des Entreprises de Presse v Robe* (1966), ILR, 47, p 102; *Chellapen v R* (1969), ILR, 51, p 25; *Caisse Sociale de la Région de Constantine v Entreprise Sourdive* (1973), ILR, 73, p 32.

So far as concerns the continuation of rights of appeal from courts in the newly independent state, or proceedings in respect of acts of authorities there, to courts in the former parent state, the jurisdiction of the latter's courts will, subject to arrangements agreed between the two states, be likely to terminate on independence, with a possible exception in respect of appeals pending at that time. See *Re Hedi Ben Zakour* (1958), ILR, 26 (1958–II), p 99; *Re Fédération des Syndicats des Travailleurs de la Fonction Publique de Madagascar* (1962), ILR, 44, p 46; *Re Union des Populations du Cameroon* (1962), *ibid*, p 36; *Re Milo* (1963), *ibid*, p 48; *Re Compagnie d'Assurances et de Réassurances Atlanta and Compagnie 'Indemnity Marine'* (1965), ILR, 47, p 85; *Commissaire du Gouvernement près la Commission Centrale des Dommages Causés aux Biens par de Troubles Survenus à Madagascar v Société Minière et Foncière de Madagascar* (1965), *ibid*, p 90. As to the retention by some independent states within the Commonwealth of appeals to the Privy Council, see § 78, n 15.

In *Carvalho v Hull, Blyth (Angola) Ltd* [1979] 1 WLR 1228, it was held that the change in judicial structure and the potential for change in the local law which went with the attainment of independence were sufficient to relieve a contracting party of the obligation under the contract to have recourse to the local courts for the settlement of disputes arising under the contract.

[30] Note, in the context of property rights and economic development contracts, that the Declaration on Permanent Sovereignty over Natural Resources (GA Res 1803 (XVII) (1962)), while allowing for expropriation of property on certain conditions (para 4: see also para 8, and, generally, § 407), provides that this in no way 'prejudices the position of any Member State on any aspect of

damages or redress[31] 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;[32] but these matters are pre-eminently suitable for being dealt with by agreement[33] 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,[1] 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 unchanged: 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

the question of the rights and obligations of sucessor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule'.

See *Government of Kuwait v Aminoil* (1982), ILR, 66, p 519, holding that while nothing in international law prevents a state agreeing not to exercise its authority in a way which it would otherwise be able to do (ie to terminate a pre-independence concession), and being bound by such agreement after independence, this was a result of such importance that it could not be presumed from general terms in the concession, especially where compensation was provided for. See also *Pales v Ministry of Transport* (1955), ILR, 22, p 113; *Re Compagnie des Eaux d'Hanoi* (1963), ILR, 44, p 37; *Re Algiers Land and Warehouse Co Ltd* (1967), ILR, 48, p 58; *Szczupak v Agent Judiciaire du Trésor Public* (1968), ILR, 72, p 253; *Agent Judiciaire du Trésor Public v Labeunie* (1971), ILR, 72, p 53.

31 See *Nederlands Beheers-Instituut v Handels-Vereeniging Amsterdam*, ILR, 24 (1957), p 60; *Khayat v Attorney-General*, ILR, 22 (1955), p 123; *Re Fédération des Syndicats des Travailleurs de la Fonction Publique de Madagascar* (1962), ILR, 44, p 46; *Re Union des Populations du Cameroon* (1962), *ibid*, p 36; *Chaurand v Agent Judiciaire du Trésor Public* (1963), *ibid*, p 39; *Re Milo* (1963), *ibid*, p 48; *Re Union Régionale d'Algérie de la Confedération Française des Travailleurs Chrétiens* (1965), ILR, 47, p 86; *Institut des Vins de Consomation Courante v A and M Chabane* (1966), *ibid*, p 94; *Etat Belge v Dumont* and *Pittacos v Etat Belge* (1966), ILR, 48, pp 8, 20; *Re Algiers Land and Warehouse Co Ltd* (1967), ILR, 48, p 58; *Re Job* (1967), *ibid*, p 59; *Alig v Trust Territory of the Pacific Islands* (1967), ILR, 61, p 89; *Dupont v Belgium (Minister of Finance)* (1968), ILR, 69, p 24; *Met Den Ancxt v Belgium (Minister of Finance)* (1968), *ibid*, p 28; *Re Bounouala* (1970), ILR, 72, p 56; *Agent Judiciaire du Trésor v Humbert* (1973), ILR, 74, p 97.

32 See § 64.

33 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 independence: see eg, as regards Belize, the Belize Act 1981, ss 4 and 5.

1 The ILC decided not to deal with succession of governments or the consequences of any form of social revolution: YBILC (1974), ii, pt 1, 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.

affecting the international rights and obligations of the state.[2] 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*.[3]

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 situate within the territory of the parent state against which the revolt took place, no question of international law arises. Insofar as the property is situate 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.[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'.[5] But

2 See §§ 42–4. But acts of a government performed on the eve of its fall in a civil war may not bind the successor regime: see *Trinh v Citibank NA*, AJ, 83 (1989), pp 573, 577.

3 See § 46.

4 *United States of America v Prioleau* (1865) 35 LJ Ch 7; *United States of America v McRae* (1869) LR 8 Eq 69; see also *King of the Two Sicilies v Wilcox* (1850) 1 Sim NS 332. For litigation in the USA arising out of the civil war in Ireland in 1919–21, and concerning the former 'Irish Republic's' funds see Dickinson, AJ 21 (1927), pp 747–53; Garner, *ibid*, pp 753–57, and *Fogarty v O'Donoghue*, AD, 3 (1925–26), No 76; *Irish Free State v Guaranty Safe Deposit Co*, *ibid*, No 77. See also *Republic of China v Merchants' Fire Assurance Corporation of New York*, decided in 1931 by the US Circuit Court of Appeals: 49 F (2d) 862; AD (1931–32), No 45. And see Smith, i, pp 405–16, and Uren, Mich Law Rev, 28 (1929–30), pp 149–62. As to the title of the US Government to the wreck of the Confederate vessel *Alabama* lying in foreign waters, see Roach, AJ, 85 (1991), pp 381–3. See also *Union of Burma v Kotaro Toda* (1965), ILR, 53, p 149.

5 Moore, *Digest*, i, § 22, p 60; and Moore, *International Arbitrations*, i, 684, 695; iii, 2900–2901, 2982–7. See also *Standard-Vacuum Oil Co Claim* (1959), ILR, 30, p 168. But sometimes a state may agree to pay for the damage done by revolutionary forces, eg in a treaty between Great Britain and Mexico in 1926; Cmd 2876. It will be noted in *United States of America v McRae*, above, where the defendant, a Confederate agent in England, claimed to set off certain sums alleged to be due to him by the former Confederate Government, that the Federal Government being unwilling to admit any liability for the acts of the Confederate Government declined to submit to an account being taken; accordingly they only recovered such property as was theirs by title paramount and appear to have abandoned their claim based on succession. *Quaere*, was this because they did not wish to prejudice their case for a general exemption of liability for the debts and wrongs of the Confederate Government? See also *Hopkins'* claim before the American-Mexican Claims Commission in AJ 21 (1927), pp 160–67; RIAA, 4, p 41; AD, 3 (1925–26), No 170.

See generally § 167, as to questions of state responsibility which arise in circumstances of revolt or insurrection.

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 a *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 1974[2] and 1981[3] 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 *Tinoco Arbitration* (1923), RIAA, 1, p 369; Award of the Permanent Court of Arbitration in the *French Claims against Peru* in AJ, 16 (1922), at 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).

[2] YBILC (1974), ii, pt 1, p 174.

[3] YBILC (1981), ii, pt 2, p 20.

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 1978[1] 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 cicumstances 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; Cmnd 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.

For comment see Caggiano, Ital YBIL, 1 (1975), pp 69–98; Yasseen, AFDI, 24 (1978), pp 59–113; Treviranus, ZöV, 39 (1979), pp 259–77; O'Connell, *ibid*, pp 725–39; Sinclair in *Essays in Honour of Erik Castrén* (1979), pp 149–83; Lavalle, AJ, 73 (1979), pp 407–25; Mériboute, *La Codification de la succession d'états aux traités* (1984).

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*,[2] the Convention's rules (Articles 6–30) 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 the formulation 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 state party when they expressly so agree or by reason of their conduct are to be considered as having agreed. In those 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 one 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 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-

[2] By virtue of Art 2.1(f) the term 'newly independent State' means 'a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible'.

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 of Succession of States in respect of State Property, Archives and Debts 1983[1] 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).

[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.

For comment see Monnier, AFDI, 30 (1984), pp 221–9.

The terms of the Convention are, by Art 5, without prejudice to the effects of a succession of states in respect of any other matter; in which context note § 62, n 32 (as to economic and financial acquired rights), and n 2 below (as to certain kinds of public property).

(a) State property[2] *(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.

[2] In dealing with 'state property' the ILC decided to leave aside two other categories of public property on which the Special Rapporteur had submitted reports, namely (*a*) property of territorial authorities other than states or of public enterprises or public bodies, and (*b*) property of the territory affected by the state succession: YBILC (1973), ii, p 202, para (87).

[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 predecessor and successor 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 connected with the activity of the predecessor 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 takes place 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 tranferred 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 at 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 in question, and 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 shall not infringe the right of the peoples of those states to development,[4] 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 apply also 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

[4] 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 equitable 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 predecessor 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.

COMPOSITE INTERNATIONAL PERSONS

Dupuis, *Le Droit des gens et les rapports des grandes puissances* (1920), pp 133–70 Nawiasky, *Der Bundesstaat als Rechtsbegriff* (1920) Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp 274–314, and *Allgemeine Staatslehre* (1926), pp 193–225 Lundborg, *Die gegenwärtigen Staatenverbindungen* (1921) Newton, *Federal and Unified Constitutions* (1923) Stoke, *The Foreign Relations of the Federal State* (1931) Verdross, pp 99–111, and ZI, 35 (1926), pp 257–75 Pilotti, Hag R, 24 (1928), iv, pp 445–544 Kunz, *Staatenverbindungen* (1929), pp 61–288, 404–713, and RI, 3rd series, 11 (1930), pp 835–77, and 12 (1931), pp 131–49 Mouskheli, *La Théorie juridique de l'état fédéral* (1931) Scelle, Hag R, 46 (1933), iv, pp 393–414 Raestad, *Nordisk TA*, 5 (1934), pp 3–28, 45–66 Schlesinger, ZöR, 16 (1936), pp 87–103 Livingston (ed), *Federalism in the Commonwealth* (1963) Wheare, *Federal Government* (4th ed, 1963) Brinton, *Federations in the Middle East* (1964) McWhinney, *Federal Constitution Making in a Multi-National World* (1966) Thiam, Hag R, 126 (1969), i, pp 323–96 Verzijl, *International Law in Historical Perspective* (vol 2, 1969), pp 133–99, 490–500 Bernier, *International Legal Aspects of Federalism* (1973) Rousseau, *Droit international public* (vol 2, 1974), pp 96–213 University of Brussels Colloquium, February 1982, *Les Etats fédéraux dans les relations internationales* (1984), also published as *Rev Belge*, 17 (1983), pp 1–594.

§ 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)[1] 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.[1] Thus 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.

[1] 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 *Isaacson v Durant* (1886) 71 QBD 54. 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.[2] 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.[3] 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. If, 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.[1] At present there is no real union in existence,[2] that of Sweden–Norway[3] having been dissolved in 1905, that of Austria–Hungary[4] 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

[2] See Thomson, *Fondation de l'État Indépendent du Congo* (1933). The Italian conquest of Albania in 1939 was carried out under the appearance of the creation of a personal union between Italy and Albania: see Marek, *Identity and Continuity of States in Public International Law* (1954), p 331; *Valborg v De Mistura* (1961), ILR, 40, p 29; and § 55, n 30. As to the position of the Pope, see § 102, n 2.

[3] As to the position of the monarchy in the Commonwealth see Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp 80–86, and Wheare, *Constitutional Structure of the Commonwealth* (1960), ch VII.

[1] See, however, as to Austria–Hungary, Advisory Opinion on the *Question of Jaworzina* (1923), Series B, No 8, at p 43, where the PCIJ referred to Austria and Hungary before 1918 as 'distinct international units'. See also the decision of Judge Parker of 25 May 1927, with regard to the jurisdiction of the Tripartite Claims Commission: AD, 4 (1927–28), No 54.

[2] As to the relationship between Denmark and Iceland from 1918 to 1944, which probably constituted a real union, see 8th ed of this vol, p 172, n 2.

As to the union from 1958 to 1961 of Syria and Egypt, under the name of the United Arab Republic, see RG, 66 (1962), pp 413–17; and § 62, nn 11, 18 and § 63, n 6. For an example of a treaty concluded by the union in respect of one only of the constituent parts of the state, see the Agreement concerning Financial and Commercial Relations and British Property in Egypt 1959: TS No 35 (1959).

[3] See 8th ed of this vol, p 172, n 3.

[4] See *ibid*, p 172, n 4.

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[1] 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.[2] The Union of 1949 between Holland and Indonesia approached in some respects, especially with regard to the somewhat rudimentary common organs, a loose confederation.[3] 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.[4] 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.[5] Under the French Constitution of 1958 the French Union

[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 1895 and came to an end in 1898. See Martens, NRG, 2nd series, 31, pp 276–92. Notable historic confederations are those of the Netherlands from 1580 to 1795, the USA from 1778 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 1813.

[2] See RG, 86 (1982), pp 374–6; ILM, 21 (1982), pp 44 and 22 (1983), p 260.

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 1022 and Sehimi, 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.

[3] See UNTS, 69, p 208; Scheuner, *Archiv des Völkerrechts*, 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 Realm.

[4] Articles 60–82. See Colliard, *Etudes Georges Scelle* (vol ii, 1950), pp 653–86; and Van Asbeck, Hag R, 71 (1947), ii, pp 386–406.

[5] 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 remoulded to form the French Community.[6] At first only dependent French Overseas Territories could become members of the Community: after 1960 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[7] (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,[8] 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 (*Bundesstaaten*) 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[1] 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* (1947–48), 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 Cambodia, 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.

6 Articles 76–87. See generally, Gonidec, *Public Law* (1960), pp 177–89; O'Connell, *State Succession in Municipal Law and International Law* (1967), pp 60–75; Whiteman, *Digest*, 1, pp 544–82. See also *Re Hamour Ben Brahim Ben Mohamed, Otherwise Paci*, ILR, 22 (1955), p 60; *Re Kotalimbora* (1961), ILR, 44, p 26; *Longuet v Levy* (1961), *ibid*, p 29.

7 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, Malagassy Republic and Senegal.

8 See §§ 78–80.

1 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 creating the federation as 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.

accepted constitution of the federal state. A federal state is said to be a real state side by side with its member states,[2] because its organs have a direct power over the citizens of those member states. This power was established by American[3] jurists of the 18th century as a characteristic distinction between a federal state and confederated states, and Kent as well as Story, the two later authorities on the constitutional law of the United States, adopted this distinction, which is still generally maintained. Since a federal state is itself a state, side by side with its member states, sovereignty is divided between the federal state on the one hand, and, on the other, the member states; competence over one part of the objects for which a state exists is vested in the federal state, whereas competence over the other part remains with the member states.[4] Within its competence the federal state can make laws which bind the citizens of the member states directly without any interference by these member states. On the other hand, the member states are totally independent as far as *their* competence reaches.[5]

For international law this division of competence is of interest insofar as it concerns competence in *international* matters.[6] Since it is always the federal state (and not the member states) which is competent to declare war, make peace, conclude political treaties, 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.

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 81 ff. 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 Stoke, *The Foreign Relations of the Federal State* (1931); Halajcuk, ÖZöR, 13 (1963), pp 307–17. A federal constitution gives rise to certain difficulties in foreign relations: for instance, as to state responsibility (see § 147, n 1), and as to signature and ratification by the federal government of treaties regulating matters within the competence of the governments of the member states: see §§ 76 and 595.

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 exchange diplomatic and consular representatives, and participate in the work of international organisations'. This repeats the terms of a constitutional amendment adopted on 1 February 1944. For comment on the position of the Union Republics, see Dobrin, *Grotius Society*, 30 (1944), pp 260–83; Aufricht, AJ, 43 (1949), pp 695–98; Yakemtchouk, *L'Ukraine en*

The constitution may allow member states to conclude treaties.[8] 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.[9] Similarly, the

droit international (1954); Dolan, ICLQ, 4 (1955), pp 629–36; Markus, *L'Ukraine Soviétique dans les relations internationales 1918–23* (1959); Aspaturian, *The Union Republics in Soviet Diplomacy* (1960); Lukashuk, Hag R, 135 (1972), i, pp 257–66; Uibopuu, *Die Völkerrechtssubjektivität der Unionsrepubliken der UdSSR* (1975), and ICLQ, 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 UN of the Ukraine and Byelorussia as full members does not affect the UK's non-recognition of them as separate states: *Parliamentary Debates (Commons)*, vol 94, cols 340–41 (written answers, 24 March 1986). When the Ukraine and Byelorussia have sought to sign, in Washington, treaties of which the USA is a depositary and which have already been signed by the Soviet Union, the US Government have declined to accept signature by them, on the ground that the Soviet Union's signature was in respect of all constituent republics of the Soviet Union: see *Arms Control and Disarmament Agreements* (1990), published by the US Arms Control and Disarmament Agency, pp 220, 221, and 459, n 2. UK practice has been the same: see BPIL (1963–II), p 141.

[8] See generally Hendry, *Treaties and Federal Constitutions* (1955); Bernhardt, *Der Abschluss Völkerrechtlicher Verträge im Bundesstaat* (1957); Steinberger, ZöV, 27 (1967), pp 411–28; Ghosh, *Treaties and Federal Constitutions* (1961); Lissitzyn, Hag R, 125 (1968), iii, pp 5, 24–50; Wildhaber, *Treaty-Making Power and Constitution* (1971), pt 2; Oliver, Hag R, 141 (1974), i, pp 337–410; Di Marzo, Can YBIL, 16 (1978), pp 197–229. In its draft articles on the Law of Treaties the ILC proposed an article to the effect that states members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down (Art 5.2), but this provision was not included in the text of the Convention as finally adopted by the Vienna Conference (see 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 treaty law applied to them by analogy, those agreements operate within the legal regime of the constitution of the 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 § 595, n 4.

As to certain arrangements concluded in 1965 between France and provinces of Canada, see Fitzgerald, AJ, 60 (1966), pp 529–37; see also Can YBIL, 5 (1967), pp 154–6 and 252–3; Torrelli, AFDI, 16 (1970), pp 275–303; and AFDI, 32 (1986), pp 1047–8. See generally on the international position of those provinces Sabourin, Can YBIL, 3 (1965), pp 73–99; McWhinney, *ibid*, pp 100–26; Morin, *ibid*, pp 127–86; McWhinney, *ibid*, 7 (1969), pp 3–32; Atkey, IJ, 26 (1971), pp 249–73; RG, 82 (1978), pp 864–7. For an Agreement on Acid Precipitation concluded in 1982 between Quebec and New York State, see ILM, 21 (1982), p 721; but for the unwillingness of the USA to conclude a special bilateral commercial agreement with Quebec, see RG, 87 (1983), p 646.

As to the position regarding the constituent republics of Yugoslavia, see Lapenna, ICLQ, 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, 28 (1934), pp 286–92, and § 419, n 4, as to *Factor v Laubenheimer* (1933), 290 US 276.

[9] See Kraus, *Archiv des Völkerrechts*, 3 (1952), pp 414–27; Bernhardt, *Der Abschluss Völkerrechtlicher Verträge im Bundesstaat* (1957); Leisner, AFDI, 6 (1960), pp 291–392; Rudolf, *Archiv des Völkerrechts*, 13 (1966–67), pp 53–74; *Port 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 heads of sovereign states, a fact 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 8th 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.[10] In the judicial settlement of disputes which have arisen between member states of a federation, the municipal courts in question have often had recourse to rules of international law.[11] 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.[12] Member states lacking inter-

[10] See His, 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.

[11] See, for clear pronouncements to 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 Valais 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 (1919). See also H Lauterpacht, *The Function of Law*, pp 439–52, Harrison Moore, JCL, 3rd series, 17 (1935), pp 163–209, and Cowles, Hag R, 74 (1949), i, pp 659; Vinuesa, AFDI, 34 (1988), pp 283–330.

See also nn 16–21, for the litigation in the USA and some other states over offshore maritime rights.

[12] *Sullivan v State of Sao Paulo*. AD, 10 (1941–42), No 50; *Poortensdijk Ltd v Soviet Republic of Latvia* (1942), AD, 11 (1919–42), No 75; *Sayce v Ameer Ruler of Bahawalpur* [1952] 2 QB 390; *Sultan of Johore v Tunku Abubakar* [1952] AC 318; *Mellenger v New Brunswick Development Corpn* [1971] 2 All ER 593. But see, denying members of federal states the right to invoke the jurisdictional immunities enjoyed by sovereign states, *Feldman v State of Bahia* (1907), AJ, 26 (1932), Suppl p 484 (and comment by Suy, ZöV, 27 (1967), pp 670–2); *Molina v Comision Regulardora del Mercado de Henequén* (1918), Hackworth, ii, pp 402–3; *State of Céara v D'Archer de Montgascon*, AD, 6 (1931–32), No 84; *Etat de Céara v Dorr, Clunet*, 60 (1933), p 644; *Dumont v State of Amazonas*, AD, 15 (1948), No 44; *Etat de Hesse v Jean Neger*, RG, 74 (1970), p 1108. See generally Sucharitkul, *State Immunities and Trading Activities in International Law* (1959), p 106ff.

Under Art 28 of the European Convention on State Immunity 1972 (see § 109, n 8) the constituent states of a federal state do not enjoy immunity, unless the federal state makes a declaration as prescribed in the Article: see also paras 110–12 of the Explanatory Report on the Convention. In the UK the State Immunity Act 1978 provides that a constituent territory of a federal state only enjoys immunity if an Order in Council is made to that effect: s 14(5). In the USA the Foreign Sovereign Immunities Act 1976 treats political sub-divisions of a foreign state as within the meaning of the term 'foreign State', thereby according such sub-divisions the same immunity as is accorded a foreign state: ILM, 15 (1976), p 1388. In the ILC's draft articles provisionally adopted on first reading in 1986 the Commission provided that political sub-divisions of the state which are entitled to perform acts in the exercise of the sovereign authority of the state are included in the expression 'State': Art 3.1(b), YBILC (1986), ii, pt 2, p 13; and see commentary on that provision, *ibid*, pp 13–14. The draft articles also provided that proceedings instituted against a political sub-division in respect of such acts shall be considered to have been instituted against its state: Art 7.3, YBILC (1982), ii, pt 2, pp 100, 102–4, paras (9)–(12).

A member state may, by virtue of the Federal Constitution, enjoy immunity from suit within the Federation in question, as is eg the position in the US: see *The Principality of Monaco v The State of Mississippi* (1933) 291 US 643, and 292 US 313; AD, 7 (1933–34), No 61; AJ, 28 (1934), p 576. See for comment thereon Reeves, *ibid*, pp 739–42. See also McGrane, *Foreign Bondholders and American State Debts* (1935). Cf *Commonwealth of Australia v New South Wales*, AD (1923–24), No 67.

national status may also sometimes have their own representatives abroad, although they will not be diplomatic agents in the usual sense of that term.[13]

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 *internal*[14] 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.[15] 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;[16] but the Submerged Lands Act 1953 in effect reversed this decision as regards the subsoil of territorial waters,[17] although by the Outer Continental Shelf Lands Act 1953 the Union retained jurisdiction over submerged lands of the continental shelf outside state areas.[18] The Canadian Supreme Court has similarly held that Canada, rather than the provinces, has power to legislate as regards the subsoil of territorial waters and the continental shelf.[19] In Australia such major litigation

[13] Thus some of the provinces of Canada, and states of Australia, maintain representative offices in London; and Quebec in particular does so in a number of other countries (see RG, 89 (1985), p 753). These offices will usually be concerned with matters such as trade and tourism. See also RG, 88 (1984), p 249, for the opening in Geneva of a 'business embassy' of one of the states of the USA. The enjoyment by such representatives and their offices of various privileges will be a matter of special arrangement with the host country, rather than an entitlement under the rules of international law concerning diplomatic and consular relations. But see n 12 above, as regards entitlement to sovereign immunity.

[14] The courts of the USA have always upheld the theory that the Federal Government is sovereign as to all powers of government actually surrendered, whereas each member state is sovereign as to all powers reserved. See Merriam, *History of the Theory of Sovereignty since Rousseau* (1900), p 163. And see Mitchell, *State Interests in American Treaties* (1936) and Levitan, Yale LJ, 55 (1946), pp 467–97.

[15] As to the position in Nigeria, see Nwogugu, ICLQ, 22 (1973), pp 349–63. See also *ASBL Koninklijk Belgisch Yachting Verbond v Province of Western Flanders* (1976), ILR, 77, p 402, as regards the powers of the central organs of the state, and those of provinces, in Belgium; and Alen, ZöV, 50 (1990), pp 501–42.

[16] *US v California* (1947) 332 US 19; AD, 14 (1947), No 20; *US v Louisiana* (1950) 339 US 699; ILR, 17 (1950), No 33; *US v Texas* (1950) 339 US 707; ILR, 17 (1950), No 32.

[17] The Act gave rise to further litigation between the states and the Union: see *US v Louisiana* (1960) 363 US 1; ILR, 31, p 141; and *US v Florida* (1960) 363 US 121.

[18] For texts of both Acts see AJ, 48 (1954), Suppl, pp 104, 110; and Stone, ICLQ, 17 (1968), pp 103–16. The Union's jurisdiction over seabed areas outside territorial waters was confirmed by the Supreme Court in *US v Maine* (1975) 43 USLW 4359. As to lateral delimitation of seaward boundaries between states of the USA, see *Texas v Louisiana* (1974–76), ILR, 59, p 195, and Charney, AJ, 75 (1981), pp 28–68. See also *Georgia v South Carolina*, AJ, 84 (1990), p 909.

[19] *Re the Ownership and Jurisdiction over Offshore Mineral Rights* (1967), ILR, 43, p 93; *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 DLR (4th) 385; ILM, 23 (1984), p 288. See also Warbrick, ICLQ, 17 (1968), pp 501–13; Gilmore, *Marine Policy* (October 1984), pp 323–9; Black, ICLQ, 35 (1986), pp 446, 452–6.

has largely[20] been avoided by an agreement reached in 1967 between the Commonwealth and the constituent states, leading to uniform legislation by both states and Commonwealth[21] 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[1] 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 as 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, after having validly concluded such treaties, unable to give effect to them.[2] In some federal states, such as Australia[3] or India,[4] 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

[20] 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 Florenca* (1976), ILR, 69, p 109; *Raptis and Son v State of South Australia* (1977), ILR, 69, p 32; *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.

[21] See the Commonwealth Petroleum (Submerged Lands) Act 1967; and Warbrick, ICLQ, 17 (1968), pp 501–13.

[1] For a comparative study of various federal systems of government, see Antieau, *States Rights under Federal Constitutions* (1984).

[2] See *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326: AD, 8 (1935–37), No 17, to the effect that an Act of the Canadian Parliament passed for the purpose of giving effect to certain International Labour Conventions ratified by Canada was *ultra vires* the Canadian Legislature. For comment thereon see a symposium in Can Bar Rev, 15 (1937), pp 393–507; see, in particular, the articles by Mackenzie, pp 436–54; Jennings, pp 455–63; and Jenks, pp 464–77. See also Stewart, AJ, 32 (1938), pp 36–62, and Fawcett, *The British Commonwealth in International Law* (1963), pp 20–24 and 214ff (and also pp 25–30 as to the position in certain other federal states in the Commonwealth). See generally on the enforcement of treaties by federal states, Oliver, Hag R, 141 (1974), i, pp 337–410.

[3] *The King v Burgess, ex parte Henry*, AD, 8 (1935–37), No 19; *Koowarta v Bjelke-Petersen*, (1982), ILR, 68, p 181; *Commonwealth v Tasmania* (1983), ILR, 68, p 266. See also Byrnes and Charlesworth, AJ, 79 (1985), pp 622–40; Hofmann, ZöV, 48 (1988), pp 489–512.

[4] Article 253 of the Constitution of India. And see Alexandrowicz, ILQ, 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.[5] 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.[6] 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.[7] 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.[8] The Constitution of the International Labour Organisation

[5] (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 345; Sutherland, HLR, 65 (1952), p 1305; Rodgers, AJ, 61 (1967), pp 1021–8. See also, as bearing on the problem of the conduct of foreign relations in federal states, Fisher, *AS Proceedings* (1951), pp 2–10; Martin, *ibid*, pp 10–20; Bishop in Minn Law Rev, 36 (1952), p 299.

[6] *United States v Curtiss-Wright Export Corpn* (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 partaking of the nature of a treaty – though not constituting treaties – to override the law and notions of public policy of the states); *Scandinavia 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 York 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).

[7] See § 21.

[8] See Sørensen, AJ, 46 (1952), pp 195–218; Looper, BY, 32 (1955–56), pp 162–203; Burmester, ICLQ, 34 (1985), pp 522–37 (with particular reference to the Australian experience). See also § 621.

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* (1983), ILR, 68, p 266. For an instance of a treaty concluded by a federal state but requiring the consent of the member state directly affected see *Jenni v Conseil d'État of the Canton of Geneve* (1978), ILR, 75, p 99.

has accepted, in a different way, the same principle.[9] 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.[10]

§ 77 Customs unions Two or more states sometimes by treaty agree to enter into a customs union,[1] 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*,[2] 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,[3] and between Belgium, Luxembourg and the Nether-

[9] See Art 19 (7) which, in effect, limits the obligations of the federal states which are members of the ILO, in the matter of conventions and recommendations accepted by the ILO, to the obligation to submit them to the member states or provinces..

[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 GATT requirements by their regional and local governments. In 1987 the GATT disputes panel considered the extent of the Canadian Government's responsibility in GATT under this provision for the actions of provinces of Canada: *GATT Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, ILM, 27 (1988), p 1599.

[1] 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'.

[2] PCIJ, Series A/B, No 41. See § 118, n 2.

[3] On the Customs Union Treaty of 29 March 1923, see Pilotti, Hag R, 24 (1928), iv, pp 463–4. 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: Off 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)[4] 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.[5]

THE COMMONWEALTH

Stewart, *Treaty Relations of the British Commonwealth of Nations* (1939) Duncan Hall, *The British Commonwealth of Nations in War and Peace* (in *The British Commonwealth at War*, eds Elliott and Duncan Hall, 1943) Mansergh, *Documents and Speeches on British Commonwealth Affairs, 1931–52*, (2 vols, 1953) Corbett, UTLJ, 3 (1940), pp 348 *et seq* Scott, AJ, 38 (1944), pp 34–49 Chevallier, *Etudes Georges Scelle* (vol i, 1950), pp 179–94 Jennings, BY, 30 (1953), pp 320–51 Wheare, *The Statute of Westminster and Dominion Status* (1953), and *Constitutional Structure of the Commonwealth* (1960) Sheridan, YB of World Affairs, 11 (1957), pp 236–56 Sir Ivor Jennings, *Problems of the New Commonwealth* (1958) Mansergh *et al*, *Commonwealth Perspectives* (1958) Fawcett, *The British Commonwealth in International Law* (1963) de Smith, *The New Commonwealth and its Constitutions* (1964) Roberts-Wray, *Commonwealth and Colonial Law* (1966) Wilson *et al*, *International Law Standard and the Commonwealth* (1966); *International and Comparative Law of the Commonwealth* (1968); *International Law and Contemporary Commonwealth Issues* (1971); and AJ, 60 (1966), pp 770–81 Verzijl, *International Law in Historical Perspective* (vol 2, 1969), pp 207–69 O'Connell and Riordan, *Opinions on Imperial Constitutional Law* (1971) Ball, *The 'Open' Commonwealth* (1971) Doxey, YB of World Affairs, 27 (1973), pp 90–109 Morvay, *Souveränitätsubergang und Rechtskontinuität im Britischen Commonwealth* (1974) Rousseau, *Droit international public* (vol 2, 1974), pp 214–63 Dale, *The Modern Commonwealth* (1983) Slinn, *Commonwealth Law Bulletin*, 15 (1989), pp 573–9 *The Commonwealth Yearbook* (annual volumes published by the Foreign and Commonwealth Office) For works published before 1939 see 8th ed of this vol, p 197.

§ 78 Progress of self-governing dominions towards independence Prior to the First World War the self-governing dominions,[1] 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[2] 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

Liechtenstein was refused admission to the League of Nations on the ground that it did 'not appear to be in a position to carry out all the international obligations imposed by the Covenant', presumably on account of its small size: *Records of the Second Assembly 1921, Plenary Meetings*, p 686. And see Gunter, AJ, 68 (1974), pp 496–501. While Liechtenstein entrusted Switzerland with its representation abroad, this was subject to the retention in principle of its sovereign rights including the right to appoint its own representatives. Although Liechtenstein was not a member of the UN, it was admitted in 1949 as a party of the Statute of the ICJ. In that capacity it is entitled to take part in the elections of the judges of the Court and to institute proceedings before it. Liechtenstein did so in 1951 when it invoked the provisions of the Optional Clause against Guatemala: see ICJ Rep (1953), p 111. Liechtenstein has participated in many international conferences, such as the UN Conference on Diplomatic and Consular Relations held in Vienna in 1961 and 1963, and is a party to a number of bilateral and multilateral treaties. Liechtenstein became a member of the Council of Europe in 1979, and is a member of the IAEA, ITU, and WIPO: it became a member of the UN in 1990.

See Astraudo, *Les Petits Etats de l'Europe* (1933); Ratin, *Le Liechtenstein et ses institutions* (1949), and *Liechtenstein* (1970); Spillmann, *Die rechtliche und politische Lage des Fürstentums Liechtenstein nach dem Weltkriege* (1933); Guggenheim, *Traité de droit international public* (vol 1, 1953), pp 176–7; Kohn, AJ, 61 (1967), pp 547–57; Rousseau, *Droit international public* (vol 2, 1974), pp 332, 339–40.

[4] Customs Union Convention 1944; Treaty Establishing the Benelux Economic Union 1958. See van Houtté, RG, 53 (1949), pp 387–408; Sibert, *ibid*, 700–9; Viner, *The Customs Union Issue* (1950); Jasper, Europ YB, 2, pp 34–57; van Lynden, *ibid*, 8 (1960), pp 132–51; van der Meersch, *Organisations Européennes* (vol 1, 1966), pp 419–51; Robertson, *European Institutions* (1973), pp 271–8; Rijmenans, Europ YB, 33 (1985), pp Benelux 1–7. Note also the Treaty of 1965, which entered into force on 1 January 1974, establishing a court to give binding rulings to national courts on the interpretation of the law of the Benelux Union.

As to the customs union created in 1921 between Belgium and Luxembourg, see Pescatore, *L'Union Economique Belgo–Luxembourgeoise* (1965); van der Meersch, *op cit*, pp 416–18; Hostert, BY, 43 (1968–69), pp 149–53. Article 233 of the Treaty establishing the EEC permits the continued existence of the Belgo–Luxembourgeoise and Benelux customs unions.

For a list of treaties up to November 1971 relating to Benelux cooperation, see ICLQ, 21 (1972), pp 189–91.

[5] Article 9 of the Treaty establishing the EEC.

[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.[3] The decisive constitutional development was the enactment of the Statute of Westminster 1931.[4] 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 repugnancy to 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,[5] 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 and consented to its enactment.[6] The dominions availed themselves in varying degrees of the emancipating provisions of the Statute of Westminster.[7]

The development since the First World War of the dominions' internal and external independence was such as to make their status indistinguishable from

[3] For a summary of the salient historical facts see 8th ed of this vol, pp 199–203. See also Gilmore, Vir JIL, 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 (Cmnd 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), Cmnd 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 coasting 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 Coal Corpn 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 *Ibralebbe v R* [1964] AC 900, 924–5, as regards Ceylon's legislative powers after independence. See n 15 as to appeals to the Judicial Committee.

[6] See Mahaffy, *The Statute of Westminster 1931* (1932); Wheare, *The Statute of Westminster and Dominion Status* (5th ed, 1954); Kennedy, LQR, 48 (1932), pp 191–216; Ewart, Can Bar Rev, 10 (1932), pp 111–22; Hudson, HLR, 46 (1932–33), pp 261–89; Loren, JCL, 3rd series, 15 (1933), pp 47–53; Chevallier, RI (Paris), 17 (1936), pp 413–41.

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 these 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 Wynne*, ILR, 19 (1952), No 16, and *R v Fineberg* (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'.

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 as and when advised by the Executive Council to do so. The Constitution of 1937 described Ireland as a sovereign and independent state.

that of full international persons,[8] despite some anomalies at times.[9] Their legal right to all the external[10] attributes of sovereignty is undisputed, and it is now acknowledged that, for those members of the Commonwealth which retain the Crown as Head of State, in the field of their external affairs the Crown acts on the advice of the Commonwealth government concerned.

[8] By 1945 Canada, Australia, New Zealand, South Africa and Ireland were all sending diplomatic and, some of them, consular representatives to various countries. Some of them, by acquiring the Great Seal and thus making it possible to dispense with the royal signature, secured machinery for the more expeditious exercise of their undisputed power of concluding treaties. Canada and South Africa acquired a Great Seal in 1932; Australia did the same, though for more limited purposes, in 1939.

As to the developments in Australia's position see Latham, *The Law and the Commonwealth* (1949); O'Connell, *International Law in Australia* (1965), pp 1–33; Sawer in *ibid*, pp 35–51.

Much of the history of Canada's constitutional development was judicially considered in detail in the litigation accompanying the 'patriation' of the Canadian constitution in 1982: see *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892, on which see Crawford, BY, 53 (1982), pp 253–9. See also *Manuel v Attorney-General, Noltcho v Attorney-General* [1983] 1 Ch 77; and § 22, n 7. See also the First, Second and Third Reports of the House of Commons Foreign Affairs Committee in 1980 and 1981 on the British North America Acts (HC (1980–81) 42; HC (1980–81) 295; HC (1981–82) 128), and the observations by the Secretary of State for Foreign and Commonwealth Affairs on the First Report (Cmnd 8450). For earlier consideration of Canada's position see Corbett and Smith, *Canada and World Politics* (1928); Ollivier, *Problems of Canadian Sovereignty* (1945); Ewart, *Canadian Historical Review*, 9 (1928), pp 194–205; Russell, *AS Proceedings* (1928), pp 19–26; Rowell, Can Bar Rev, 8 (1930), pp 570–86; *Round Table*, 25 (1934–35), pp 100–12; Scott, *Foreign Affairs (USA)*, April 1937, pp 429–42; Elkin, RG, 45 (1938), pp 658–93. On Canada's power to perform treaty obligations see MacDonald, Can Bar Rev, 11 (1933), pp 581–99, 664–80.

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.

[9] 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 setting up of 'two independent Dominions ... to be known respectively as India and Pakistan', India became a fully self-governing dominion and an independent state. See also *T P Sankara Rao v Municipal Council of Masulipatam*, ILR, 26 (1958–II), p 104. As to India's position prior to that date, see Sen, *The Indian States, their Status, Rights, and Obligations* (1930); Palmer, *Sovereignty and Paramountcy in India* (1930); Holdsworth, *The Indian States and India* (1930); Jennings, RI, 3rd series, 10 (1929), pp 480–91; Sundaram, *International Affairs*, 9 (1930), pp 452–66, and *Grotius Society*, 17 (1931), pp 35–51; Sethi, Can Bar Rev, 14 (1936), pp 36–49; *The British Empire* (Report by Study Group of Royal Institute of International Affairs (1937)), pp 108–32; Whiteman, *Digest*, 1, pp 489–509; Poulose, BY, 44 (1970), pp 201–12.

As to the states which arose on what was formerly Indian territory see O'Connell, BY, 26 (1949), pp 454–63; and see § 62, nn 2–4. As to the Indian vassal states see § 81, n 3.

[10] In the internal sphere the Statute of Westminster did not do away altogether with the right of and necessity for Imperial legislation. Thus legislation by Parliament at Westminster was until recently necessary for any amendment to the Constitution of Canada, 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 *Bistricic v Rokov* (1976), ILR, 69, p 11). These 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

With the passing of the doctrines of the indivisibility of the Crown[11] and of common allegiance,[12] there is no longer[13] 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.[14] 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;[15] 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.

(para 3). As to the position in South Africa in connection with the amendment of the entrenchment clauses in the South Africa Act, see the Judgment of the Supreme Court of South Africa on the Validity of the Separate Representation of Voters Act (1951), *South African Law Reports*, 2, p 428, and Mansergh, *op cit* in bibliography preceding § 78, vol i, p 97; *Harris v Minister of the Interior*, ILR, 19 (1952), No 15.

11 See Communiqué of the Commonwealth Relations Office of 12 November 1952, on the Queen's Style and Titles (Mansergh, *op cit* in bibliography preceding § 78, vol ii, p 1293). See Royal Titles Act 1953; de Smith, ICLQ, 2 (1953), pp 263–74. See generally O'Connell, ICLQ, 6 (1957), pp 103–25; Wheare, *Constitutional Structure of the Commonwealth* (1960), pp 150–69; Fawcett, *The British Commonwealth in International Law* (1963), pp 79–83; Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp 84–6; Dale, *The Modern Commonwealth* (1983), pp 35–9. See also *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] 2 All ER 118, at pp 123 and 127–8 (*per* Lord Denning MR), 131–2 (*per* Kerr LJ), and 136 (*per* May LJ).

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 plural Crown 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 For an indication of earlier doubts on the matter see 8th ed of this vol, p 206, n 3.

14 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 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 British 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 *Nadan v The King* [1926] AC 482; *British Coal Corp v R* [1935] AC 500. 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

§ 79 The Commonwealth since 1945 Much of the former uncertainty about the international status of the dominions arose as a result of the gradual process of evolution through which they progressed to independence. Since 1945 independence has been attained normally as the result of a single act by which dependent status was ended and independence attained. There has consequently been little room for ambiguity as to the fully independent status of those members of the Commonwealth which at the end of the Second World War were still British dependent territories but which have since been granted independence.[1]

Upon becoming independent, a former British[2] dependent territory usually seeks to join the Commonwealth. There is no set formal procedure for admission; the views of existing Commonwealth members are sought and their agreement to the membership of the new member has always been forthcoming. However, a territory becoming independent may not wish to join the Commonwealth, as was the case with Burma in 1947,[3] the Southern Cameroons in 1961,

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 *Ibralebbe 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), at p 137, n 25). Many members of the Commonwealth no longer allow appeals to the Privy Council.

See generally Wheare, *Constitutional Structure of the Commonwealth* (1960), pp 45–54; Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp 433–63; Jackson, CLJ, 28 (1970), pp 271ff; 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.

1 As to Cyprus, see § 40, 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 as 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.

2 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.

3 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 (Cmd 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'.

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,[4] South Africa in 1961,[5] Pakistan in 1972,[6] and Fiji in 1987.[7] 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 a 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 *Bicknell v Brosnan* [1953] 1 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 *Hume Pipe & Concrete Construction Co Ltd v Moracrete Ltd* [1942] 1 KB 189.

Moreover, 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 a citizen of the Republic of Ireland, and 'foreign country' does not include the Republic of Ireland (s 50(1)). By virtue of s 37(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 Faucon, *Le Statut de l'Etat Libre d'Irlande* (1929); Rynne, *Die völkerrechtliche Stellung Irlands* (1930); Kohn, *The Constitution of the Irish Free State* (1932); Phelan, *The British Empire and the World Community* (1932); Williams, 'Great Britain and the Irish Free State', *Foreign Policy Reports*, 8 (1932); Jacquemard, RI (Paris), 6 (1930), pp 204–24; Jennings, RI, 3rd series, 13 (1932), pp 473–523; *Round Table*, 25 (1934–35), pp 21–43.

As an instance of the view that the Republic of Ireland is not a foreign country in relation to the UK, see the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act 1961, which conferred upon the representatives of members of the Commonwealth and of the Republic of Ireland when attending conferences in the UK immunities enjoyed by an envoy of a foreign sovereign power; and the provisions of the British Nationality Act 1981 cited above.

[5] See Wilson, AJ, 55 (1961), at pp 442–4.

[6] Pakistan rejoined the Commonwealth in 1989.

[7] 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 Year Book* (1989), p 39. Notwithstanding this, Fiji was held to be still a member of the Commonwealth in 1988, for purposes of the application of the Fugitive Offenders Act: *R v Brixton Prison Governor, ex parte Kahan* [1989] 2 All ER 368.

II is the Head of the Commonwealth, a state may be a member of the Commonwealth notwithstanding that it is a republic.[8]

The full international personality of the members of the Commonwealth is not inconsistent with the fact that their relations *inter se* are, in some respects, of a special character. Generally, members of the Commonwealth do not treat other member states as 'foreign' states.[9] While the members of the Commonwealth send permanent representatives to and receive them from other members of the Commonwealth, they are usually designated as High Commissioners instead of ambassadors. However, these representatives for most purposes now enjoy a status virtually indistinguishable from that of diplomatic representatives of foreign states, although this was not formerly the case.[10] Again, although accept-

[8] For republics which are members of the Commonwealth, see § 80, n 1. The issue first arose in 1949 when India, while remaining a member of the Commonwealth, became a republic. The India (Consequential Provisions) Act 1949 was passed to cover the resulting situation. When its new constitution came into force on 26 January 1950, India became a 'sovereign democratic Republic'. The Government of India had previously informed other countries of the Commonwealth of the impending change. The meeting of the Commonwealth Prime Ministers in April 1949 took note of the proposed new Constitution of India. At the same time the Government of India 'declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth'. The governments of the other countries of the Commonwealth accepted and recognised the continued membership of India in accordance with the terms of the above declaration. At the same time they affirmed that the basis of their own membership, namely the common allegiance to the Crown, had not changed as the result: Final communiqué of the Meeting of the Commonwealth Ministers, 27 April 1949 (as printed in Mansergh, *op cit* in bibliography preceding § 78, vol ii, p 846). See also Kemal, *Indian Year Book of International Affairs*, 6 (1957), pp 143–71. It is now the established convention that if a Commonwealth country is about to change from a monarchy to a republic and wishes to continue thereafter to be a member, it informs the Secretary-General of the Commonwealth so that he can initiate the necessary consultations with all member governments, the unanimous concurrence of those members being required for continued membership: see Press Release from the Commonwealth Secretariat, 30 September 1987, in the context of possible constitutional changes in Fiji.

[9] See British Nationality Act 1981, s 50(1) as to the meaning of 'foreign country', and the same section and s 51(4) as to the meaning of 'alien'. See also eg the Indian Constitutional Order, No 2, 1950, issued in connection with Part II of the Constitution of 1949 relating to citizenship and laying down that 'every country within the Commonwealth is hereby declared not to be a foreign state for the purposes of the Constitution'. But for purposes other than those of the constitution itself, another member state of the Commonwealth may still be regarded as 'foreign': see *Naziranbai v The State*, ILR, 24 (1957), p 429, and *Jagan Nath Sathu v Union of India* (1950), ILR, 53, p 95. But it may be noted that Eire, which is not a member of the Commonwealth, is also regarded by many of its members as not being a foreign country (see § 79, n 4). In general, the international implications of the statement that a country is not regarded as a foreign country are not clear. This applies in particular to the operation of most-favoured-nation clause treaties (see § 669).

[10] Their privileges and immunities are now regulated in the UK primarily by the Diplomatic Relations Act 1964, which applies equally to ambassadors of foreign states. See generally Fawcett, *The British Commonwealth in International Law* (1963), pp 197–201; Wilson, AJ, 51 (1957), at pp 614–17 (and note the incident there referred to, p 617, n 22, concerning the Letters of Credence of the Australian Ambassador to Ireland in 1954, which, being signed by the Queen in her capacity of Queen of Australia, were thought might involve undesirable consequences for

ances 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.[11] Similarly, the concept of a common national status[12] 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 so as 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 153–4, 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 or 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 jurisdiction of the ICJ based on 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, 1960).

The Irish Nationality and Citizenship Act of 1935 abolished for its citizens the status of British subject (s 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 member of the Commonwealth is for the purposes of its own law entitled to pass Acts repugnant to an Imperial Act – *Moore and Others v Attorney-General of the Irish Free State* [1935] AC 484 – it has been judicially stated with regard to the above-mentioned provision of the Irish Act of 1935 that such an Act is not necessarily operative outside the State enacting it: *Murray v Parkes* [1942] 2 KB 123. See also n 4.

13 It appears that only in the UK were British subjects, in the wider sense, from other parts of the Commonwealth treated on a similar, though not the same, footing as persons born in the UK. In 1962 the Commonwealth Immigrants Act was passed, followed by the Commonwealth Immigrants Act 1968 and the Immigration Act 1971: their effect was to restrict the freedom of immigration into the UK of British subjects who did not have certain specified close connections with the UK.

Other members of the Commonwealth do not, in most cases, admit equality of treatment in such matters as immigration and political franchise. For the affirmation of the rule that a British subject does not, as such, have the right to enter or stay in any part of the Commonwealth, see *De Merigny v Langlais*, decided by the Supreme Court of Canada: AD, 14 (1947), No 63. See also *Musson and Musson v Rodriguez* (1952), ILR, 22 (1955), p 61; *Mohd Abdul Ghani v The State*, ILR, 24 (1957), p 56; *Naziranbai 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 by reference to 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 diminishing[16] 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;[2] 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 *Pugh Claim* the UK presented a claim against Panama in respect of a national of the Irish Free State: 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 § 595, 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 (*Govt of India, Ministry of Finance (Revenue Division) v Taylor*, ILR, 22 (1955), p 286.

17 See § 669, n 39, as to Commonwealth preference; § 417, nn 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, Solomon Islands, 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, Dominica, 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.

2 A foreign observer described it in 1927 as 'a true League of Nations of sovereign States of British race': Löwenstein *Archiv des öffentlichen Rechts*, New Series, 12 (1927), at p 272. Kunz, *Staatenverbindungen* (1929), pp 796 *et seq*, regarded it as a quasicomposite state approximating most nearly to a real union. See for a full discussion of earlier views, Baker, *The Present Juridical Status of the British Dominions in International Law* (1920), especially pp 130–342.

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,[3] 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.[4] 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.[5] 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.[6] Moreover, account must be taken of the flexible but regular and effective machinery of consultation and exchange of information.[7] 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

Dupuis, *Le Droit des gens et les rapports des grandes puissances* (1920), pp 233–69 Rutherford, AJ, 20 (1926), pp 300–25 Kunz, *Staatenverbindungen* (1929), pp 163–93 Sereni, *La rappresentanza nel diritto internazionale* (1936), pp 304–11, and Hag R, 73 (1948), ii, pp 73–159 Venturini, *Il protettorato internazionale* (1939) McNair, *Opinions* (vol 1, 1956), pp 39–66 Kamanda, *A Study of the Legal Status of Protectorates in Public International Law* (1961) Fawcett, *The British Commonwealth in International Law* (1963), pp 115–38 Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp 47–52, 54, 112–16, 126–30 Verzijl, *International Law in Historical Perspective* (vol 2, 1969), pp 339–490 Rousseau, *Droit international public* (vol 2, 1974), pp 270–300 Crawford, *The Creation of States in International Law* (1979), pp 187–214 Dale, *The Modern Commonwealth* (1983), pp 15–18.

[3] See *Agreed Memorandum on the Commonwealth Secretariat*, July 1965 (Cmnd 2713); see also ICLQ, 15 (1966), pp 577–8, and Doxey, YB of World Affairs, 30 (1976), pp 69–96. The Commonwealth Secretariat Act 1966 conferred certain privileges and immunities on the Secretariat. In 1976 the Commonwealth Secretariat was granted observer status at the UN: GA Res 31/3. As to the Commonwealth Legal Advisory Service, see Marshall, ICLQ, 21 (1972), pp 435–51. For consideration of the Commonwealth as an international organisation see Dale, ICLQ, 31 (1982), pp 451–73.

[4] Periodic high-level meetings of Commonwealth leaders began (after the earlier Colonial Conferences) with the Imperial Conferences held between 1911 and 1937; after the Second World War these were resumed, from 1945 to 1965, as Commonwealth Prime Ministers' Meetings. They have subsequently been known as Commonwealth Heads of Government Meetings: the first to be so titled was held in 1966 and since 1969 they have been held every two years.

[5] See § 78, n 12.

[6] See § 79, n 9.

[7] In 1946 the meeting of the Commonwealth Prime Ministers put on record their conviction that the existing methods were 'preferable to any existing arbitral machinery' which 'would not facilitate, and might even hamper, the combination of autonomy and unity which is characteristic of the British Commonwealth and is one of their great achievements'. *Parliamentary Debates (Lords)*, vol 153, cols 1154–8 (17 February 1948). See Harvey, *Consultation and Cooperation in the Commonwealth* (1952). See also the same author in *International Conciliation*, Pamphlet No 487 (1953). As to the members of the Commonwealth in the UN, see Carter in *International Organisation*, 4 (1950), pp 247–60. As to the results of the Commonwealth Conference of 1949, see Ivor Jennings, BY, 25 (1948), pp 414–20.

§ 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.[1] 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.[2] Vassal states, although retaining internal independence, normally had no separate international position.[3]

[1] See generally on so-called vassal states, 8th ed of this vol, §§ 90, 91; particularly p 189, n 1; and see p 190, n 3, as to Turkish suzerainty over Egypt up to 1914, and p 190, n 1 and n 2 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 both Egypt and the Indian states see cases cited at n 3 below, and on the latter see also Chacko, Hag R, 93 (1958), i, pp 181–203.

[2] See *Parliamentary Debates (Commons)*, vol 602, col 126 (written answers, 25 March 1959), and *Parliamentary Debates (Lords)*, vol 346, 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 2011 (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, 60 (1966), pp 369–71, and Rubin, *ibid*, pp 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, Hag R, 103 (1961), ii, pp 409–17; UNYB (1959), pp 67–9, and *ibid* (1961), pp 138–40. See further as to the position of Tibet, Sen, RG, 55 (1951), pp 417–38; Choudary, *Indian Yearbook of International Affairs*, 1 (1952), pp 185–96; Alexandrowicz, AJ, 48 (1954), pp 265–74; Tien-Tseng Li, AJ, 50 (1956), pp 394–404; van Praag, *The Status of Tibet* (1987).

[3] This was the position of the Indian vassal states of Great Britain, which had no international relations whatever either between themselves or with foreign states. (Not to be confused with the position of the Indian vassal states is the position of India: see § 78, n 9.) See Hall, p 28; Westlake, i, pp 41–43, and *Papers*, pp 211–19, 620–32; and Lindley, pp 195–201. See also Lee-Warner, *The*

Still of some contemporary relevance are protectorates. A protectorate arises when a weak state surrenders itself by treaty[4] to the protection of a strong state in such a way that it transfers the management[5] 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 tribes:[9] those 'protectorates' possessed no international status at all.

Native States of India (1910), pp 254–79; Stimmel in Strupp, *Wört*, iii, pp 3–13, and Fitzgerald (as to Berar), LQR, 42 (1926), pp 514–20; Das, AJ, 43 (1949), pp 57–72; Fawcett, *The British Commonwealth in International Law* (1963), pp 126–8. But see *Dalmia Cement Co Ltd v Federation of Pakistan* (1959), ILR, 27, p 108; and *Ex parte Mwenya* [1960] 1 QB 241, referred to at n 9.

However, their rulers have been held entitled to the immunity from jurisdiction which, under international law, is accorded to heads of states abroad: see, as to the Indian vassal states of the UK, *Statham v Statham and the Gaekwar of Baroda* [1912] P 92; *Sayce v Ameer of Bahawalpur* [1952] 1 All ER 326; 2 All ER 64; *Sirkar v Subnemonia Iyen*, AD, 13 (1946), No 9; *Maharaja Bikram Kishore of Tribura v Province of Assam*, ILR, 22 (1955), p 64; *Bhimajii Narasu Mane v Vijayasinvrao Ramrao Dale*, ILR, 22 (1955), p 67; *Darber Saheb Surangwala of Jetpur v The New India Assurance Co Ltd*, ILR, 22 (1955), p 71. But for contrary decisions see *The Superintendent, Government Soap Factory, Bangalore v Commissioner of Income Tax*, AD, 10 (1941–42), No 10; *Bishwanath Singh v Commissioner of Income Tax*, AD, 10 (1941–42), No 11; *Rani Amrit Kunwar v Commissioner of Income Tax* (1945), ILR, 22 (1955), p 73 (holding rulers to enjoy limited immunity, not extending to a ruler's wife); and see § 451, n 7. An ex-ruler was held not to enjoy immunity in *Thakore Saheb Khanji Kashari Khanji v Gulam Rasul Chandbhal*, ILR, 22 (1955), p 253. The Khedive of Egypt was held not to have sufficient status, while Egypt was under Turkish suzerainty, to justify the grant of immunity: *The Charkieh* (1873) LR 4 A & E 59; but cf *Solon v Mehemet Ali* (1847), Phillimore, ii, p 145, holding the Khedive sufficiently independent to be entitled to immunity.

By s 7(1)(b) of the Indian Independence Act 1947 British suzerainty over the Indian states lapsed; none of the powers previously exercised by the Crown in relation to them was transferred to India or Pakistan. Their status pending their accession to either India or Pakistan was not wholly clear. The issue arose in 1948 when Hyderabad, which had in 1947 concluded a 'Standstill' Agreement with India under which India conducted Hyderabad's foreign relations, brought to the Security Council the matter of India's invasion of Hyderabad. There was much discussion in the Council whether Hyderabad was a 'State' for the purpose of Art 35(2) of the Charter. See SCOR, III, Nos 109, 111–12, 127–9, and IV, Nos 28–9; Eagleton, AJ, 44 (1950), pp 277–302; *UN Repertoire*, 2, p 252.

See also the award in the *Indo-Pakistan Western Boundary (Rann of Kutch) Case* (1968), ILR, 50, p 2, for consideration of the significance of British suzerainty over Kutch.

See generally n 1.

4 This is the rule, but in the case of Egypt the protectorate was based upon a unilateral declaration on the part of Great Britain. As to the 'Protectorate' established by Germany over Bohemia and Moravia in 1938, see § 55, n 6. Relations between the protected and protecting states will normally be internal rather than international: see Fitzmaurice, BY, 30 (1953), pp 4–5.

5 A treaty of protectorate must not be confused with a treaty of protection, in which one or more strong states promise to protect a weak state without absorbing the international relations of the latter. See also § 120, as to treaty relations which, while not establishing a protectorate, nevertheless impose restrictions upon a state's independence.

6 That the admission of consuls belongs to these affairs became apparent in 1906, when Russia, after some hesitation, finally assented to Japan, and not Korea, granting the exequatur to the consul-general appointed by Russia for Korea, which was then a state under Japanese protectorate.

7 See eg *Ecoffard (Widow) v Cie Air France* (1964), ILR, 39, p 453, at p 456.

8 Advisory Opinion on the *Western Sahara*, ICJ Rep (1975), p 38.

§ 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] But 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

9 These British colonial protectorates probably were covered by a British declaration of war. They were primarily administered under the Foreign Jurisdiction Act 1890, but their constitutional position was not always free of doubt. See eg *Sobhuza II v Miller*, where the Privy Council held, in effect, that the Swaziland Protectorate was foreign territory and its inhabitants aliens: [1926] AC 518; AD, 3 (1925–26), No 28, and Note; see also *Ex parte Sekgome* [1910] 2 KB 576, and *Jani v Jani*, ILR, 18 (1951), No 24. But in *Ex parte Mwenya* [1960] 1 QB 241, the Court of Appeal held, in respect of the Northern Rhodesia protectorate, that the relationship between the UK and the protectorate could be so indistinguishable from a colony that the prerogative writ of *habeas corpus* lay in respect of detention in the protectorate; cf *Re Kuwait Criminal Case No 51 of 1958* as to the non-availability of the prerogative order of prohibition in the protected State of Kuwait (ILR, 26, p 250), and *Re Ning Yi-Ching* (1939) 56 TLR 3, as to the non-availability of the writ of *habeas corpus* in the British Concession at Tientsin in respect of a foreigner there. In *Ex parte Mwenya* (above), the Colonial Secretary stated to the Court of Appeal that 'The North Rhodesia Protectorate is a foreign country within which Her Majesty has power and jurisdiction ... The territory of the said Protectorate is a foreign territory under Her Majesty's protection'. As to the Protectorate in Kenya see *Nyali Ltd v Attorney-General* [1956] 1 QB 1; [1957] AC 253; as to the Protectorate in Uganda see *Ndibarema v The Enganzi of Ankole* (1959), ILR, 27, p 275, and *The Katikiro of Buganda v Attorney-General of Uganda* (1959), *ibid*, p 261; as to the Nyasaland Protectorate, see *R v Amihya* (1964), ILR, 53, p 102; and on the Aden Protectorate as distinguished from the Aden colony see Robbins, AJ, 33 (1939), pp 700–15.

1 See also § 35, and § 411, as to diplomatic protection. See *Puran Singh v de Souza Brothers*, ILR, 26 (1958–II), p 245, for the extent of the jurisdiction of the protecting state's courts in the protected state being dependent on the terms of the treaty of protection. But the law applied in those courts is the law of the protecting state, although the law of the protected state may be taken into account in those courts as evidence of local standards: *Abdul Rahman Al-Ali da 'Ij v Mohamed Nur Ahmad*, ILR, 26 (1958–II), p 248. See also *Administration of the Territory of Papua New Guinea v Guba and Doriga* (1973), ILR, 71, p 39.

2 *Nationality Decrees in Tunis and Morocco* (1923), PCIJ, Series B, No 4, p 27.

3 It seems to have been assumed, without argument, by the ICJ that Morocco, even under the protectorate, retained its personality as a state in international law: *Rights of United States Nationals in Morocco*, ICJ Rep (1952), pp 185, 188. See also ICLQ, 2 (1953), p 358; Fitzmaurice, BY, 30 (1953), pp 2–5. See also *Occidental Petroleum Corpn v Buttes Gas & Oil Co* (1972), ILR, 57, p 13, for the application of the 'act of state' doctrine in relation to the acts of a protected state; also *Buttes Gas v Hammer* [1981] 3 WLR 787, for a similar decision by the House of Lords.

governments of protectorates enjoy the usual jurisdictional immunities in the courts of the protecting state[4] and, probably, in those of other states. The protectorate is not considered a mere portion of the protecting state.[5] It is, therefore, not necessarily a party in a war[6] 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[7] (although they may enjoy diplomatic protection by the protecting state);[8] and treaties concluded by the superior state are not *ipso facto*

[4] *Mighell v Sultan of Johore* [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 Johore v Abubakar* [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 13) a state under protection 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 suzerainty.

[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 Grainetière Marocaine* (1961), ILR, 44, p 35; *Administration of the Territory of Papua New Guinea v Guba and Doriga* (1973), ILR, 71, p 39. But in *R v Secretary of State for Home Affairs, ex parte Demetrious* [1966] 2 QB 194, Qatar, although a foreign state in which the Crown exercised jurisdiction, was held to be a 'British possession' within the terms of a statute providing for the return of fugitive criminals; see also *R v Amihiya* (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 no such protected states now exist. A British protected person is, however, not an 'alien': see n 7.

[6] See the case of *The Ionian Ships* (1885) 2 Spinks 212; Phillimore, i, § 77; Scott, *Cases*, p 21; Pitt Cobbett, *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 *Katransias v Bulgaria*, *Recueil TAM*, 7 (1926), p 39. In *H C van Hoogstraten v Low Lum Seng* 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 (1938–40), 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 (*Thakrar 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, Parry, *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 487; and § 411, n 5. In *Motala 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 (*Cabet de Chambine v Bessis*, 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 Hamour Ben Brahim Ben Mohammed*, ILR, 22 (1955), p 60).

[8] See § 411, n 5.

concluded for the protected state,[9] which may in certain cases remain capable of concluding treaties for itself.[10] 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;[11] otherwise it will be the protecting state which is answerable internationally.[12] When the protectorate terminates the protected state will resume its full sovereign independence, which has been partially in suspense during the protectorate.[13]

§ 83 Recent and existing protectorates In Europe there is at present[1] one protectorate, namely the Republic of Andorra, which is under the joint protect-

[9] But treaties may be concluded by the protecting state specifically for the protected state, and these will continue to bind the protected state on its emergence from protection: ICJ Rep (1952), at p 193. See Louis-Ducas, *Clunet*, 88 (1961), pp 86–119, about Tunisia's position regarding pre-independence treaties. See also *Ecoffard (Widow) v Cie Air France* (1964), ILR, 39, p 453; and § 595, n 5.

[10] See, eg the agreements concluded by Kuwait and referred to at § 83, n 7; and the 1958 Agreement between Saudi Arabia and Bahrain (ICLQ, 7 (1958), p 518), and an earlier agreement between them in 1936 (TS No 13 (1936)). See generally Lissitzyn, Hag R, 125 (1968), iii, pp 5, 51–4.

[11] *Trochel v Tunisia*, ILR, 20 (1953), p 47; *Prince Sliman Bey v Minister for Foreign Affairs* (1959–62), ILR, 28, p 79 and ILR, 44, p 1; *Re Bruneton and Mifsud* (1963), ILR, 44, p 32. Whether the due execution of treaties concluded by the protected state before the protectorate began is the responsibility of that state or of the protecting state will be likely to depend upon the extent of the protecting state's assumption of control of the protected state's international affairs: in the case of Morocco the ICJ held that France was bound by Morocco's pre-protectorate treaties: *Case concerning US Nationals in Morocco*, ICJ Rep (1952) at p 188. For an (unsuccessful) argument that a concession contract concluded by a protected state should not remain binding on it after the end of its protected status, having been concluded when it was not in possession of its full sovereign powers and thus had a colonial character and was imposed on the state, see *Government of Kuwait v American Independent Oil Co* (1982), ILR, 66, pp 519, 587.

[12] *Spanish Zone of Morocco case* (1925), RIAA, 2, pp 615, 649; the *Studer Claim* (1925), *ibid*, 6, p 149.

[13] See *Magher Singh v Principal Secretary of the Jammu and Kashmir Government*, ILR, 20 (1953), p 4. In the agreements terminating British protection over Bahrain and Qatar those states were referred to as 'resuming' full international responsibility as sovereign and independent states: TS No 78 (1971) and No 3 (1972).

[1] Of former protectorates in Europe the following may be mentioned:

(1) The Principality of Monaco, which was under the protectorate of Spain from 1523 to 1641, afterwards of France until 1814, and then of Sardinia, became through *desuetudo* a full sovereign state, since Italy never exercised the protectorate. The present status of Monaco is not easy to classify. By a treaty of 17 July 1918, between France and Monaco, France 'assure à la principauté de Monaco la défense de son indépendance et de sa souveraineté et garantit l'intégrité de son territoire' (see Fauchille, § 178 (with bibliography); Moncharville, RG, 27 (1920), pp 217–32; Ruzé, RI, 3rd series, 2 (1921), pp 330–46 (including text of treaty of 17 July 1918); Roussel-Despièrres, RI (Paris), 6 (1930), pp 531–43). Monaco agreed that its international relations should always be the object 'd'une entente préalable' between the two governments, and that in the event of a vacancy in the Crown of Monaco 'notamment faute d'héritier direct ou adoptif' the territory of Monaco would form, under the protectorate of France, an autonomous state. (This treaty is recognised by the parties to the Treaty of Peace with Germany of 1919: see Art 436.) Until that event happens, it seems preferable to regard Monaco as an independent state in close alliance with France. In April 1937 the Principality of Monaco accepted generally the jurisdiction of the PCIJ and adhered to the Optional Clause of Art 36 of the Statute: see PCIJ, Series E, No 13, pp 71–3; this expired in 1942 (*ibid*, No 16, pp 50 and 57). Relations between Monaco and

orate of France and Spain.[2] Outside Europe[3] 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 Morocco[4] (formerly part under French, part under Spanish,[5] protection); Tangier;[6] 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 907–11, 976–86. Monaco is represented in France by an ambassador, but France only has a consul-general in Monaco: RG, 82 (1978), p 900. 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 Law of Treaties 1969, and the Helsinki Conference on Security and Cooperation in Europe 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 Régime international de la Principauté de Monaco* (1964); Rousseau, *Droit international public* (vol 2, 1974), pp 332–9.

(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 ed of this vol, p 194, n. For the extensive literature as to the status of the Free City of Danzig while under Polish 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 international public* (vol 2, 1974), pp 423–30; Crawford, *The Creation of States in International Law* (1979), pp 160–66; Hannum, *Autonomy, Sovereignty, and Self-Determination* (1990), pp 375–9.

(3) San Marino has been described as a protectorate of Italy. See eg 7th ed of this vol, p 176, and Fauchille, § 181. However, see Sottile, *La République 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 No 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, WHO, UNESCO, ITU and WIPO.

2 This protectorate is exercised for Spain by the Bishop of Urgel. As regards the international position of Andorra, see Vilar, *L'Andorre* (1905); Fauchille, § 177 (2); Goulé, in *Répertoire*, i, pp 562–6; Rousseau in *Symbolae Verzijl* (1958), pp 337–46, and *Droit international public* (vol 2, 1974), pp 342–7; and see AFDI, 30 (1984), p 950, and 32 (1986), p 962.

See also the decision of the French Court of Cassation in *Re Société de Nickel* (1933), Sirey (1935), 3, 1, with a note by Rousseau; AD, 7 (1933–34), No 21. In *Massip v Cruzel*, ILR, 18 (1951), No 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 Boedecker and Ronski* (1962), ILR, 44, p 176, in which, as in the last cited case, Andorra was regarded as a 'fief without international personality'; *Elsen v Bouillot*, RG, 72 (1968), p 857 – and see Riéra, *ibid*, pp 361–80. See also *Re Lothringer* (1962), ILR, 44, p 182; *Armengol v Mutualité Sociale Agricole de l'Hérault* (1966), ILR, 47, p 135; *Elsen v 'Le Patrimoine' (1) and (2)* (1971), ILR, 52, p 14; *Fornells v Ministère Public* (1969), ILR, 52, p 26; *Courtiol v 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, 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 Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.

3 On the American continent the USA established for a time a relationship with Cuba, Panama, the Dominican Republic, Haiti and Nicaragua which, while implying the right 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 described above. See Hyde, i, §§ 19–24; and Kunz, *Staatenverbindungen* (1929), pp 301–4, who regards the relation as one of 'quasi-protectorate.' As to the relationship between the USA and Puerto Rico, 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 in the transitional period limited to ten years, foreign affairs would be under the direct supervision and control of the USA. See Toynbee, *Survey* (1933), pp 544–74; *Documents* (1934), pp 419–47; Gilmore, Iowa Law Rev, 16 (1930), pp 1–19; Friede, ZöV, 5 (1935), pp 172–88; Hayden, *Foreign Affairs (USA)*, 14 (1935), 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 Commonwealth was a sovereign state and that its property was, therefore, immune from the jurisdiction of the courts of the USA: 24 F Suppl 28; AD (1938–40), No 17. See also *ibid*, No 18, where, in *Suspine et al v Compañia Transatlantica Centroamericana*, it was held that citizens of the Philippines were subject to the US neutrality legislation. In *M/V Monusco Inc v Commissioner of Internal Revenue* the USA was regarded as having exercised a protectorate over the Philippines up to independence 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 UN; the Philippines became formally independent in 1946.

4 As to Morocco see Arts 141–146 of the Treaty of Versailles, and Rouard de Card, *Le Traité 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 Nationalité dans les protectorats de Tunisie et du Maroc* (1926), pp 17–52; and the judgment of the ICJ in the case concerning *Rights of United States Nationals in Morocco*, ICJ Rep (1952), p 185. See also *Re Société des Phosphates Tunisiens* (1929), decided by the French Conseil d'Etat, AD, 5 (1929–30), No 12 and Note; and *Mackay Radio and Telegraph Co v El Khadar* (1954), AJ, 49 (1955), pp 267, 413. On capitulations in Morocco see § 406. On the recognition by the US of the French Protectorate over Morocco, see Rouard de Card, *Les États-Unis d'Amérique et le protectorat de la France en Maroc* (1930). See Fitoussi and Bénazet, *L'État tunisien et le protectorat français* (2 vols, 1931). See also Maresco, *Les Rapports des droits publics entre la Métropole et les Colonies, Dominions et autres territoires d'outremer* (1937) and De Laubadère, *Études Georges Scelle* (vol i, 1950), pp 315–48. The protectorates over Tunis and Morocco were terminated in 1956: see documents in AJ, 51 (1956), pp 676–87.

5 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 (1924), RIAA, 2, p 615.

6 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 the Tangier Zone is entrusted to France (Art 6). On 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). On 14 June 1940, Spanish troops invaded the Zone and on 4 November the Spanish army of occupation terminated the activities of the administration under the Treaty; Great Britain and a number of other signatories of the Treaty protested. See Delore, AJ, 35 (1941), pp 140–45. As the result of a Conference held in Paris in 1945 the position as it existed before 1940 was restored: Cmd 6678 (1945). See generally on Tangier, TS No 23 (1924) for the Convention organising the Tangier Zone; TS No 25 (1928), for the Convention of 1928; AJ, 23 (1929), Suppl, pp 235–84; see vol II of this work (7th ed), § 72(8), and Ruzé, RI, 3rd series, 5 (1924), pp 590–629; von Gravenitz, *Die Tangier-Frage* (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 (1927), pp 231–37 (the Mixed Court); Toynbee, *Survey* (1929), pp 189–201; Charles, *Le Statut de Tanger* (1927); Stuart, *The International City of Tangier* (2nd ed, 1955); Baldoni, *La zona di Tangeri* (1931), and *Rivista*, 22

the Persian Gulf, namely Kuwait, Bahrain, Qatar and the Trucial States (all formerly under British protection);[7] the Malay States[8] (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]

(1930), pp 396–414, 542–82; Gutteridge, BY, 30 (1953), pp 498–506 (on the 1952 reform of the Mixed Court); Nadelman, AJ, 49 (1955), pp 506–17; Rousseau, *Droit international public* (vol 2, 1974), pp 430–40.

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 460–66.

[7] See generally Al-Baharna, *The Arabian Gulf States, their Legal and Political Status and their International Problems* (2nd rev ed, 1978). See *Puran Singh v de Souza Brothers*, ILR, 26 (1958–II), p 245; *Abdul Rahman Al-Ali da 'Ij v Mohamed Nur Ahmad* (1957), *ibid*, p 248.

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 Iles Bahrein* (1960); see also *Al Baker v Alford* [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 ILM, 9 (1970), pp 787–805. 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), pp 560–68. Kuwait'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 (1960), and IMCO (1960). Qatar's protected status (as to which see *R v Secretary of State for Home Affairs, ex parte Demetrious* [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 Hammer* [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 litigation) the British Government recognised the State of Sharjah (at the time one of 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).

[8] Namely Johore, Tahang, Negri Sembilan, Selangor, Perak, Kedah, Perlis, Kelantan and Trengganu. See 8th ed of this vol, p 196, n, and Rubin, *International Personality of the Malay Peninsula* (1974).

[9] 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 Rabul, *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 (see Poulouse, ICLQ, 20 (1971), pp 195–212), Bhutan became a member of the UN in 1971 (GA Res 2751 (XXVI)).

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 undertaking responsibility for the defence and foreign relations of Sikkim (Arts 3 and 4): see *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 Fischer, AFDI, 20 (1974), pp 201–14.

[10] Cmnd 4932, amending an earlier treaty of 1959 (BFSP, 164 (1959), p 38). Under the 1971 treaty 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 remained 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.

DEPENDENT TERRITORIES

Moresco, Hag R, 55 (1936), i, pp 513–90 Van Asbeck, *ibid*, 71 (1947), ii, pp 349–472, and *Grotius Society*, 39 (1953), pp 5–30 *International Conciliation* (1947), No 435 Fawcett, BY, 26 (1949), pp 85–93 Kelsen, *Law of the United Nations* (1950), pp 550–66 Fox, *International Organisation*, 4 (1950), pp 199–218 Johnson, YB of World Affairs (1951), pp 226–31 Eagleton, AJ, 47 (1953), pp 88–93 Toussaint, YB of World Affairs (1954), pp 141–69 Sandy, *The United Nations and Dependent Peoples* (1956) Jenks, *Common Law of Mankind* (1958), pp 231–54 Nawax, *Indian Year Book of International Affairs*, 11 (1962), pp 3–47 Fawcett, *The British Commonwealth in International Law* (1963), pp 106–15, 138–43 Higgins, *Development of International Law through the Political Organs of the United Nations* (1963), pp 90–106, 110–18 de Yturriaga, YB of World Affairs (1964), pp 178–212 Castles in *International Law in Australia* (ed O'Connell, 1965), pp 368–400 Roberts-Wray, *Commonwealth and Colonial Law* (1966) *Measures taken within the United Nations in the Field of Human Rights* (a study prepared by the UN Secretary-General, 1967) (UN Doc A/CONF 32/5), paras 81–141 Emerson in *The Relevance of International Law* (eds Deutsch and Hoffman, 1968), pp 153–74, and *International Relations*, 3 (1970), pp 766–81 Bleckmann, *Das Französiche Kolonialreich und die Gründung neuer Staaten* (1969) Goodrich, Hambro and Simons, *Charter of the United Nations* (3rd ed, 1969), pp 448–63 Gutteridge, *The United Nations in a Changing World* (1969), pp 48–71 El Ayouty, *The United Nations and Decolonisation* (1971) Crawford, *The Creation of States in International Law* (1979), pp 84–106, 356–84 Dale, *The Modern Commonwealth* (1983), pp 202–204, 264–5, 305–20 Cot and Pellet, *La Charte des Nations Unies* (1985), pp 1061–75 Simma (ed), *Charta der Vereinten Nationen* (1991), pp 878–88 See also § 85, n 14, for a bibliography on the self-determination of peoples.

§ 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

[1] It has been said that the essential factor distinguishing international states (whether full or part sovereign) from entities which are neither states nor international persons is that the latter lack the capacity to enter into treaty or other international relationships either directly or mediately: such entities 'cannot, *as such*, enter into separate international relationships *at all*, even through the agency of another entity': Fitzmaurice, BY, 30 (1953), p 2, n 2; see also Hyde, i, pp 22–3. The practice of including in many multilateral treaties a so-called 'territorial (or colonial) application clause' (see § 621) which is usually phrased in terms wide enough to refer equally to protected states, 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,[2] 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,[3] Southern Rhodesia in 1965,[4] and Anguilla in 1971.[5]

The degree of internal authority possessed by colonial territories varies greatly, as do their legal relationships with their parent state.[6] Often the colony and its

[2] In the *Case concerning the Interpretation of the Statute of the Memel Territory* (1932) the PCIJ 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: Series 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), PCIJ, Series A/B, No 71, and see § 170(2). See also § 34, n 8.

[3] British Guiana (Constitution) (Temporary Provisions) Order in Council 1953, Art 3.

[4] 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 WMO. After the illegal declaration of independence in 1965 authority for Rhodesian 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 plenipotentiary 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, Hag R, 130 (1970), ii, p 675, n 57. See generally § 55, n 7, as to Southern Rhodesia's illegal declaration of independence and its consequences.

[5] Anguilla Act 1971; Anguilla (Administration) Order 1971.

[6] See generally Blaustein and Blaustein, *Constitutions of Dependencies and Special Sovereignties* (1975). The position of British colonies and dependent territories is fully considered by Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp 40–47, 99–112, 117–26 and 655ff. See also Fawcett, *The British Commonwealth in International Law* (1963), pp 106–43, O'Connell and Riordan, *Opinions on Imperial Constitutional Law* (1971); Dale, *The Modern Commonwealth* (1983), pp 305–20, and the relevant sections in *The Commonwealth Yearbook*, published annually by the Foreign and Commonwealth Office, London.

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 Dunphy* [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 those Islands, Roberts-Wray, *op cit*, pp 672–7; Simmonds, CML Rev, 6 (1969), 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 Arbitartion* (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, 2444.

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, since 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), p 226, and subsequent proceedings in ILR, 23 (1956), p 191 and (1961), ILR, 44, p 72; *Etat Belge v Dumont* and *Etat Belge v Pittacos* (1966), ILR, 48, pp 8, 20, 23; *Dupont v Belgium (Minister of Finance)* (1968), ILR, 69, p 24; *Poldermans v State of the Netherlands*, ILR, 24 (1957), p 69; *Syndicat Indépendant des Fonctionnaires du Condominium des Nouvelles Hebrides* (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 § 384, n 3. See also *Ministry of Home Affairs v Kemali* (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 *Ying 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 Futura 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 Französiche Kolonialreich und die Gründung neuer Staaten* (1969).

As to certain Portuguese colonial territories, see § 85, n 9.

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] Each case must be considered on its merits, in the light of the purpose in mind,[8] 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]

Since colonies have no separate statehood or sovereignty[11] they cannot send or receive diplomatic envoys, or conclude treaties:[12] 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).[13] Colonies are not separately responsible in international law for damage caused by their acts to foreign interests: this too is a matter for the parent state as is the claiming of international rights enjoyed in respect of the colonial territory.

Despite this, however, colonial territories may occasionally participate directly in the activities of the international community, usually in those fields within which they have self-government.[14] 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

[11] An attempt to institute legal proceedings against a colony may nevertheless be met by a plea of sovereign immunity since although the colony may not in its own right be entitled to immunity, proceedings against a colony may be regarded as amounting to proceedings against the parent state and thus as attracting sovereign immunity. See *Huttinger v Upper Congo–Great African Lakes Railway Co*, AD, 7 (1933–34), No 65; *Isbrandtsen v Netherlands East Indies Government*, AD, 14 (1947), No 26; *van Heyningen v Netherlands Indies Government*, AD, 15 (1948), No 43; *Montefiore v Belgian Congo*, ILR, 22 (1955), p 226, and further proceedings in ILR, 23 (1956), p 191, and (1961), ILR, 44, p 72; *Pittacos v Etat Belge* (1966), ILR, 48, p 20; *Etat Belge v Dumont* (1966), ILR, 48, p 23. See generally Sucharitkul, *State Immunities and Trading Activities in International Law* (1959), pp 106–12. Insofar as a colony is a legal entity of a state which is distinct therefrom and is capable of suing or being sued, it may, under Art 27 of the European Convention on State Immunity 1972, be proceeded against in the same manner as a private person, except in respect of acts performed in the exercise of sovereign authority. That is also the effect of s 14(1) and (2) of the State Immunity Act 1978, enacted in the UK. However, in the USA under the Foreign Sovereign Immunities Act 1976 (ILM, 15 (1976), p 1388) the term 'foreign State' is defined in such a way as could include colonies (see also ILM, 12 (1973), pp 134–5). 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 8) a colony would appear to be capable of being considered as a political sub-division of a state and, if performing acts in the exercise of the sovereign authority of the state, as falling within the scope of the term 'State' in Art 3.1, and of benefiting accordingly from the immunities provided in the draft articles for states.

[12] See nn 15 and 16, as to general and *ad hoc* entrustments of treaty-making power to colonies. The UN Secretariat will not accept for registration a treaty concluded between a state and a government of a dependent territory unless the treaty is formally binding on the state responsible for the conduct of foreign relations of the dependent territory, so that that state can be shown in the Register as a party to the treaty: *UN Repertoire*, 5, p 295. 'Dependent territories have no capacity to bind themselves by treaties on the international plane': UN Juridical YB (1974), pp 197, 198. For some earlier Opinions of the Law Officers of the Crown on treaty-making in relation to colonies see O'Connell and Riordan, *Opinions on Imperial Constitutional Law* (1971), pp 368–87. See also *Public Prosecutor and Customs Administration v Schreiber and Air France*, ILR, 24 (1957), p 54. And see generally McNair, *Law of Treaties* (1961), pp 116–19; Lissitzyn, Hag R, 125 (1968), iii, pp 5–87, especially 64–82; and § 595, nn 6–8. As to the extension to colonies and other dependent territories of treaties concluded by the parent state and their conclusion by the parent state solely in respect of a dependent territory, see § 621.

[13] See § 621.

[14] A territory which is self-governing in the matters to be dealt with at a conference called by the UN Economic and Social Council, but which is not responsible for the conduct of its foreign relations, may be invited to participate in the conference if the state responsible for its foreign relations approves and if the Council decides in favour of such participation: GA Res 366 (IV) (1949). See also Deener in *International and Comparative Law of the Commonwealth* (ed Wilson, 1968), pp 40–62.

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,[15] or *ad hoc* in relation to a particular treaty;[16] it will often be expressly recited in the treaty. Again, some colonial territories have certain membership rights in some international organisations.[17] 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 conferment 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.[18] Similarly, the associated states established by

[15] See eg Art 73 of the Singapore (Constitution) Order 1958, and the communication from the British Government to the Government of Singapore, quoted in E Lauterpacht, ICLQ, 10 (1961), p 576. Southern Rhodesia was also entrusted with certain general powers of concluding treaties, by virtue of which, for example, it became a party to the International Wheat Agreement 1962 (TS No 15 (1963)). But this did not extend to maintaining direct diplomatic relations with a third state: see E Lauterpacht, *BPIL (1965–II)*, p 105. See also § 78, as to treaties concluded by the old British Dominions. In 1966 the Premier of British Guiana was one of the signatories for the UK of the UK–Venezuela treaty relating to the boundary dispute between British Guiana and Venezuela (TS No 13 (1966)). See generally on treaty relations of British overseas territories, Fawcett, BY, 26 (1949), pp 86–107.

[16] See eg the agreement concluded in 1954 between Hong Kong, 'acting with the consent of the Government of Great Britain and Northern Ireland', and Burma: TS No 37 (1959). For a specific entrustment to the Governor of Hong Kong to conclude an Air Services Agreement with the Netherlands in 1986 see UKMIL, BY, 58 (1987), pp 515–16. See also UKMIL, BY, 60 (1989), pp 593–5, citing extracts from the Foreign and Commonwealth Office's *Instruction Manual (1988)*.

[17] Thus Hong Kong is a member of the WMO, GATT, and the Asian Development Bank, and an associate member of the IMO and the Economic Commission for Asia and the Pacific; 'British overseas dependent territories' constitute a collective member of the UPU, and also of the ITU until the International Telecommunications Convention 1973, which abolished such membership, entered into force. Montserrat became a member of the Organisation of Eastern Caribbean States, but without participating in its defence and external affairs activities: see *Parliamentary Debates (Commons)*, vol 47, col 444 (written answers, 3 November 1983). As to Southern Rhodesia, see n 4.

Participation by colonies in international organisations is particularly likely with organisations of an administrative or technical kind, which are more concerned with the possession by a territory of the relevant functional capacity (eg its own postal or meteorological services) than with its political status. See also Fawcett, *The British Commonwealth in International Law* (1963), pp 229–31. Non-self-governing territories in the region covered by the Economic Commissions for Asia and the Pacific and for Latin America and the Caribbean may be associate members of those Commissions, and several have done so.

[18] See 8th ed of this vol, pp 198–209, and § 78 above.

In respect of the Federation of Rhodesia and Nyasaland (which was established in 1953) the UK in 1957 agreed to entrust the Federation with responsibility for external affairs 'to the fullest extent possible consistent with the responsibility which Her Majesty's Government [in the UK] must continue to have in international law so long as the Federation is not a separate international entity': *Parliamentary Debates (Commons)*, vol 569, col 357 (2 May 1957). The limits of this delegated responsibility were thus left very uncertain. In 1958 the British Government appear to have regarded as outside their retained responsibility for external affairs the matter of a complaint by India regarding the treatment of Indian diplomatic representatives in the Federation: ICLQ, 7

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 Extradition 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 Whiteman, *Digest*, 1, pp 515–21. And see *M/V Nonsuco Inc v Commissioner of Internal Revenue*, ILR, 23 (1956), p 29, holding the Philippines, prior to 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.

19 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, Cmnd 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, while Anguilla reverted to colonial status). See generally E Lauterpacht, BPIL (1967), pp 5–15; Broderick, ICLQ, 17 (1968), pp 368–403; Laing, *ibid*, 23 (1974), pp 127–42; Clark, Harv ILJ, 21, (1980), pp 1, 60–64. See also § 85, n 9, as to the status of associated states for purposes of transmission of information to the UN under Art 73 of the Charter. For the opinion 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 commodity agreement, see *ibid* (1974), pp 197–9. As to certain aspects of the associated states' membership of CARICOM see Meijers, Neth IL Rev, 24 (1977), pp 160, 164–71; and as to their treaty relations see Lissitzyn, Hag R, 125 (1968), iii, 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.

20 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, ICLQ, 17 (1968), pp 368–390–2; UN Juridical YB (1971), p 213 and (1979), pp 172–4 (treating the Islands as not an independent state); Clark, Harv ILJ, 21 (1980), pp 1, 54–60; Hannum, *Autonomy, Sovereignty and Self-Determination* (1990), pp 384–9. The Cook Islands are a member of the FAO, WHO, ICAO and the Asian Development Bank, and an associate member of the Economic Commission for Asia and the Pacific.

21 Puerto Rico's 'Commonwealth' status, attained in 1952 with the adoption of a new Constitution, amounts in practice to a form of association with the USA: but Puerto Rico is not part of the USA. Puerto Rico is internally self-governing, but the USA retains responsibility for external affairs. Puerto Rico was previously a non-self-governing territory for purposes of Chapter XI of the UN Charter, and the USA, as the administering state, had certain obligations in respect of Puerto Rico under Chapter XI. After the constitutional change in 1952 the USA was relieved of those obligations: GA Res 748 (VIII) (1953). But in 1973 the Committee of Twenty-Four adopted a resolution which appeared to regard Puerto Rico as still a colonial and non-self-governing territory, and its report was approved by the General Assembly in Res 3163 (XXVIII) (1973). Puerto Rico has not, however, been brought back within the scope of the USA's Chapter

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 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'.

Apart from entry into associations of the kinds already mentioned, colonies have usually ceased to be such by their accession to independence, whether as a

XI obligations. As to the position of Puerto Rico generally, see *Report of the United States–Puerto Rico Commission on the Status of Puerto Rico* (1966); Cabranes, ICLQ, 16 (1967), pp 531–9; Cabranes, Benitez, Barrios Martinez in *AS Proceedings* (1973), pp 1–7, 7–11 and 11–17; RG, 78 (1974), pp 1182–7; Reisman, *Puerto Rico and the International Process* (1975); Clark, Harv ILJ, 21 (1980), pp 1, 41–6. See also *Balzac v Porto Rico* (1922) 258 US 298; *Fonseca v Prann* (1960) 282 F 2d 153; *US v Vargas*, AJ, 68 (1974), p 744; *US v Villarin Gerena*, AJ, 71 (1977), p 788; *Garcia v Friesecke*, AJ, 74 (1980), p 193.

As to the Commonwealth of the Northern Mariana Islands in Union with the USA, see ILM, 15 (1976), p 651; and as to the compacts of free association of the Federated States of Micronesia and of the Marshall Islands with the USA, see Clark, Harv ILJ, 21 (1980), pp 1–86. The various territories formed part of the Trust Territory of the Pacific Islands, administered by the USA: see § 93. As to the overseas territories governed by, or subject to special governmental responsibilities of, the USA (Puerto Rico, US Virgin Islands, Guam, Northern Mariana Islands, American Samoa, Federated States of Micronesia, Marshall Islands, Palau) see Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* (1989).

22 In 1954 the Netherlands, the Netherlands Antilles and Surinam were constituted as a single kingdom, having its own organs and with each part enjoying full autonomy and being united, on a footing of equality, for mutual assistance and the protection of their common interests. Surinam became independent in 1975, and Aruba separated from the Netherlands Antilles in 1986, leaving the Realm comprising the three participants named in the text. The Realm is responsible *inter alia* for defence and external affairs. In matters not the responsibility of the Realm, the overseas participants are wholly self-governing. Their consent is necessary for the conclusion or termination of international agreements in respect of them if those agreements deal with economic and financial matters; other agreements affecting them are subject only to consultation with them. Economic and financial agreements can be concluded applying solely to the separate participants, and the Realm Government is as a general rule bound to cooperate in concluding such agreements. The participants can separately join international organisations, and have done so: thus, on 1 January 1988 the Netherlands Antilles was a separate member of the UPU, WMO, and an associate member of the Economic Commission for Latin America and the Caribbean. The position resulting from a declaration of war affecting any part of the Realm is governed by Art 34 of the Statute for the Kingdom of the Netherlands, for which see BFSP, 161 (1954), p 786. See generally van Panhuys, ZöV, 16 (1955), pp 304–30; Clark, Harv ILJ, 21 (1980), pp 1, 46–9; and *Poldermans v State of the Netherlands*, ILR, 24 (1957), p 69.

23 See § 85; and *Namibia (South West Africa) Legal Consequences Case*, ICJ Rep (1971), p 31.

24 GA Res 2625 (XXV) (1970).

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[25] and Macao[26] 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 position of territories of all kinds which have not attained independence, and the condition of their inhabitants.[1] Dependence 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

[25] See the UK–China Joint Declaration on the Question of Hong Kong 1984: TS No 26 (1985); ILM, 23 (1984), p 1366. See also the Hong Kong Act 1985. See generally Slinn, AFDI, 31 (1985), pp 167–90, and *International Relations*, 9 (1987), pp 1–22; Landry, Harv ILJ, 26 (1985), pp 249–63; Ress, ZöV, 46 (1986), pp 647–99; Focsaneanu, RG, 91 (1987), pp 479–532; White, ICLQ, 36 (1987), pp 483–503; Corwin, *Law and Policy in International Business*, 19 (1987), pp 505–36; Hannum, *Autonomy, Sovereignty and Self-Determination* (1990), pp 129–50. See also § 65, nn 2, 4.

[26] See RG, 90 (1986), pp 968–9; 91 (1987), pp 604, 931; and 92 (1988), p 689; Afoso and Pereira, Hong Kong LJ, 16 (1986), pp 28–57; Focsaneanu, RG, 91 (1987), pp 1279–1303.

[1] Thus in 1947, the governments administering non-self-governing territories in the South Pacific signed an agreement (UNTS, 97, p 227) establishing the South Pacific Commission with the object of promoting the economic and social advancement of the two million inhabitants of the South Pacific: see Sudy in *Bulletin of the State Department*, 16 (1947), p 459; Varsanyi in *International Law in Australia* (ed O'Connell, 1965), pp 184–93. By an amendment made in 1964 (TS No 87 (1965)) independent countries within the Commission's scope immediately before independence could become participating members of the Commission, and several have done so.

In 1983 the annual Conference of the Commission agreed that its 27 governments and administrations should have full and equal membership.

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 1990 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,[7] or whether, having once been non-self-governing, it is to be regarded as having ceased to be so.[8] Despite Article 2(7) of the Charter, the

[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 Arsanjani, 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 2064 (1965)); Southern Rhodesia (see next n); Portuguese territories in Africa (*ibid*); 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.[9] The decision as to what constitutes self-government is not always easy; in particular, there is no justification for interpreting that term to mean independence.[10] In GA Res 1541 (XV) (1960)[11] the General Assembly decided that certain principles, annexed to the resolution, 'should be applied 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;

[9] 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 (XV)), 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 Southern Rhodesia 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 General 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.

[10] 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 UNCIO, 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.

[11] 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 functioning 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 whether, as decided by it in 1953, the General Assembly, acting by simply 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 because of 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.[13] Article 1(2) of the Charter, in setting out the purposes of the United Nations, acknowledges 'the principle of equal rights and self-determination of peoples'.[14] This 'principle' has been gradually transformed, not without question,[15] into a 'right'.[16]

[12] See GA Res 2064 (XX) (1965), paras 5 and 6, for acknowledgement that the duty to transmit information and the status of non-self-government may cease without independence being attained.

[13] See observations by the ICJ in its Advisory Opinions on *Namibia (South West Africa) Legal Consequences*, ICJ Rep (1971), p 31ff, and *Western Sahara*, ICJ Rep (1975), pp 31–3, with comment on the latter by Shaw, BY, 49 (1978), pp 119, 144–9.

[14] See also Art 55. On self-determination see Chakravarti, *Human Rights and the United Nations* (1958), ch VI; Johnson, *Self-Determination within the Community of Nations* (1967); Gutteridge, *The United Nations in a Changing World* (1969), pp 51–70; Emerson, AJ, 65 (1971), pp 459–75; Mirkine-Guetzévitch, Hag R, 83 (1953), ii, pp 326–51; Wright, Hag R, 98 (1959), iii, pp 171–95; Higgins, *Development of International Law through the Political Organs of the United Nations* (1963), pp 90–106; Tunkin, *Droit International Public, Problèmes Théoriques* (1965), pp 42–51; Whiteman, *Digest*, 5, pp 38–87; Bowett and Emerson, *AS Proceedings* (1966), pp 129–41; Verzijl, *International Law in Historical Perspective* (vol 1, 1968), pp 321–36; Brownlie, *Grotian Society Papers* (1968), pp 90–9; Emerson, AJ, 65 (1971), pp 459–75; Calogeropoulos-Stratis, *Le Droit des peuples à disposer d'eux mêmes* (1973); Rabl, *Das Selbstbestimmungsrecht der Völker* (2nd ed, 1973); Sureda, *The Evolution of the Right of Self-Determination* (1973); Fitzmaurice, *Annuaire: Livre du Centenaire* (1973), pp 232–5; Doehring, *Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts* (1974); Thürer, *Das Selbstbestimmungsrecht der Völker* (1976); Schoenberg, Israel YB HR, 6 (1976), pp 91–103; Guilhaudis, *Le Droit des peuples à disposer d'eux mêmes* (1976); Pomerance, AJ, 70 (1976), pp 1–27, and *Self-Determination in International Law* (1982); Przetacznik, *Rev Belge*, 13 (1977), pp 238, 257–64; Chowdhury, Neth IL Rev, 24 (1977), pp 72–84; Engers, *ibid*, pp 85–91; Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (1977); Arechaga, Hag R, 159 (1978), i, pp 100–11;

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 all[18] other territories which have not yet attained independence,[19] 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'.[20] In 1966 self-determination clearly acquired the character of a legal right in Article 1 of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights,[21] both adopted in that year.

Cassese and Espiell in *UN Law: Fundamental Rights* (ed Cassese, 1979), pp 137–66 and 167–74; Crawford, *The Creation of States in International Law* (1979), pp 84–106; Yonah, Alexander and Friedlander (eds), *Self-Determination: National, Regional and Global Dimensions* (1980); Lachs, Hag R, 169 (1980), iv, pp 43–54; White, Neth IL Rev, 28 (1981), pp 147–70; Wilson, *International Law and the Use of Force by National Liberation Movements* (1988), pp 55–88; Hannum, *Autonomy, Sovereignty and Self-Determination* (1990), pp 27–49. As to self-determination within the context of Arts 19–21 of the African Charter on Human and Peoples' Rights 1981 (§ 444), see Addo, *Journal of African Law*, 32 (1988), pp 182–93; *United Nations Action in the Field of Human Rights* (UN Secretariat, 1988: UN Doc ST/HR/2/Rev 3), pp 54–74; Thornberry, ICLQ, 38 (1989), pp 867–89. See also works cited at § 29.

15 Eg as to whether 'peoples' could possess international rights and be owed international duties (see n 29); and whether the drafting history and the terms of Chapter XI justified such a transformation. (It may be noted that Chapter XI does not use the term 'self-determination', nor does Chapter XII.)

16 Amongst the many resolutions of the General Assembly asserting a 'right' of self-determination see GA Res 545 (VI) (1952), 637 A (VII) (1952), 1185 (XII) (1957), 1514 (XV) (1960) and 2621 (XXV) (1970). Such references are now almost a matter of course in resolutions on questions concerning non-self-governing territories. And see UN Juridical YB (1980), pp 182–3.

17 See the observations of the ICJ referred to in n 13, which come close to attributing to the resolution the status of customary international law. For the view that the Court's pronouncements have the effect that GA Res 1514 (XV) has come to be customary international law, see Arechaga, BY, 58 (1987), at p 5. Compare Wilson, *International Law and the Use of Force by National Liberation Movements* (1988), pp 76–7.

18 The comprehensive scope of this call for independence ignores the special difficulties faced by territories with populations so small or resources so exiguous that meaningful independence is scarcely realisable. For discussion of some of the issues which arise, see de Smith in *International Organisation: Law in Movement* (eds Fawcett and Higgins, 1974), pp 64–78.

19 See n 10.

20 Even when a territory has been found by the General Assembly to have attained full self-government (although not independence) the Assembly does not consider that its responsibilities under GA Res 1514 (XV) are necessarily over, at least if the territory requests further assistance under that resolution in the achievement of full independence: see eg GA Res 2064 (XX) (1965), relating to the Cook Islands.

21 See generally § 440. In the *Burkino Faso/Mali Frontier Dispute Case* the ICJ referred to self-determination as a legal right, but equally as a 'principle': ICJ Rep (1986), pp 544, 567. In the same case the Court noted that there was *prima facie* a conflict between self-determination and the application of the principle of *uti possidetis*: *ibid*, p 567. See also Naldi, ICLQ, 36 (1987), pp 893–903. But no claim for self-determination may be brought under the Optional Protocol to the Covenant: *AB v Italy, South Tirol Case*, Human Rights LJ, 12 (1991), p 25.

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 Friendly Relations and Cooperation among States, which principles are declared to 'constitute basic principles of international law'.[22] 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 above in 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

22 GA Res 2625 (XXV) (1970). The Declaration was adopted by acclamation.

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.'

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.[23] 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 peoples' views.[24]

The legal implications of the principle, or right, of self-determination are still 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 territories[25] or the right of the people of the territory to use force in pursuit of self-determination,[26] and as to the legitimacy of another state aiding a liberation

[23] *Western Sahara* Case, ICJ Rep (1975), pp 31–33. For critical comment on the process of decolonisation of the Sahara see Franck, AJ, 70 (1976), pp 694–721. As to doubts whether the integration of East Timor into Indonesia reflected a free and voluntary choice of the peoples of East Timor in exercise of their right of self-determination, see GA Res 3485 (XXX) (1975), 31/51 (1976), and 32/34 (1977), SC Res 384 (1975) and 389 (1976), and Elliott, ICLQ, 27 (1978), pp 238–49.

[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 1967 in which the people expressed their wish to retain their links with Britain, and called for negotiations between the UN and Spain to put an end to the colonial situation in Gibraltar on a basis which, by references in the resolution to the 'national unity' of Spain, would have involved 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 2353 (XXII) (1957) and 242 (XXIII) (1968); and UNYB (1967), pp 668–76, and *ibid* (1968), pp 745–50 and Cmnd 4123, pp 93, 181–2 (for the text of the UK representative's statement). See generally Eisemann, *Der Streit um Gibraltar* (1974).

[25] See § 127, n 10, and § 130, n 22. As to the right of the parent state to seek assistance from other states, and as to their right to respond to such a request, see § 130, nn 20, 21.

[26] See Schwebel, Hag R, 136 (1972), ii, pp 483–6; Klein, ZöV, 36 (1976), pp 618–52; 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 31/146 (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 n 27, and § 131, para (4).

These questions are closely related to the law applicable to civil wars: see § 49, n 2, and, as to 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.

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.[27] 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 lawfulness 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

[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 Fraleigh in *International Law of Civil War* (ed Falk, 1971), pp 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 the Declaration 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 Juridical 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, nn 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 General 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.

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), pp 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 adoption 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), pp 188–204; and in respect of Mayotte, see Oraison, *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.

[30] See also para 6 of GA Res 1514 (XV) (1960); and note the remarks of the UK representatives in 1964 as to its significance, BPIL (1964–II), pp 237, 239–40. And see Blay, Indian JIL, 25 (1985), pp 386–410; Adar, *ibid*, 26 (1986), pp 425–47; Brilmayer, Yale JIL, 16 (1991), pp 177–202. For consideration of the impact of the principle of self-determination upon acquisition of territory, see § 274.

[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); Buchheit, *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 dispute observed that positive international law did not recognise the right of self-determination of peoples to separate themselves from the state to which they belonged (Off J (1920), Special Suppl 3, pp 3–19).

[32] Thus, in 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, often 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 than 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, Neth IL 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 wars and intervention. See on self-determination in the post-Colonial period, Rao, Indian JIL, 28 (1988), pp 58–71.

The obligations in Chapter XI of the Charter, within their general compass, are legal obligations. But they are obligations for the implementation of which no machinery is provided in the Charter. Thus while the states in question are required to transmit regularly to the Secretary-General statistical and other information relating to economic, social and technical conditions, such information is described as being of a 'technical nature', for 'information purposes', and only insofar as this is consistent with 'security and constitutional considerations'.[33] The subject matter of Chapter XI is, however, one of legitimate concern for the United Nations. It is within the same powers of discussion and of recommendation which the General Assembly has in respect of 'any questions or any matters within the scope' of the Charter (Article 10).[34] Moreover, the Assembly has in practice taken the requirement to transmit information to the United Nations as the starting point for far-reaching action relating to non-self-governing territories, going beyond the original intentions of the framers of the Charter, and taking increasingly less account of the restriction in Article 2(7) of the Charter against intervention in matters essentially within the domestic jurisdiction of member states.[35]

The requirement to transmit information necessitated the establishment of some procedures for dealing with the information submitted. A special form was adopted for the guidance of administering states in preparing the information to be submitted,[36] and a committee was established to consider that information.[37]

[33] Article 73(e).

[34] The Assembly's Fourth Committee normally deals with these matters.

[35] See Higgins, *Development of International Law Through the Political Organs of the United Nations* (1963), pp 90–106.

[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 848 (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[38] a Special Committee on the Implementation of the Declaration was established.[39] This Committee, after being enlarged in 1962 to twenty-four members, became known as the Committee of Twenty-Four.[40] Since 1963 it has been the Committee which considers the information submitted under Article 73(e).[41] 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.[42]

In 1970 the General Assembly adopted a programme of action for the full implementation of the Declaration.[43] The Assembly declared the further continuation 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,[44] 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.[45] 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.[46] In 1988 the General Assembly declared an 'international Decade for the Eradication of Colonialism'.[47] The International Law Commission, in its draft Articles on State Responsibility,[48] and in its draft Code of Crimes against the Peace and Security of Mankind,[49] has affirmed the international criminality of the establishment or maintenance by force of colonial domination.

Increasingly the Assembly has devoted its attention to the possible hindrance to full implementation of the Declaration caused by activities of foreign economic and other interests in non-self-governing territories, which are seen as supporting the continuation of colonial regimes.[50] This was discussed as a separate item of the Assembly's agenda for the first time in 1973, and has been treated separately since then. The Assembly, in adopting the Declaration on the Establishment of the New International Economic Order, included in the princi-

matter of obligation, to submit information on political and constitutional developments in 1961: see Cmnd 1791 p 100. Since 1962 the Committee on Information from Non-Self-Governing Territories (and its successors) has examined information on constitutional and political developments; Portugal's refusal to transmit information led to the appointment of a committee to examine 'such information as is available', and it has not hesitated to consider political matters (GA Res 1542 (XV) (1960)). There has thus been a tendency to assimilate in some measure the contents and the machinery of examination of the information supplied with regard to non-self-governing territories to those of trust territories (see §§ 89–95).

37 At first the Assembly, in February 1946, had requested the Secretary-General to include in his annual report on the Organisation a summary of the information transmitted to him by members under Art 73: GA Res 9 (I). Later that year an *ad hoc* committee was set up to assist the Assembly in the consideration of the information received and to recommend procedures to be followed: GA Res 66 (I). In 1947 the Assembly set up a Special Committee to examine and report on the economic, social and educational conditions in non-self-governing territories and to make recommendations: GA Res 146 (II); see also GA Res 219 (III) (1948). In 1948 this Committee's place was taken by the Special Committee on Information transmitted under Art 73(e), later renamed the Committee on Information from Non-Self-Governing Territories: GA Res 332 (IV) and 569 (VI) (1951); see also 646 (VII) (1952), 933 (X) (1955) and 1332 (XIII) (1958). In 1961 its terms of reference were widened to include the examination of political and constitutional information transmitted by administering states: GA Res 1700 (XVI). The Committee was dissolved in 1963, and its functions were transferred to the Special 'Committee of Twenty-Four': GA Res 1970 (XVIII).

38 GA Res 1514 (XV).

39 GA Res 1654 (XVI) (1961).

40 In 1962 the Committee took over the functions of the Special Committee on South West Africa and the Special Committee on Portuguese Territories, which were dissolved: GA Res 1805, 1806, 1807 and 1809 (XVII). On the work of the Committee see Khol, *Human Rights Journal*, 3 (1970), pp 21–50.

41 GA Res 1970 (XVIII).

42 Thus, missions have visited the US Virgin Islands, the Cayman Islands, and French Somaliland in 1977; the New Hebrides and Guam in 1979; the Turks and Caicos Islands in 1980; the Cocos (Keeling) Islands in 1980 and 1984; Tokelau, and American Samoa in 1981; Montserrat in 1982; and Anguilla in 1984.

43 GA Res 2621 (XXV). The resolution contained special recommendations regarding South Africa, Southern Rhodesia and Portuguese territories in southern Africa. See also GA Res 2908 (XXVII) (1972). The passage of GA Res 2621 (XXV) reinforced doubts entertained by the UK as to whether the Committee of Twenty-Four could offer any constructive help in resolving the remaining problems of decolonisation, and the UK informed the Secretary-General of the UN on 11 January 1971 that the UK would withdraw from membership of the Committee: *Parliamentary Debates (Commons)*, vol 809, cols 30–31 (written answers, 12 January 1971). Australia had withdrawn in 1969, Italy in 1970, and the USA in 1971, all, broadly, because of reservations as to whether the Committee was acting within the limits of its legitimate powers. In 1974 the UK resumed its participation in the work (but not membership) of the Committee: Cmnd 5907, p 98. In 1986 the UK, while still proposing to transmit information on its remaining non-self-governing territories to the UN, notified the Committee that it would no longer participate in the work of the Committee: see UKMIL, BY, 57 (1986), p 513.

44 GA Res 1514 (XV) (1960) had declared that the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation'.

Colonialism has also been designated a 'slavery-like' practice: see p 981.

45 See also GA Res 2704 (XXV) (1970), 2873 (XXVI) (1971), and 2908 and 2980 (XXVII) (1972).

46 GA Res 35/118.

47 GA Res 43/47.

48 Article 19.3(b): YBILC (1976), ii, pt 2, pp 95, 106–7.

49 Article 15: *Report of the ILC* (41st Session, 1989), para 217.

50 See eg GA Res 1314 (XIII) (1958), 2621 (XXV) (1970) and 2979 (XXVII) (1972). See also § 407, n 42, as to permanent sovereignty over natural resources.

ples on which it is based the right of all territories and peoples under alien and colonial domination and apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, their natural and all other resources, and their right to achieve their liberation and to regain effective control over their natural resources and economic activities.[51] Article 16 of the Charter on the Economic Rights and Duties of States, also adopted in 1974,[52] provides that it is 'the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development'. Similarly, the General Assembly has, since 1965, repeatedly called on states administering colonial territories to withdraw their military establishments from those territories and to refrain from establishing new ones.[53]

The General Assembly and the Committee of Twenty-Four have in some respects stretched to the limit – and even beyond – the legal powers conferred on the Assembly by the Charter, and their activities in this respect are not free from criticism.[54] They have done so principally by building on the provisions of the Charter which refer to self-determination and to the promotion of human rights,[55] and by asserting a connection between continued colonialism and the threat to international peace. Although the Charter did not provide adequate procedures for the implementation of Chapter XI, it was legitimate for the Assembly to establish suitable procedures. However, there is less justification in this part of the Charter for, for example, equating self-determination with independence; for extending the obligations of members of the United Nations in relation to information to be supplied and otherwise by, for instance, enlarging the scope of information to cover matters of constitutional development or the measure of progress achieved in the direction of self-government or independence; for requiring the 'immediate' termination of colonial situations irrespective of the extent to which the territory is ready and able to assume the obligations of sovereignty; or for fixing arbitrary dates by which a colonial situation is to be 'terminated' by delivery of the territory to another state contrary to the expressed view of the territory's inhabitants as to their interests, which the Charter itself states 'are paramount'; or, generally, for eroding the significance of Article 2(7) of the Charter in this context virtually to the point of disappearance.

[51] GA Res 3201 (S–VI) (1974). The Assembly has adopted similar resolutions in subsequent years (eg GA Res 38/50 (1983), 39/42 (1984)) reaffirming the inalienable right of dependent peoples to independence, self-determination and the enjoyment of their natural resources, and, generally, seeking to prevent the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples from being impeded by foreign economic activities.

[52] GA Res 3281 (XXIX) (1974); see § 106.

[53] See GA Res 2105 (XX). Such calls have become a regular feature of relevant resolutions of the General Assembly.

[54] See eg Waldock, Hag R, 106 (1962), ii, pp 27–34. Several states have asserted the illegality of the Committee's establishment or operations, or those of its predecessors: see eg the views of Belgium (UNYB (1954), p 318), and n 43 above.

[55] As to developments within the framework of UN human rights activities see generally § 433ff; and Res VIII adopted by the International Conference on Human Rights, held at Teheran, 1968 (UN Doc A/CONF 32/41, p 9).

The political content of many of the anti-colonial resolutions, their lack of realism in certain respects,[56] 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

Schücking und Wehberg, pp 688–711 Redslob, *Théorie de la Société des Nations* (1927), pp 175–216 H Lauterpacht, *Analogies*, §§ 84–86 Millot, *Les Mandats internationaux* (1924) Diena, *Les Mandats internationaux* (1925), and Hag R, 5 (1924), iv, pp 215–63 Stoyanovsky, *La Théorie générale des mandats internationaux* (1925) Schneider, *Das völkerrechtliche Mandat* (1926) Vallini, *I mandati internazionali* (1923) Balladore Pallieri, *I mandati della Società delle Nazioni* (1928) Gsell-Trümpi, *Zur rechtlichen Natur der Völkerbundsmandate* (1928) Van Rees, *Les Mandats internationaux* (vol i, *Le Contrôle international*, 1927) (vol ii, *Les Principes généraux*, 1928) Van Maanen-Helmer, *The Mandates System in Relation to Africa and the Pacific Islands* (1929) Wright, *Mandates under the League of Nations* (1930) (a leading treatise) Margolith, *The International Mandates* (1930) Bentwich, *The Mandates System* (1930), and Hag R, 29 (1929), iv, pp 119–82 Pic, *Le Régime du mandat* (1932) Pelichet, *La Personnalité internationale distincte des collectivités sous mandat* (1932) Comisetti, *Mandats et Souveraineté* (1934) Monarca, *L'Appartenenza della sovranità sui territori sotto mandato* (1936) Duncan Hall, *Mandates, Dependencies and Trusteeships* (1948) Rolin, RI, 3rd series, 1 (1920), pp 329–63 Lewis, LQR, 39 (1923), pp 458–75 Baty, BY, 1921–22, pp 109–21 Corbett, *ibid* (1924), pp 128–36 Wright, AJ, 17 (1923), pp 691–703; 18 (1924), pp 306–15; 20 (1926), pp 768–72 Bileski, ZV, 12 (1923), pp 65–85, and 13 (1924), pp 77–102 and ZöR, 13 (1933), pp 8–67 Lee, *Grotius Society*, 12 (1927), pp 31–48 Buza, ZöR, 6 (1926), pp 235–45 Rolin, *Annuaire*, 34 (1928), pp 33–58 Tachi, RI (Paris), 14 (1934), pp 337–60 Bentwich, ZöV, 4 (1934), pp 277–95 Hales, *Grotius Society*, 23 (1937), pp 85–26; 25 (1939), pp 185–284; and 26 (1940), pp 153–210 Haas, *International Organisation*, 6 (1952), pp 521–26 Upthegrove, *Empire by Mandate* (1954) Whiteman, *Digest*, 1, pp 598–731 Chowdhuri, *International Mandates and Trusteeship Systems* (1955) Verzijl, *International Law in Historical Perspective*, 2 (1969), pp 545–73 Rousseau, *Droit international public*, 2 (1974), pp 378–98 Crawford, *The Creation of States in International Law* (1979), pp 335–55 See also, § 88, n 2, as to the Mandate for South West Africa (Namibia).

§ 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

[56] Such as the call for 'immediate steps' to be taken to confer independence, expressly irrespective of political, economic, social or educational preparedness: GA Res 1514 (XV) (1960). It may be noted that although the resolutions have been adopted with overwhelming majorities they have often not included the affirmative votes of the states most immediately concerned with the practical application of the resolutions, namely the administering states. More weight probably attaches to their votes than to those of states with less direct involvement in the subject: see § 10, n 21.

[57] As to the law-creating possibilities of General Assembly resolutions, see § 16.

them.[1] 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.[2] 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.[3] In conformity with the Charter of the United Nations the system of mandates has been replaced by the international trusteeship system, described below.[4]

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'.[5]

A territory, by being placed under a mandate was not thereby annexed by the mandatory.[6] The mandatory was precluded by the terms of the mandate from

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[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 mandatories, 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 preambles of the mandates.

In its Opinion in the *Namibia (South West Africa) Legal Consequences Case* the ICJ was unable to accept 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 28ff.) considered in some detail the nature of 'C' mandates.

[6] *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 mandatory*: see Rolin, RI, 3rd series, 1 (1920), pp 329–63, Lindley, pp 263, 267, and *R v Jacobus Christian* (AD (1923–24), No 12), where the Appellate Division of the Supreme Court of South Africa held that the mandatory government – 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 mandatory. With reference to the claim of General Hertzog, 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 1118–20; and *Round Table* (December 1927), pp 217–22. See also § 88, for subsequent developments in relation to South West Africa.

The mandatory's virtually full legislative and administrative powers over the mandated territories were confirmed in several cases (eg *De Bodinat v Administration de l'Enregistrement*, AD, 11 (1919–42), No 33; *Wong Man On v The Commonwealth*, ILR, 19 (1952), p 327), but subject to the terms of the mandate (see *Jerusalem-Jaffa District Governor v Suleiman Murra* [1926] AC, 321; *Ahmed Shauki El Kharbutli v Minister of Defence*, AD 16 (1949), No 19; but cf *Rozenblatt v Register of Lands (Haifa)*, AD, 14 (1947), No 11; and *State v Tuhadeleni* (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 *Stampfer 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 Zealand 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 Goralschvili*, mentioned in AJ, 20 (1926), p 771 (AD, 3 (1925–26), No 33); Redslob, *Théorie de la Société des Nations* (1927), pp 196, 197; Corbett, BY (1924), p 134; Bentwich, *The Mandates System* (1930), p 19; Scelle, i, pp 170, 171;

(e) In the inhabitants of the mandated area, but temporarily in suspense: see Stoyanovsky, *La Théorie générale des mandats internationaux* (1925); Pelichet, *La Personnalité internationale distincte 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 91;

(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).

[7] ICJ Rep (1950), p 132. See also the *Namibia (South West Africa) Legal Consequences Case*, ICJ Rep (1971), pp 28, 30, 43, for clear rejection of the notion of annexation.

[8] See Art 22.4 of the Covenant, referring to certain communities subsequently to become mandated territories as having 'reached a stage of development where their existence as independent

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 mandatories had not acquired all of those rights was equally clear. 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* the International Court of Justice held that the conferment of the mandate over that territory upon South Africa did not involve any cession or transfer of territory to the Union of South Africa.[7] Type 'A' mandates possessed a sufficient degree of separate status to enjoy a limited treaty-making capacity.[8]

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 civilisation[9] ... The international rules regulating the Mandate constituted an international status for the Territory...'.[10] 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.[12] 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.[13]

§ 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.[1] However, the renunciation by Germany and Turkey of their rights in respect of the

nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone'. See also Lissitzyn, Hag R, 125 (1968), iii, pp 54–8; and *Shehadeh v Commissioner of Prisons*, AD, 14 (1947), No 16.

9 In the *South West Africa Cases* (Second Phase) the ICJ held that the principle of the 'sacred trust' was primarily a moral or humanitarian concept, and had no residual juridical content which could operate *per se* to give rise to legal rights and obligations outside the mandate system as a whole: ICJ Rep (1966), pp 34–5. For a survey of some 19th century antecedents of the 'sacred trust' see Alexandrowicz, AJ, 65 (1971), pp 149–59.

10 ICJ Rep (1950), p 132. And see, in particular, the Separate Opinion of Judge McNair, *ibid*, pp 153–57.

11 See § 90.

12 ICJ Rep (1971), pp 29–30.

13 See Feinberg, *La Juridiction de la Cour Permanente dans le système des mandats* (1930), and Hag R, 59 (1937), i, pp 596–632, 682–702. See the *Mavromatis Palestine Concession Case* (1924), PCIJ, Series A, No 2. It was in reliance on such a provision that Ethiopia and Liberia instituted proceedings against South Africa in 1960: see § 88, n 16.

1 See generally Weis, *Nationality and Statelessness in International Law* (2nd ed, 1979), pp 20–25. For purposes of English law persons connected in certain specified ways with British mandated territories in Togoland and Cameroons were considered British protected persons: British Protected Persons Order 1934 (SR and O 1934 No 499). See also the definition of the term 'British protected person' in the British Nationality Act 1948, s 32(1). Article 127 of the Treaty of Versailles gave the mandatory powers, as 'Governments exercising authority over the territories', the right of diplomatic protection over native inhabitants of former German possessions; and see *Malapa v Public Prosecutor* (1959), ILR, 28, p 80. See also *Pablo Nájéra (of the Lebanon) Case*, AD, 4 (1927–28), No 30.

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 resolutions[4] 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;[7] 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 of 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 (1948), No 67, and *Ex parte Schwietering*, *ibid*, No 86.

4 Off J (1923), p 604.

5 Act 30 of 1924: see Emmett, JCL, 3rd series, 9 (1927), and BY (1925), pp 188–91, and Van Pittius, *Nationality within the British Commonwealth of Nations* (1930), pp 177–201; Steinberg, *Archiv des Völkerrechts*, 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 1924 became an alien. 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: ss 1(1)(x), 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, ZöV, 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 Goralschwili*, AD, 3 (1925–26), No 33. In *Klausner v Levy* (1949) a Palestinian citizen was held by a US court not to be a citizen of a 'foreign State' because Palestine was not a state while under British mandate: Whiteman, *Digest*, 2, p 655. But see *Kletter v Dulles*, 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: *Hussein v Governor of Acre Prison*, ILR, 17 (1950), p 112; *Naqara v Minister of the Interior*, ILR, 20 (1953), p 49.

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.[8]

§ 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 Africa[2] 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 consultation of its inhabitants. There was no disposition on the part of the members of the Assembly to acknowledge such right of incorporation and South Africa refrained from annexing the territory.[3]

[8] *The King v Ketter* [1940] 1 KB 787; *Wong Man On v The Commonwealth*, ILR, 19 (1952), p 327, where it was held that a person born in a 'C' mandate did not become a national of the mandatory power; see also O'Connell, BY, 31 (1954), pp 458–61. Note, however, the effect of certain New Zealand legislation which, despite an earlier decision in a contrary sense in *Levave 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 Lesa v Attorney-General of New Zealand* [1983] 2 AC 20. The far-reaching consequences of the decision were, following 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.

[2] See generally on South West Africa, Imishue, *South West Africa: An International Problem* (1966); Slonim, Can YBIL, 6 (1968), pp 115–43, and *South West Africa and the United Nations* (1973); Lucchini, AFDI, 15 (1969), pp 355–74; Whiteman, *Digest*, 1, pp 706–31; Obozuwa, *The Namibian Question* (1973); Dugard, *The South West Africa/Namibia Dispute* (1972); Bernhardt, ZöV, 33 (1973), pp 1–37; Sagay, *Legal Aspects of the Namibian Dispute* (1976); Zacklin, Hag R, 171 (1981), ii, pp 225–340; Dore, Harv ILJ, 27 (1986), pp 159–91. See also n 16.

As to the extension of South African treaties to South West Africa, see Schaffer, South African LJ, 95 (1978), pp 63–70. As to questions of state succession arising in relation to Namibia's eventual independence, see Makonnen, Hag R, 200 (1986), v, pp 149–218.

[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 a 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), pp 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).

When in 1950 the International Court of Justice found by a majority, in its Advisory Opinion on the *Status of South West Africa*,[4] that there was no legal obligation[5] upon South Africa to conclude a trusteeship agreement for the territory held by it under a League of Nations mandate, it affirmed at the same time, unanimously, that South Africa, acting alone, had no competence to modify the international status of that territory and that the competence to determine and modify that status rested with South Africa acting with the consent of the United Nations. The Court also held that South Africa continued to be bound by the international obligations laid down in Article 22 of the Covenant of the League of Nations and in the mandate for South West Africa as well as by the obligation to transmit petitions from the inhabitants of that territory. The Court found that the main supervisory functions of the League of Nations with respect to the mandated territories devolved upon the United Nations[6] with the result that South Africa was under an obligation to furnish to the United Nations for examination reports on its administration of the territory held under a mandate from the League. The Court refused to admit that the obligation to submit to supervision had disappeared merely because the supervisory organ – namely, the Mandates Commission – had ceased to exist; for the United Nations possessed an international organ performing similar, though not identical, supervisory functions, namely the Trusteeship Council, while the General Assembly had sufficient powers under Article 10 of the Charter to exercise the relevant supervision over the continued administration of the territory.[7] The conclusion that the United Nations succeeded to the supervisory functions of the League of Nations over mandated territories followed partly from the principle, adopted by the Court, that the regime established for the mandates created an international status and was not a purely contractual arrangement. The Court added that 'the degree of supervision to be exercised by

[4] ICJ Rep (1950), p 128, given in response to GA Res 338 (IV) (1949).

[5] 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.

[6] 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 continuance of the mandatory's obligations in general (pp 332–5, 338–42). But see also n 16, as to the Second Phase of the case.

[7] 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'.[8] South Africa continued to maintain that the mandate had lapsed[9] 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 1950 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 Committe could do so.[14]

In 1961 the General Assembly proclaimed[15] (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

[8] ICJ Rep (1950), p 138. The passage quoted was subject to further elaboration by the Court in the *South West Africa (Voting Procedure) Case*, ICJ Rep (1955), p 67.

[9] For consideration (and rejection) of the suggestion that the mandate terminated as the result of South Africa's assumption of republican status and departure from the Commonwealth in 1961, see Blom-Cooper, MLR, 24 (1961), pp 256–60.

[10] See the statement by the South African Government recorded in the report of the Secretary-General to the Security Council, published in April 1973: UN Doc S/10921, para 14. As to the national status of the inhabitants of South West Africa, see § 87, n 5.

[11] GA Res 449 A (V) (1950). The resolution also established a committee to confer with South Africa concerning procedural measures necessary for implementing the Court's Opinion.

[12] The Committee was replaced in 1961 by the Special Committee on South West Africa (GA Res 1702 (XVI)), which was in turn dissolved in 1962 and its functions assigned to the Special Committee of Twenty-Four (GA Res 1805 (XVII)): see § 85, n 40.

[13] ICJ Rep (1955), p 67.

[14] ICJ Rep (1956), p 23.

[15] GA Res 1702 (XVI).

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 Assembly[17] 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 fulfil its obligations in respect of the administration of the Mandated Territory ... and has, in fact, disavowed the Mandate'; decided 'that the Mandate ... is therefore terminated, that South Africa has no other right to administer the Territory[18] 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.[19] 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,[20] 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.

[16] ICJ Rep (1966), p 6. There had been earlier proceedings to consider – and reject – certain preliminary objections raised by South Africa: ICJ Rep (1962), p 319. For discussion of these judgments, see Johnson, ICLQ, 13 (1964), at pp 1143–58; Verzijl, Neth IL Rev, 11 (1964), pp 1–25; Higgins, *International Affairs*, 42 (1966), pp 573–99; Dugard, South African LJ, 83 (1966), pp 429–60; Falk, *International Organisation*, 22 (1967), pp 1–24; McWhinney, Can YBIL, 5 (1967), pp 73–9; Fleming, *ibid*, pp 241–52; Cheng, *Current Legal Problems* (1967), pp 181–212; Nisot, *Rev Belge*, 3 (1967), pp 24–36; Katz, *The Relevance of International Adjudication* (1968), Ch 4; Anand, *Studies in International Adjudication* (1969), pp 119–51; Falk, *The Status of Law in International Society* (1970), pp 126–73, 378–402.

[17] GA Res 2145 (XXI). This resolution has been subject to considerable criticism, both on the practical ground that the United Nations should not purport to do things which it is manifestly in no position to carry out, and on the legal ground that the legal right of the General Assembly to terminate the Mandate and of the UN to assume powers under it was very far from clearly established: see n 27; Rousseau, RG, 71 (1967), pp 382–4; and Dugard, AJ, 62 (1968), pp 78–97.

[18] For the proposition that if the mandate lapsed South Africa's authority in South West Africa would equally lapse, see ICJ Rep (1950), p 42. With the termination of the Mandate South Africa's right to represent South West Africa in international organisations and extend treaties to the territory also came to an end: see UN Juridical YB (1981), pp 143–5, and as to the position in the International Telecommunications Union, Blix, Hag R, 130 (1970), ii, p 665, n 36.

[19] The resolution also established an *ad hoc* committee for South West Africa, composed of 14 member states, to recommend practical means by which South West Africa should be administered.

[20] GA Res 2248 (S-V); see also GA Res 2325 (XXII) (1967), 2372 (XXIII) (1968). In 1972 the Council was increased from 11 to 18 members: GA Res 3031 (XXVII). The Council issued travel documents to persons belonging to Namibia, and concluded agreements concerning the recognition of these documents (eg with Tanzania, UN Doc A/AC 131/29; and see also UN Juridical YB (1973), pp 18, 21). See generally UN Juridical YB (1967), p 309 and (1982), pp 164–70; Engers, AJ, 65 (1971), pp 571–8.

In order to enable the Council's work to be carried out more effectively the General Assembly in 1970 established a UN Fund for Namibia to provide comprehensive assistance to the people of the territory: see GA Res 2679 (XXV) (1970) and SC Res 283 (1970). The Council for Namibia acted as trustee of the Fund and administered and managed it. See generally Osieke, BY, 51 (1980), pp 189, 192–6; Zacklin, Hag R, 171 (1981), ii, pp 308–27.

With the attainment of independence by Namibia in 1990 (n 48), the Council recommended that it be dissolved: this was done by GA Res 44/243, of 11 September 1990.

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.[21] These events occasioned condemnation of South Africa by the United Nations.[22] In 1968 the General Assembly changed the name of the territory to 'Namibia'.[23] 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,[24] 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[25] 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)'.[26]

The Court's Opinion[27] 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.'

[21] *The State v Tuhadeleni* (1968), ILR, 52, p 29; see ICLQ, 18 (1969), p 789, and Dugard, AJ, 64 (1970), pp 19–41.
[22] GA Res 2324 (XXII) (1967); SC Res 245 (1968), 246 (1968).
[23] GA Res 2372 (XXII).
[24] SC Res 264 and 269.
[25] UN Doc S/9863.
[26] The formulation of the question to be put to the Court is not free from criticism, since it assumed certain propositions which were legally controversial, such as that the General Assembly had legally terminated the mandate.
[27] *Namibia (South West Africa) Legal Consequences Case*, ICJ Rep (1971), p 4. The Opinion was subject to much critical comment, particularly as to the Court's determination that the General Assembly had validly terminated the mandate. The dissenting opinions of Judges Fitzmaurice and Gros contained powerful arguments that the Assembly lacked the authority to revoke the mandate. The UK was unable to accept as legally correct the conclusions reached by the Court: see the statement by the British representatives in the Security Council on 6 October 1971 (Cmnd 5049, pp 177–81); *Parliamentary Debates (Commons)*, vol 823, col 678ff. (19 October 1971); and *ibid*, vol 882, cols 1564–6 (4 December 1974). See generally on the Opinion, Hevener, ICLQ, 24 (1975), pp 791–810; Bollecker, AFDI, 17 (1971), pp 281–333.

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;[28] 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;[29] 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;[30] 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.[31] 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.[32]

The General Assembly[33] 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,[34] 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,

[28] At pp 46–7.
[29] At pp 47–9.
[30] At p 50.
[31] At pp 51–4. For consideration of the decision of the Court as to the binding nature of this and certain other resolutions, see Higgins, ICLQ, 21 (1972), pp 270–86.
[32] See § 55, at p 197.
[33] GA Res 2871 (XXVI) (1971). See also GA Res 3031 (XXVII) (1972). Similar resolutions were adopted in the immediately following years.
[34] SC Res 301 (1971). For unsuccessful attempts to enforce in national courts the illegality of South Africa's presence in Namibia, and to give effect to the various UN resolutions, see *Diggs v Dent*, ILM, 14 (1975), p 797; *Diggs v Richardson*, AJ, 72 (1978), p 152.

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,[35] and in 1973 SWAPO was recognised by the General Assembly as the 'authentic representative of the Namibian people'.[36] 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.[37] In accordance with these requests, the Council has represented Namibia at several international conferences and in certain international organisations.[38] 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.[39] This Decree, adopted by the Council in exercise of its authority to administer Namibia pending its independence,[40] 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 from Namibia without the permission of the Council, and if exported they might be seized, 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.[41]

[35] GA Res 3031 (XXVII); UNYB (1972), p 612.

[36] GA Res 3111 (XXVIII).

[37] See eg GA Res 3111 (XXVIII) (1973), 31/149 (1976), and 32/9 A, para 4, and E (1977); S-9/2 (1978).

[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 Vienna Conference on Succession of States in Respect of Treaties, and in the Law of the Sea Conference. See generally Osieke BY, 51 (1980), pp 189–229.

[39] ILM, 13 (1974), p 1513. The General Assembly endorsed the Decree in GA Res 3399 (XXX) (1975).

[40] See n 20.

[41] See generally Schermers, ICLQ, 26 (1977), pp 81–96. The General Assembly in 1981 decided that the Council for Namibia should take all measures to ensure compliance with Decree No 1, including considerations of the institution of legal proceedings: GA Res 36/121 C. The necessary studies were entrusted to the Commissioner for Namibia, whose report on the possibility of instituting legal proceedings in the domestic courts of states was presented in 1985 (UN Doc A/AC 131/194; AJ, 80 (1986), pp 442–91), and it was decided to commence legal proceedings in 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).

Subsequent discussions[42] with South Africa to secure compliance with the various United Nations resolutions proved difficult.[43] In 1976 the Security Council called for free elections to be held in Namibia under United Nations' supervision and control and set out certain other elements as the basis for an internationally acceptable settlement.[44] In 1978 the General Assembly adopted a Declaration on Namibia and Programme of Action in Support of Self-Determination and National Independence for Namibia,[45] in which the Assembly restated in comprehensive terms its attitude to the situation in Namibia and the future of the territory. South Africa, however, made arrangements for elections in Namibia, if necessary without United Nations' involvement; the Security Council declared such unilateral measures to be 'null and void'.[46] Similarly the Security Council condemned as 'null and void' action by South Africa in 1985 establishing in Namibia an interim government and legislative assembly, reserving to South Africa direct control of defence and external affairs.[47] Eventually complex arrangements were agreed in 1988 and 1989, which led to independence for Namibia on 21 March 1990.[48]

[42] Eg by the Secretary-General acting under SC Res 309, 319 and 323 (1972), and subsequently by five members of the Security Council, sometimes referred to as the 'Contact Group' (France, UK, USA, Canada, and the Federal Republic of Germany). See Richardson AJ, 78 (1984), pp 76–120.

[43] 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 return 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 683–4; RG, 82 (1978), pp 692–4; Goeckner and Gunning, Yale LJ, 89 (1980), pp 903–922; Makonnen, Hag R, 200 (1986), v, pp 212–18. And see *Binga v Administrator-General for South West Africa* (1988), ILR, 82, pp 465, 494ff. The future of Walvis Bay is for negotiation between South Africa and Namibia.

[44] SC Res 385. In April 1978 further proposals were made, in accordance with SC Res 385, for securing the independence of Namibia by the end of 1978 on the basis of free elections under UN supervision: UN Doc S/12636; ILM, 17 (197), p 762. See also the Report of the Secretary-General's Special Representative appointed pursuant to SC Res 431 (1978): UN Doc S/12827; ILM, 17 (1978), p 1537.

[45] GA Res S-9/2.

[46] SC Res 435 and 439 (1978).

[47] See statement made on behalf of the Council on 3 May 1985 and SC Res 566 (1985): UNYB (1985), pp 1096–8.

[48] Independence for Namibia, and with it the withdrawal of South African armed forces from the territory, was closely linked to the withdrawal of Cuban forces from Angola and of SWAPO forces from Namibia. For the complex arrangements to secure this, involving also UN assistance with the transition arrangements, see ILM, 28 (1989), pp 944–1017. See also Cadoux, AFDI, 34 (1988), pp 13–36; RG 94 (1990), pp 801–2; Kamto, RG, 94 (1990), pp 577–634.

TERRITORIES UNDER THE SYSTEM OF TRUSTEESHIP

Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948), and BY, 24 (1947), pp 33–71 Kelsen, *The Law of the United Nations* (1950), pp 566–695 Schwarzenberger, *Power Politics* (2nd ed, 1951). pp 660–94 Mathiot, RG, 50 (1946), pp 159–200 Armstrong and Cargo, *Department of State Bulletin*, 16 (1947), pp 511–19 Wellons and Yeomans, *ibid*, pp 1089–98 Berthoud, *Friedenswarte*, 47 (1947), pp 233–5 Sayre, AJ, 42 (1948), pp 263–98 Parry, BY, 27 (1950), pp 164–85 Johnson, YB of World Affairs (1951), pp 220–45 Roche, RG, 58 (1954), pp 399–437 Chowdhuri, *International Mandates and Trusteeship Systems* (1955) Chandarasomboom, *Le Régime international de tutelle et son fonctionnement* (1955) Leroy, RG, 69 (1965), pp 977–1018 Sady, *The United Nations and Dependent Peoples* (1956) Toussaint, *The Trusteeship System of the United Nations* (1956) Murray, *The United Nations Trusteeship System* (1957) Whiteman, *Digest*, 1, pp 731–911, and 13, pp 679–90 Goodrich, Hambro and Simons, *Charter of the United Nations* (3rd ed, 1969), pp 464–543 Veicopoulos, *Traité des territoires dependants* (vol 1, 1960 and vol 2, 1971) Rousseau, *Droit international public*, 2 (1974), pp 398–412 Crawford, *The Creation of States in International Law* (1979), pp 335–55, 426–8 Cot and Pellet, *La Charte des Nations Unies* (1985), pp 1093–1238 Simma (ed), *Charta der Vereinten Nationen* (1991), pp 888–926.

§ 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]

[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.

[1] 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'.

(b) territories detached from the defeated states as a result of the Second World War;
(c) other territories voluntarily placed under the trusteeship system by states hitherto responsible for their administration.

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)[2] 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 mandatories by 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 matters[1] 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.[2] 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: UNYB (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 (I) (1946).
[5] See § 88.

[1] 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.
[2] 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'[1] – 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 agreement 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 agreements[4]

[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 *Canadian Commentary on the Charter, Department of External Affairs*, Conference Series (1945), No 2, p 50. See § 95, n 10, as to the meaning given by the UN to the concepts 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 objective 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'.

[1] Article 79. For a discussion of the meaning of that term see 8th ed of this vol, p 228, n 1; Wolfe, AJ, 42 (1948), pp 368–88; and Badiali, *Comunicazioni e studi*, 9 (1958), pp 73–115. See also generally on trusteeship agreements Parry, BY, 27 (1950), pp 164–85; Vedovato, Hag R, 76 (1950), i, pp 613–94; and Leroy, RG, 69 (1965), pp 977–1018.

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), ILR, 61, p 89; but cf *People of Saipan v United States Department of the Interior* (1974), ILR, 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 476. This statement, it is believed, accurately expresses the legal position. See § 86, as to the nature of mandates.

[2] See § 93.

[3] 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 XIII of the Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (TS No 77 (1975).

[4] 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

submitted to it in respect of the following eight trust territories, hitherto subject to the mandates system: Tanganyika,[5] British Togoland,[6] and the British Cameroons,[7] to be administered by the United Kingdom; French Togoland[8] and

British Cameroons the 'Administering 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 these 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, 48, p 26; *People of Saipan v US Department of the Interior* (1974), ILR, 61, p 113; in *Società 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 *Trafficante 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, 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 political 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 *Maleksultan 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 either of 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 inhabitants of the 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, n 10, para 2).

[5] TS No 19 (1947); UNTS, 8, p 91.

[6] TS No 21 (1947); UNTS, 8, p 151.

[7] TS No 20 (1947); UNTS, 8, p 119.

[8] 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]

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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 71.

12 TS No 68 (1947); UNTS, 8, p 181. See Castles in *International Law in Australia* (ed O'Connell, 1965), pp 304–7, 318–40 and 373–87.

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 Ryuku Islands, which include Okinawa. The Japanese Supreme Court held that the transport of goods from Okinawa to Japan involved import into Japan: *Hiizu Hiraide v Yasuhide Niizato* (1966), ILR, 53, p 281; see also *Re Shimabukuro* (1967), ILR, 54, p 214, and *Williamson v Alldridge* (1970), ILR, 56, p 229. See generally on the status of Okinawa, Eisemann, 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 Luce, *Le Referendum du Togo (1956)*, (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 courts have held themselves no longer able to hear 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 Cameroon* (1962), ILR, 44, p 36.

§ 93 Strategic trust areas The Charter distinguished between ordinary trust territories and so-called strategic areas which may include part or all of the trust territory. With regard to these areas the strategic requirements of defence and security made it necessary that the functions which with regard to trust territories in general were exercised by the General Assembly should be performed by the Security Council,[1] which by virtue of its composition is able to act more expeditiously and which is more particularly associated with international peace and security. But it was expressly provided that the general principles of trusteeship as laid down in Article 76 of the Charter applied to strategic areas and that, subject to the specific trusteeship agreements and requirements of security, the Security Council had to avail itself of the services of the principal organ of the trusteeship system, namely, the Trusteeship Council.[2] Only one strategic trust area was established, for the territory of the Pacific Islands (formerly Japanese Mandated Islands), comprising the Mariana Islands (except Guam), and the Caroline and Marshall Islands, often together referred to as Micronesia. The trusteeship agreement for this territory[3] differed little from other trusteeship agreements.[4]

The territory came to be administered as four districts, namely the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, and Palau. The United States of America concluded a Covenant with the Northern Mariana Islands whereby they would become a self-governing commonwealth in political union with and under the sovereignty of the United States, which would have responsibility and authority with respect to matters of defence and foreign affairs.[5] The United States also concluded Compacts of Free Association with the Federated States of Micronesia, the Republic of the Marshall Islands,[6] and Palau whereby these territories would become self-governing with the right to conduct foreign affairs in their own name (subject to the authority of the United States in security and defence matters). These various agreements[7] entered into force in 1986[8] except that with Palau, where successive referendums

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1 Articles 82 and 83.

2 Article 83. See also *Canadian Commentary on the Charter*, p 51.

3 TS No 76 (1947); UNTS, 8, p 189.

4 The words 'or independence' as an alternative to self-government appear even in the trusteeship agreement on the Pacific Islands, an undeveloped strategic trust area to be administered by the USA (Art 6). They were inserted in the course of the consideration of the agreement by the Security Council. The USA originally opposed the insertion of these words because of the unlikelihood that such independence 'could possibly be achieved within any foreseeable future in this case'.

Article 13 of the trusteeship agreement provided that the application of the provisions of Arts 87 and 88 of the Charter concerning annual reports and visits to the territory could be limited in respect of areas which may from time to time be specified by the administering authority as closed for security reasons.

See generally Robbins, *Department of State Bulletin*, 16 (1947), pp 783–90; *AS Proceedings* (1973), pp 17–21; Wilson, *ibid*, pp 21–28.

5 RG, 79 (1975), pp 1128–32; ILM, 15 (1976), p 651.

6 RG, 87 (1983), pp 176–7.

7 See generally on developments leading to these agreements, Lucchini, AFDI, 21 (1975), pp 155–74; Armstrong, AJ, 74 (1980), pp 689–93; Clark, Harv ILJ, 21 (1980), pp 1–86; Armstrong and Hills, AJ, 78 (1984), pp 484–97.

8 AJ, 81 (1987), pp 405–8.

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:[1]

(a) to consider reports submitted by the administering authority;
(b) in consultation with the latter to accept and examine petitions[2] from the inhabitants of trust territories;
(c) to arrange for periodic visits to trust territories at times agreed upon with the administering authority;[3]

[9] Res 2183 (LIII) of 28 May 1986. See generally Goy, AFDI, 34 (1988), pp 454–74; McKibben, Harv ILJ, 31 (1990), pp 257–93.

[10] The purported termination of the agreements in respect of the three entities, as proclaimed by the USA (see AJ, 81 (1987), pp 405–8; but see Clark, *ibid*, pp 927–34) was thus of doubtful validity. Notwithstanding the doubts, some of the territories in question would appear to have been accorded a limited degree of international status by some states other than the USA. Thus some of them signed a treaty on the regulation of tuna fishing in the South Pacific in 1987: AJ, 81 (1987), p 940. In *Bank of Hawaii v Balos* a US District Court held the trusteeship agreement to be still technically in force, and thus the Trust Territory of the Pacific Islands to be still technically in existence, but that in post-1986 circumstances the Republic of the Marshall Islands had *de facto* become a foreign state and should be treated as such: AJ, 83 (1989), p 583. As to the possibility of the territories signing the UN Law of the Sea Convention 1982 see UN Juridical YB (1982), pp 186–7. For agreements establishing diplomatic relations with the USA see AJ, 84 (1990), pp 237–9. Note also that Palau, in respect of which the USA has not purported to terminate the trusteeship agreement, has been held to be a foreign state for purposes of sovereign immunity: *Morgan Guaranty Trust Co v Republic of Palau*, AJ, 81 (1987), p 220. See also other cases cited at § 95, n 9.

[11] The Federated States of Micronesia and the Republic of the Marshall Islands became widely recognised as states, and became members of the UN in 1991.

[1] Article 87. The General Assembly exercises, in principle, concurrent jurisdiction with the Trusteeship Council with regard to the supervision of the administration of the trust territories. In particular, it is to the General Assembly that the administering authority made an annual report with regard to the territory entrusted to its administration. With regard to strategic areas the functions of the UN are exercised by the Security Council (Art 83). The competence of the Committee of Twenty-Four (see § 85, n 40) extends to trust territories, as does the Declaration of the Granting of Independence to Colonial Countries and Peoples (§ 85, n 17).

[2] See generally Beauté, *Le Droit de pétition dans les territoires sous tutelle* (1962).

[3] No corresponding provision is to be found in the mandates. The liberal interpretation given by the Trusteeship Council to the provisions of the Charter concerning petitions from and visits to trust territory may be gauged from the fact that the first visiting mission sent by the Council was that sent to Western Samoa in 1947 to investigate a petition from the leaders and representatives of that territory asking that it be granted self-government. See Finkelstein, *International Organisation*, 2 (1948), pp 266–82. Visits of this nature have become a prominent feature of the work of the Trusteeship Council. A detailed account of them will be found in the successive issues of the UNYB.

(d) to formulate questionnaires on the political, economic, social, and educational progress of the inhabitants of the trust territories – such questionnaires to form the basis of the annual reports submitted to the General Assembly by the administering authority;
(e) to take any other action in conformity with the trusteeship agreements.

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[4] – 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,[5] and that the representatives of these states must be persons 'specially qualified'.[6] 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]

[4] In April 1947 the Trusteeship Council approved provisionally the form of a questionnaire which, in accordance with Art 88 of the Charter, should form the basis of the annual reports on each trust territory. The document contains questions on such matters as the status of the territory (including the organisation of its legislative, administrative, and judicial systems) and its inhabitants, international and regional relations, and the advancement achieved in the political, economic, educational and social spheres. The latter includes questions on standards of living, status of women, human rights, labour conditions, public health, sanitation, drugs, alcohol, population, social security and welfare, housing and town planning, and penal organisation (Doc T/44).

[5] Articles 86 and 89(1). It may be noted that the composition of the Trusteeship Council substitutes governmental representation for the system which obtained with regard to the Mandates Commission. The latter was composed of individuals not representing any government, a fact generally regarded as a guarantee of its impartiality and independence.

[6] Article 86(2).

[7] See Meron, BY, 36 (1980), pp 250–78; UN Juridical YB (1967), pp 330–32; Blum, AJ, 63 (1969), pp 747–68.

§ 95 Sovereignty over trust territories In considering the question of sovereignty over trust territories,[1] 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.[2] 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.[3]

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 and that the status of the state exercising sovereignty is that of 'the administering authority'.[4] In essence the position is the same as in the corresponding case of mandates.[5] The terms 'trust' and 'tutelle' (in the French text of the Charter)[6] 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.[7]

[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 *Aradanas v 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 resided 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 fideicometidos', 'consejo de administración fiduciaria'.

[7] 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 (1950), 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 this case, 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).

Although the majority of trusteeship agreements provided that the territories in question were to be administered as an 'integral part' of the administering state,[8] 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.[9] That fact of delegation implied also the ultimate power of revocation in case of abuse or failure of the trust vested 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

[8] 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 Togoland and the Cameroons 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.

[9] 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 Togoland and the Cameroons 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 *Falema'i Lesa v Attorney-General of New Zealand* referred to at § 87, n 8.

For judicial consideration of the nature of the relationship between a trust territory and an administering state, see *Società ABC v Fontana and Della Rocca*, ILR, 22 (1955), p 76; *Maleksultan v Jerai*, *ibid*, p 81; *Trafficante v Ministry of Defence* (1961), ILR, 40, p 37; *Alig v Trust Territory of the Pacific Islands* (1967), ILR, 61, p 89. In *Callas v US*, ILR, 26 (1958–II), p 62, a US court held a US trust territory to be a 'foreign country'; see also, maintaining the separateness of a trust territory from the administering state, *Application of Reyes*, ILR, 23 (1956), p 35; *Aradanas v Hogan*, ILR, 24 (1957), p 57; *Morgan Guaranty Trust Co v Republic of Palau*, AJ, 81 (1987), p 220; *Porter v United States* (1974), ILR, 61, p 102; cf *People of Saipan v US Department of the Interior* (1974), ILR, 61, p 113, holding a US trust territory to be within the scope of legislation applicable to all areas under US 'control'; and for purposes of applying an ILO Convention it is nevertheless a territory over which the US exercises jurisdiction: AJ, 56 (1962), pp 168–9.

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 not 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 sovereign 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.[10] 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.[11]

NEUTRALISED STATES

Littell, *The Neutralisation of States* (1920) Dupuis, *Le Droit des gens et les rapports des Grandes Puissances avec les autres états* (1920) Sottile, *Nature juridique de la neutralité à titre permanent* (1920) Ekdahl, *La Neutralité perpétuelle avant le pacte de la Société des Nations* (1923) Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933) (a comprehensive treatise) Graham, AJ, 21 (1927), pp 79–94 Moscato, *Rivista*, 22 (1930), pp 379–95, 526–41, and 23 (1931), pp 54–66, 199–215 Dollot, Hag R, 67 (1939), i, pp 7–112 Verosta, *Die Dauernde Neutralität* (1967) Black, Falk, Knorr and Young, *Neutralisation and World Politics* (1968) Verzijl, *International Law in Historical Perspective* (vol 3, 1970), pp 500–12 Rousseau, *Droit international public*, 2 (1974), pp 301–28.

[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 Scelle* (vol i, 1950), pp 349–64; Mulenzi, *La Tutelle internationale et les problèmes des unions administratives* (1963). 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: British Togoland and Cameroons – with Nigeria; French Togoland and Cameroons – with the French Union; Ruanda-Urundi – with Belgian Congo; Tanganyika – with Kenya and Uganda. The union of New Guinea with Papua, which was an Australian non-self-governing territory, was held to be consistent with the trusteeship agreement for New Guinea: *Fishwick v Cleland* (1960), ILR, 32, p 38. See also Castles in *International Law in Australia* (ed O'Connell, 1965), pp 323–32. In 1971 the General Assembly agreed to call the territory 'Papua New Guinea' and to treat it as a single political and territorial entity: GA Res 2865 (XXVI).

In 1961 Cameroon instituted proceedings before the ICJ against the UK, complaining of a violation of the trusteeship agreement for Northern Cameroons in connection with the administrative union between it and Nigeria. The Court held that as the trusteeship agreement had already terminated, any adjudication would be devoid of purpose and beyond the limits of the judicial function: *Northern Cameroons Case*, ICJ Rep (1963), p 15. For comment see Johnson, ICLQ, 13 (1964), pp 1143–92; Gross, AJ, 58 (1964), pp 415–31; Verzijl, Neth IL Rev, 11 (1964), pp 25–33.

[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.[1] 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[2] and 1867.[3] Not to be confused[4] with neutralisation of states[5] is, in the first place, neutralisation of parts of states, of

[1] In the 8th ed of this vol, at p 244, the view was expressed that it followed from the neutralisation that the neutralised state could, apart from frontier regulations, neither cede a part of its territory nor acquire new parts of territory without the consent of the guaranteeing states. This was a much-discussed and very controversial point. See works there cited, at n 1. See also § 244 below.

Further, given the restraints inherent in the condition of neutralised states, it has sometimes been maintained that the states are part-sovereign only, and not international persons occupying the same position as other states. This opinion is, however, without foundation. If sovereignty is none other than supreme authority, a neutralised state is as fully sovereign as any non-neutralised state. It is independent outside as well as inside its borders, independence is not identical with unlimited liberty of action. See § 120.

[2] For details, see 8th ed of this vol, pp 246–8.

[3] For details, see 8th ed of this vol, pp 248–9. Similarly Albania has now ceased to be a neutralised state, although it was in 1913 constituted a sovereign independent kingdom and neutralised, its neutrality being guaranteed by the 'Six Powers': see 8th ed of this vol, p 255, n 2.

[4] See § 237, and vol II of this work (7th ed), § 72, with Note on demilitarisation, neutralisation, and internationalisation. For comment on the proposal for the neutralisation of Israel as part of a settlement of the Middle East problem, see Murphy, AJ, 65 (1971), pp 167–72.

[5] The status of Trieste after the Second World War was special. Trieste was formerly under Italian sovereignty. The Treaty of Peace with Italy 1947 terminated Italian sovereignty over Trieste, and established the Free Territory of Trieste, under a Permanent Statute. This laid down that the territory should be demilitarised and declared neutral; that no armed forces, except upon direction of the Security Council, should be allowed; and that the Government of the Free Territory should not make or discuss any military arrangements or undertaking with any state: TS No 50 (1948), Arts 21 and 22, and Annexes VI–IX. The responsibility of ensuring the independence and integrity of the Free Territory and of appointing a governor (as required by the statute) was accepted by the Security Council in 1947, but the Council was unable to agree upon a governor: see UNYB (1947–48), pp 352–3; Schachter, BY, 25 (1948), pp 96–8. The Permanent Statute could thus not be put into effect. Alternative practical arrangements were made for the Free Territory in 1954 by which Italy and Yugoslavia each assumed responsibility for separate zones of the Free Territory: the 'practical arrangements' were set out in a memorandum concluded between Italy, the UK, the USA and Yugoslavia, which did not purport to amend the Peace Treaty. See UN Doc S/3301; BFSP, 161 (1954), pp 419–26. The Soviet Union stated that it took cognisance of the memorandum: UN Doc S/3305. By a treaty concluded in 1975 Italy and Yugoslavia abandoned their residual claims to the zone administered by the other: see RG, 80 (1976), pp 949–51, and 81 (1977), p 1177, and Caggiano, Ital YBIL, 2 (1976), pp 248–72; Vukas, AFDI, 22 (1976), pp 77–95; Udina, RG, 83 (1979), pp 301–49. See generally Leprette, *Le Statut international de Trieste* (1949); Udina, RIF, 16 (1947), pp 161–75; Gervais, RG, 51 (1947), pp 134–54; Kelsen, YB of World Affairs (1950), pp 174–90; Hannum, *Autonomy, Sovereignty and Self-Determination* (1990), pp 400–6; and, as to human rights under the Trieste settlement, see § 428, n 3. Italian courts were inclined to the view that the termination of Italian sovereignty did not take effect while the Permanent Statute was not effective and that courts in Trieste remained Italian courts, and that marriages there had not taken place in foreign territory:

rivers, canals,[6] and the like, which has the effect that war cannot lawfully be made or prepared there;[7] 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.[8] The principal neutralised states now in existence[9] are Switzerland and Austria, which are discussed further below.

see *Case of Solazzi and Pace*, AJ, 49 (1955), p 423, and other cases cited in *ibid*, p 268, and AJ, 51 (1957), p 434. For the view that Italy's powers over Trieste under the 1954 Memorandum did not amount to sovereignty see the decision of the Council of State in *Società Teatro Puccini v Commissioner-General of the Government for the Territory of Trieste* (1961), ILR, 40, p 43. But cf *Cernorograz and Zudich v INPS* (1978), ILR, 77, p 627, in which the Court of Cassation held that the 1954 arrangements amounted to a provisional distribution of effective sovereignty over the zones of Trieste to Italy and Yugoslavia respectively, which was made permanent and confirmed by the treaty concluded in 1975.

6 See eg § 186, as to the Panama canal.

7 See eg the Agreement made in 1905 between Sweden and Norway providing for the 'perpetual neutrality' of certain frontier zones of the two countries (BFSP, 98 (1904–5), p 821); and § 583, n 11, as to the Aaland Islands. See also § 257, as to the Antarctic Treaty 1959, which demilitarised Antarctica; and § 362ff., as regards outer space. See generally on non-military areas in UN practice, Bailey, AJ, 74 (1980), pp 499–524.

8 On so-called 'autonomous neutralisation' see Robertson, AJ, 11 (1917), pp 607–16. There is no doubt that any state can declare itself permanently neutral, or, like Sweden, adopt a policy of neutrality, but it is not 'neutralised' in the sense hitherto understood. An instance of self-neutralisation is afforded by Iceland, which in 1918 declared itself 'permanently neutral': BFSP, 111 (1917–18), p 706. Article 24 of the Conciliation Treaty of 11 February 1929, between the Holy See and Italy (the Lateran Treaty, see § 101) may be regarded as another instance. In Art 24 the Holy See declares that 'it desires to take, and shall take, no part in any temporal rivalries between other States', and that the Vatican City shall therefore 'be invariably and in every event considered as neutral and inviolable territory': *Documents* (1929), p 224. Note also Art 9 of the Japanese Constitution of 1946, by which Japan forever renounces war as a sovereign right of the nation, and states that land, sea and air forces, as well as other war potential, will never be maintained, and that the state's right of belligerency will not be recognised: but this does not exclude action in self-defence. See *Japan v Shigeru Sakata and Others* (1959), ILR, 32, p 43. It seems that self-neutralisation (or autonomous neutralisation) has primarily political consequences: see Graham, AJ, 21 (1927), at pp 87, 88, and, in particular, Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp 179–86. But see § 98, as to Austria. The neutrality of Cambodia resulted from a Cambodian law and not from an international obligation (see Whiteman, *Digest*, 1, p 361), although the Paris Agreements of 1973 relating to the restoration of peace in Vietnam (see § 40, n 58), which referred to the parties' commitment to respect the neutrality of Cambodia, will have given that neutrality some international status. See also Malta's Declaration of Neutrality of 15 May 1981, and its recognition by Italy: ILM, 21 (1982), p 396; RG, 85 (1981), p 411, and RG, 89 (1985), p 459; and for its recognition by France, RG, 86 (1982), p 411; and generally Ronzitti, Ital YBIL, 5 (1980–81), pp 171–201; Flauss, AFDI, 29 (1983), pp 175–93. As to Costa Rica's declaration of permanent neutrality in 1983, see RG, 88 (1984), pp 448–9. As to Finland, see Muoser, *Finnlands Neutralität und die europäische Wirtschaftsintegration* (1986), and Broms, *Rev Belge*, 21 (1988), pp 88–96.

9 The situation of Laos may also be noted. The hostilities which, after the Second World War, broke out in Vietnam (see § 40, n 48) spread into the neighbouring territories of Laos and Cambodia. At the Geneva Conference of 1954 Agreements on the Cessation of Hostilities in Vietnam, Laos and Cambodia were signed by the military commanders of the contending forces, and the 1954 Conference itself orally adopted a Final Declaration taking note of their principal provisions (Cmnd 9239, pp 9, 11–40). In Laos, notwithstanding the 1954 Geneva Agreements, fighting between the government and dissident forces in northern Laos, the 'Pathet Lao', continued. In 1961 a Conference on the Settlement of the Laotian Question was convened at Geneva. At its conclusion in July 1962 the 13 conference members (other than Laos) signed a Declaration on the Neutrality of Laos (TS No 27 (1963)): see also Czyzak and Salans, AJ, 57 (1963), pp 300–17; Dupuy, AFDI, 8 (1962), pp 3–40): this declaration incorporated, as an integral part, a Statement of Neutrality by the Royal Government of Laos, and together the two instruments were regarded as constituting an international agreement. In their declaration the 13 other Conference states declared 'that they recognise and will respect and observe in every way the sovereignty, independence, neutrality, unity, and territorial integrity of the Kingdom of Laos', and appealed to other states to do the same. They also undertook certain specific commitments which were broadly the counterparts of declarations in the Laotian Statement of Neutrality and which served to establish and maintain the neutrality of Laos. In addition they undertook, in the event of a violation or threat of violation, of the sovereignty, independence, neutrality, unity or territorial integrity of Laos, to consult jointly with the Royal Government of Laos and among themselves to consider measures which might prove necessary to ensure the observance of these principles and other provisions of the declaration.

Despite these formal commitments, Laos's neutrality was not fully respected. North Vietnamese forces assisted rebel authorities in Laos, and used certain border areas of Laos (particularly the so-called 'Ho Chi Minh' trail) as a supply route for forces fighting in South Vietnam against the Government of the Republic of Vietnam – a circumstance which led that government to mount an attack into Laotian territory against North Vietnamese forces in that country, and led to aerial attacks on the supply route by US aircraft in support of the Government of the Republic of Vietnam. The Paris Agreements of 1973 relating to the restoration of peace in Vietnam repeated the parties' commitment to respect the neutrality of Laos: see Art 20 of the Agreement on Ending the War and Restoring Peace in Vietnam, and Art 8 of the Act of the International Conference on Vietnam: TS No 39 (1973); and see § 40, n 58. A ceasefire agreement between the government and rebel forces in Laos was concluded shortly thereafter: ILM, 13 (1973), p 397. In 1975 the rebel (Communist) authorities achieved success and full charge of Laos. Thereafter, and with the end of hostilities in Vietnam, the question of the neutralised status of Laos has been of less practical consequence than previously.

§ 97 Switzerland The Swiss Confederation,[1] 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 recognised and collectively guaranteed, and on 27 May 1815, 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.[2] 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 Switzer-

1 See Schweizer, *Die Geschichte der schweizerischen Neutralität* (2 vols, 1895); Sherman, AJ, 12 (1918); pp 241–50, 462–74, and 780–95; and Guggenheim, *Traité de droit international public* (vol 2, 1954), pp 549–61.

2 See Martens, NR, ii, pp 157, 173, 419, 740.

land was recognised by the Council of the League of Nations[3] 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'.[4] The Charter of the United Nations admits of no such latitude,[5] 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.[6] 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

[3] See Mowat, BY (1923–24), pp 90–94; Rappard, *L'Entrée de la Suisse dans la Société des Nations* (vol ii, 1924), § 292g; and Guggenheim, ZöR, 7 (1928), pp 266–73. See also Bonjour, *Geschichte der schweizerischen Neutralität* (1946) (also in English translation, 1946). During the application of sanctions against Italy in 1935 and 1936 Switzerland interpreted the above-quoted condition of her admission as meaning that the participation on her part in *economic* measures was conditional upon their not endangering her military neutrality. See *Sixteenth Assembly, Plenary Meetings*, 10 October 1935, p 6, and the Message of the Swiss Federal Council of 2 December 1935 (*Bundesblatt* (1935), pp 943, 944). In 1938 Switzerland declared that she would no longer participate in those economic measures: Off J (1938), p 385; see Keppler, ZöR, 18 (1939), pp 505–45. As to the internment by Switzerland of American and French military personnel in the Second World War, see Freeman, AJ, 53 (1959), at pp 645–6.

[4] See vol II of this work (7th ed), § 292g. See also Schindler, RI, 3rd series, 19 (1938), pp 433–72.

[5] See Kelsen, *Law of the United Nations* (1950), p 94. But note that Art 48.1 of the Charter permits the Security Council to oblige some only of the member states to take action called for by the Council. See generally on problems of reconciling neutrality with membership of international organisations, Blix, *Sovereignty, Aggression and Neutrality* (1970), pt 3.

[6] As to the position with regard to the UN, see Guggenheim in *Neue Schweizer Rundschau*, November and December 1945; *Völkerbund, Dumbarton Oaks, und die schweizerische Neutralität* (1945); and in *Ann Suisse*, 2 (1945), pp 9–47. See also Hageman, *Die neuen Tendenzen der Neutralität und die völkerrechtliche, Stellung des Schweiz* (1945). See also Lalive, BY, 24 (1947), pp 87–9, and Huber, *Ann Suisse*, 5 (1948), pp 9–28. As to Swiss participation in the Neutral Nations Supervisory Commission established by the Korean Armistice Agreement 1953, see Duft, *Das Mandat der Neutralen Überwachungskommission in Korea* (1969). 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.

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 took various steps to avoid Switzerland being used as a means whereby Rhodesian trade could avoid UN sanctions (see Un Doc S/7781 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 UN Juridical YB (1977), 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 'on its own initiative' an embargo on weapons and war materials: UN Doc S/12644 of 13 April 1978. In response to SC Res 661 (1990), 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 neutral.[7] Switzerland signed a special relations agreement with the European Economic Community in 1972[8] 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.[1] As a result of discussions between Austria and the Soviet Union in April 1955 they signed a memorandum[2] in Moscow in which Austria undertook to 'make a declaration in a form which will obligate 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.[3] 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,[4] 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.[5]

In October 1955 Austria enacted a Constitutional Federal Statute on Austria's

[7] See eg reservations made in respect of the IAEA (TS No 19 (1958)) and IMCO (TS No 54 (1958)). In 1953 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 relied on the opinion of leading Swiss international lawyers to the effect that international law does not prohibit a permanently neutralised state from providing accommodation in its territory for an international laboratory devoted to purely scientific objects.

[8] Misc No 53 (1972); Cmnd 5181. On problems of an association agreement for states like Switzerland (and Austria) see Plessow, *Neutralität und Assoziation mit der EWG* (1967); Mayrzedt and Binswanger (eds), *Die Neutalen in der Europäischen Integration* (1970).

[1] See generally on Austria's neutral status, Reut-Nicolussi, *Grotius Society*, 39 (1953), pp 119–31; Chaumont, AFDI, 1 (1955), pp 151–7; Verdross, AJ, 50 (1956), pp 61–8, in *Festgabe für Alexander N Makarov* (1958), pp 512–30, in *Symbolae Verzijl* (1958), pp 410–18, and *Die immerwährende Neutralität österreichs* (4th ed, 1977); Kunz, AJ, 50 (1956), pp 418–25; de Nova, *Comunicazioni e studi*, 8 (1957), pp 1–31; Ermacora, *Osterreichs Staatsvertrag und Neutralität* (1957); Verosta, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 70–90; Seidl-Hohenveldern, *Jahrbuch für Internationales Recht* (1969), pp 128–52; Wildhaber, Malaya Law Rev, 12 (1970), pp 140–59; Ginther, *Neutralität und Neutralitätspolitik* (1975).

As to Germany's seizure and occupation of Austria in 1938, see § 55, n 36, and works there cited.

[2] AJ, 49 (1955), Suppl p 191.

[3] The Soviet Union's willingness to participate in such a guarantee was expressed in the same memorandum.

[4] TS No 58 (1957); for comment see Kunz, AJ, 49 (1955), pp 535–42, and E Lauterpacht, ICLQ, 7 (1958), pp 94–8.

[5] Article 2. Article 4 prohibited any political or economic union with Germany, and Arts 12 and 13 contain significant restrictions on Austria's military capacity.

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'.[6] 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,[7] 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'.[8]

After the Security Council had adopted SC Res 418 (1977), imposing an arms embargo on South Africa, Austria reiterated those considerations of principle.[9] In the context of relations between Austria and the European Economic Community[10] doubts were expressed about the possible incompatibility between Austria's neutral status and the conclusion by it of an association agreement with the Community (in 1972 Austria entered into a special relations agreement with the Community)[11] and, more recently, of possible membership of the Community.

[6] BFSP, 162 (1955–56), p 395.

[7] A list of 57 states which recognised Austrian neutrality is given in Ermacora, *Österreichs Staatsvertrag und Neutralität* (1957). As for the UK, see *Parliamentary Debates (Commons)*, vol 600, col 348 (18 February 1959).

[8] UN Doc S/7795 of 28 February 1967.

[9] UN Doc S/12632 of 6 April 1978. Austria acted similarly in response to SC Res 661 (1990), imposing economic sanctions on Iraq following its aggression against Kuwait: UN Doc S/21593, 22 August 1990.

[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); Cmnd 5159.

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Toynbee, *Survey* (1929), pp 422–78 Giannini, *Saggio di una bibliographia sugli accordi del Laterano* (1930) Tostain, *Le Traité politique du Lateran et la personnalité en droit international public* (1930) Le Fur, *Le Saint-Siège et le droit des gens* (1930); RI (Paris), 3, (1929), pp 25–69 Donato, *La Citta del Vaticano nella Teoria Generale dello Stato* (1930) Brazzola, *La Cité du Vatican est-elle un état?* (1932) Dilhac, *Les Accords de Lateran* (1932) Govella, *La Cité du Vatican et la notion d'état* (1933) Falco, *The Legal Position of the Holy See* (trans from Italian, 1935) Eckhardt, *The Papacy and World Affairs* (1937) *Round Table*, 19 (1928–29), pp 740–64 Anzilotti, *Rivista*, 21 (1929), pp 165–76 Diena, *ibid*, pp 177–87 Jemolo, *ibid*, pp 188–96 Morelli, *ibid*, pp 197–236 Scott, *AS Proceedings* (1929), pp 13–23 De la Brière, RI (Paris), 3 (1929), pp 13–24; RI, 3rd series, 10 (1929), pp 123–58, and Hag R, 33 (1930), iii, pp 115–63 Ruzé, RI, 3rd series, 10 (1929), pp 336–64 Fenwick, AJ, 23 (1929), pp 370–74 Delos, RG, 36 (1929), pp 452–78 Ottolenghi, *Rivista*, 22 (1930), pp 180–95 Checchini, *ibid*, pp 196–211 Strupp, ZV, 15 (1930), pp 531–74 Oeschey, *ibid*, pp 623–93 Balladore Pallieri, ZöR, 11 (1931), pp 505–25 Kaas, ZöV, 3 (1932–33), pp 488–522 (with an extensive bibliography on pp 489, 490) Ireland, AJ, 27 (1933), pp 271–89 Schoen, ZöR, 14 (1934), pp 1–25 D'Avack, *Rivista*, 27 (1935), pp 83–124, 217–36 Kunz, AJ, 46 (1952), pp 308–14 Van der Heydte, OZöR, 2 (1950), pp 572–86 Raffel, *Die Rechtsstellung der Vatikanstadt* (1961) Quadri, Hag R, 113 (1964), iii, pp 412–20 Lucien-Brun, AFDI, 10 (1964), pp 536–542 Verzijl, *International Law in Historical Perspective* (vol 2, 1969), pp 295–302, 308–38 Rousseau, *Droit international public*, 2 (1974), pp 353–77 Crawford, *The Creation of States in International Law* (1979), pp 152–60 Ororio (ed), *Le Saint-Siège dans les relations internationales* (1989).

§ 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.[1] Throughout the existence of the Papal States, until their annexation by the Kingdom of Italy in 1870, the Pope was a monarch 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

[1] This state owed its existence to Pepin-le-Bref and his son Charlemagne, who established it in gratitude to the Popes Stephen II and Adrian I, who crowned them as Kings of the Franks. It remained in the hands of the Popes till 1798, when it became a republic for about three years. In 1801 the former order of things was re-established, but in 1809 it became a part of the Napoleonic Empire. In 1814 it was re-established, and remained in existence till 1870.

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 envoys accredited to Italy, special envoys to the Pope, and the latter sent envoys 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.[1] 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).[2] Italy also recognised the passive and active right of legation

[1] Its principal provisions (Martens, NRG, xviii, p 41) will be found in the 4th ed of this work, p 227.

[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 295–302, 308–38.

[1] 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.

[2] This is a repetition of Art 3 in which Italy 'recognises the full ownership, exclusive dominion, and sovereign authority and jurisdiction 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 Nunzi*, ILR, 24 (1957), p 214; *Baronci 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.

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 Markincus 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

as belonging to the Holy See in accordance with international law (Article 12).[3] 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.[4] 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.[5] Article 1 of the new concordat reaffirms '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

was refused: see Oellers–Frahm, ZöV, 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, AFDI, 33 (1987), pp 370–8.

[3] As to the foreign service of the Vatican City see Benson, *Vatican Diplomatic Practice* (1936) and de la Brière, RI (Paris), 15 (1935), pp 340–46; Graham, *Vatican Diplomacy* (1959). See also § 461, n 1. As to the position of diplomatic agents of Italian nationality accredited to the Holy See, see Morelli, *Rivista*, 26 (1934), pp 42–56.

As to concordats see Bierbaum, *Das Konkordat* (1928); Lange-Ronneberg, *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 Brière, Hag R, 62 (1938), i, pp 371–464; Ehler, Hag R, 104 (1961), iii, pp 1–63 (with bibliography at p 65); Lucien-Brun, AFDI, 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 (1933–34), 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.

[4] See also 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.

[5] See ILM, 24 (1985), p 1589; RG, 88 (1984), pp 723–5, and 89 (1985), pp 164–5; and generally, Gaudemet, AFDI, 30 (1984), pp 209–20.

persons residing therein by virtue of their office.[1] 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.[2]

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,[3] it has participated in many major international conferences of states,[4] is a party to some major multilateral treaties,[5] and is a member of some international organisations.[6] Its true signi-

[1] And of their descendants, who must emigrate when they marry or attain the age of 25: see Arts 2–5 of Law No 3 of the Vatican City 1929.

[2] For a discussion of these views see Falco, in bibliography preceding § 99. See, in addition to the writers there cited, Jarrige, *La Condition internationale du Saint-Siège avant et après les accords du Latran* (1930); Bracci, *Italia, S Sede e Città del Vaticano* (1931); Arangio-Ruiz, *Rivista di diritto pubblico* (1929), pp 615 *et seq*; Balladore Pallieri, *Rivista internazionale di science sociali*, etc (1930), pp 195 *et seq*; Ruffini, *Atti della Reale Academia delle Scienze di Torino*, 66 (1931), pp 585 *et seq*; Giacometti, *Zeitschrift für die gesamte Staatswissenschaft*, xc, pt I (1931), pp 40 *et seq*. Petroncelli, *Rivista internazionale di scienze sociali*, etc (1932), pp 169 *et seq*.

[3] The delay on the part of some states in entering into diplomatic relations with the Vatican had more to do with attitudes to religion than with doubts as to international status. As regards the USA, legislation enacted in 1867 prevented federal funds being used for a diplomatic mission to the Vatican, but the repeal of that law in 1983 enabled diplomatic relations to be established in 1984 (although the USA had had a personal Presidential Representative to the Holy See since 1939): see AJ, 78 (1984), p 427; RG, 88 (1984), pp 246–7, 702. The papal representative in London, with the rank of Apostolic Delegate (who has previously been regarded as a personal representative of the Pope, and as not being a diplomatic agent: *Parliamentary Debates (Commons)*, vol 958, cols 618–19 (written answers, 22 November 1978)) was in 1979 granted diplomatic status, although accredited to the Roman Catholic hierarchy in the UK rather than to the Court of St James: see RG, 84 (1980), pp 649–50); *Parliamentary Debates (Lords)*, vol 403, cols 683–4 (4 December 1979). A British diplomatic representative to the Holy See was appointed, at the level of minister, in 1914. In 1982 their mutual representation was raised to ambassadorial level, with a British Ambassador appointed to the Vatican, and a Papal Pro-Nuncio appointed in London.

[4] The Holy See was represented at, eg, the 1958 Conference on the Law of the Sea (and has signed, but not ratified two of the four conventions adopted there), the 1968–69 Conference on the Law of Treaties (and has signed and ratified the resulting convention), the Conference on Security and Cooperation in Europe 1973–75 (and signed the Final Act) and the Conference on the Law of the Sea 1973–82 (and signed the Final Act).

[5] The Holy See is a party to, eg the Convention relating to the Status of Refugees 1951, the Vienna Conventions on Diplomatic Relations 1961 and on Consular Relations 1963, and the International Convention for the Elimination of All Forms of Racial Discrimination 1965.

[6] Eg, IAEA, UPU, ITU and WIPO. The Holy See has had a permanent observer mission to the UN since 1964, and to the OAS since 1978.

ficance 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.[7] 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.

[7] Some similar problems arise in connection with the Sovereign Order of Malta, which since 1879 has had its seat in Rome (but has no territory) and has close links with the Holy See. After a papal commission had reported to the Pope in 1953, the Order adopted a new constitution in 1956. Certain states at least regard the Order as an international person and have exchanged diplomatic representatives with it (for a list of 32 states with which the Order has formal diplomatic relations see Turack, BY, 43 (1968–69), p 214, n 1). In 1884 Italy recognised the Order's right of legation, and in 1929 by decree admitted its right to be described as sovereign and to receive certain ceremonial treatment. In 1935 the Italian Court of Cassation held the Order to be an international person possessing sovereignty: *Nanni and Others v The Maltese Order*, AD, 8 (1935–37), No 2. Similarly in *Cartolari v Sovereign Order of Malta* (AJ, 49 (1955), p 270); while in *Sovrano Militare Ordine di Malta v Soc Comaria* an Italian court applied to the Order the usual Italian distinction in matters of sovereign immunity between acts *iure imperii* and *iure gestionis* (ICLQ, 4 (1955), p 486). See also *Association of Italian Knights of the Order of Malta v Piccoli* (1974), ILR, 65, p 308; and *Piccoli v Association of Italian Knights of the Order of Malta* (1978), ILR, 77, p 613. In *Bachelli v Comune di Bologna* (1978), ILR, 77, p 621, the Italian Court of Cassation denied international legal personality to the Order of Santa Maria Gloriosa, distinguishing its position from that of the Sovereign Order of Malta. As to passports issued by the Order see Turack, BY, 43 (1968–69), pp 214–15.

See generally on the Order, Cansacchi, *La personalità di diritto internazionale del SMO Gerosolimitano Detto di Malta* (1936); Farran, ICLQ, 3 (1954), pp 217–34, and *ibid*, 4 (1955), pp 308–9; Breycha-Vautier and Potulicki, AJ, 48 (1954), pp 554–63; Hafkemeyer, *Der Rechtsstatus des Souveränen Malteser-Ritter-Ordens* (1955); Sperduti, *Rivista*, 38 (1955), pp 48–55; Quadri, Hag R, 113 (1964), iii, pp 420–3; Bernadini, *Rivista*, 50 (1967), pp 497–562; Prantner, *Melteserorden und Völkergemeinschaft* (1974); Fischer, Hag R, 163 (1979), ii, pp 1–47. As to the agreement of 5 September 1983 between France and the Order, see Larger and Monin, AFDI, 29 (1983), pp 229–40.

Chapter 3

Position of the states in international law

BASES OF STATEHOOD

Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp 213–24 Knubben, *Die Subjekte des Völkerrechts* (1928), pp 202–38 Korte, *Grundfragen der völkerrechtlichen Rechtsfähigkeit* (1934), pp 98–101 Scelle, *Manuel élémentaire de droit international public* (1943), pp 87–95 Graf, *Die Grundrechte der Staaten im Völkerrecht* (1948) Lord Phillimore, Hag R, 1 (1923), pp 29–71 Gidel, *ibid*, 10 (1925), v, pp 541–97 Brown, AJ, 9 (1915), pp 305–35 Lüttger, ZöR, 6 (1926), pp 203–212 Brierly, Hag R, 23 (1928), iii, pp 470–77 Bruns, ZöV, 1 (1929), pp 12–25 Bilfinger, *ibid*, pp 63–76 Petraschek, *Archiv für Rechts- und Sozial-philosophie*, 27 (1934), pp 499–523 YBILC (1949), pp 61–128, 135–79 Alfaro, Hag R, 97 (1959), ii, pp 95–176 Crawford, BY, 48 (1976–77), pp 93–182, and *The Creation of States in International Law* (1979) See also bibliography at p 105, n 2 below.

§ 103 International personality A state, upon becoming a member of the international community, acquires international personality.[1] 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',[2] 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[3] and international organisations.[4] 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.

1 See § 33.
2 *Reparations for Injuries Case*, ICJ Rep (1949), at p 178.
3 See § 81.
4 See § 7.

§ 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,[1] 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,[2] and the notion of fundamental rights fell into disfavour.

1 These were chiefly enumerated 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.

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.

2 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 generally Alfaro, 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, ZöV, 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; ZöV, 4 (1934), p 650. The Bogotá Charter of the Organisation 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 juridical 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,[3] which, however, was largely based on earlier conceptions of the matter. It was referred by the General Assembly to governments for their consideration,[4] 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[5] 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 principally suggested, be filled with the principles of 'peaceful coexistence' – a concept the legal content of which was

down that '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 develop its cultural, political and economic life freely and naturally'; it lays down that 'in this free development, the State shall respect the rights of the individual and the principles of universal morality'. Article 14 lays down the principle of observance and publicity of treaties. Articles 15 and 16 prohibit intervention by way of armed force and other means of pressure. Article 17 lays down the principle of inviolability of territory and non-recognition 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), ii, 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 principal rules of international law. For a survey of various treaties and drafts on the 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 'transitional' (ie contemporary) period the state continues to exist and 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 customary international law which have not been expressly assented 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.

both uncertain and lacking in sufficient detail to act as an adequate regulator of international intercourse.[6] Attempts in 1960–62 to remedy this by having the principles of 'peaceful coexistence' codified within the framework of the United Nations, were unsuccessful.

§ 105 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States 1970 The discussion demonstrated, however, the strong desire of many states for clarification of the legal content of certain basic principles embodied in the United Nations Charter. In 1963 the General Assembly established[1] a Special Committee on the Principles of International Law concerning Friendly Relations and Cooperation among States. This Committee held six sessions between 1964 and 1970, and on the basis of its work the General Assembly in 1970 adopted a Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[2] in which certain basic

6 Peaceful coexistence was not only a feature of East–West relations in this period, but also a distinctive element in the Asian (and specifically Chinese) approach to international law, formally stated in the Sino-Indian Treaty of 1954, and set out the following year in the declaration of the Bandung Conference. The literature on peaceful coexistence is extensive, and is often more political than legal (as is appropriate for a concept which has been put forward largely for political purposes). Amongst the more legally centred contributions are Hazard, AJ, 51 (1957), pp 63–71, AJ, 55 (1961), pp 109–20, AJ, 57 (1963), pp 86–97, 604–13, and AJ, 59 (1965), pp 59–66; Fifield, AJ, 52 (1958), pp 504–10; Tunkin, Hag R, 95 (1958), iii, pp 5–78, and *Droit international public, problèmes théoriques* (1965), pp 19–62; Snyder and Bracht, ICLQ, 7 (1958), pp 54–71; Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961), pp 206–19; McWhinney, AJ, 56 (1962), pp 951–70, RG, 67 (1963), pp 544–62, *'Peaceful Coexistence' and Soviet–Western International Law* (1964), and *Conflit idéologique et ordre public mondial* (1970); Lapenna, ICLQ, 12 (1963), pp 737–77; Higgins, *Conflict of Interests* (1965), pp 99–170; Sharma, *Indian Year Book of International Affairs*, 14 (1965), pp 109–136; Ramundo, *Peaceful Coexistence* (1967); Freeman, AJ, 62 (1968), pp 710–22; Dore, *International Law and the Superpowers* (1984), pp 1–29. See also the discussions of the International Law Association in ILA, *Report of the 47th Conference* (1956), pp 17–63; *ibid, Report of the 48th Conference* (1958), pp 417–505; *ibid, Report of the 49th Conference* (1960), pp 332–84; *ibid, Report of the 50th Conference* (1962), pp 260–374; *ibid, Report of the 51st Conference* (1964), pp 777–821. See also § 25, nn 21, 22, as to the Soviet approach to international law, and § 105, n 2, as to the 'Friendly Relations' Declaration.

1 GA Res 1815 (XVII) (1962); ILM, 9 (1970), p 1292; see also GA Res 1966 (XVIII) (1963) and 2181 (XXI) (1966). In establishing the Special Committee the Assembly was acting under Art 31.1 of the Charter, the same provision by which the International Law Commission was established.

2 GA Res 2625 (XXV). Of the 7 principles, 5 were based closely on Art 2 of the UN Charter, one was generalised from Art 2(7), and one (self-determination) was derived from Arts 1(2) and 55. See generally on the work of the Special Committee and its results, Hazard, AJ, 58 (1964), pp 952–9; Lee, ICLQ, 14 (1965), pp 1296–313; McWhinney, AJ, 60 (1966), pp 1–13; Houben, AJ, 61 (1967), pp 703–36; Witten, Harv ILJ, 12 (1971), pp 509–19; Rosenstock, AJ, 65 (1971), pp 713–35; Sahovic (ed), *Principles of International Law Concerning Friendly Relations and Cooperation* (1973), and Hag R, 137 (1972), iii, pp 249–308; Arangio-Ruiz, *ibid*, pp 431–731 and *United Nations Declaration of Friendly Relations and the System of the Sources of International Law* (1979); Graf zu Dohna, *Die Grundprinzipien des Völkerrechts über die freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten* (1973); Sinclair in *Essays in International Law* (ed Nawaz, 1976), pp 107–40; Šahović, AFDI, 31 (1985), pp 527–33.

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.[3] 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.[4]
(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.[5]
(4) The duty of states to cooperate with one another in accordance with the Charter.
(5) Equal rights and self-determination of peoples.[6]
(6) Sovereign equality of states.[7]

[3] The ICJ has regarded the effect of consent to such resolutions of the General Assembly, and particularly the Friendly Relations' Declaration, as not being merely that of a reiteration or elucidation of the treaty commitment undertaken in the Charter, but as an acceptance of the validity of the rules declared by the resolution by themselves, and as an expression of an *opinio juris* respecting such rules which thenceforth may be treated separately from other provisions with which, on the treaty-law plane, they would otherwise be associated: *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 89–90, 91. See generally on the effect of resolutions of the General Assembly, § 16, n 1.

For an adaptation of the principles elaborated in the Declaration to the circumstances in a particular region see the Declaration on Principles Guiding Relations between Participating States which was adopted in 1975 in Helsinki as part of the Final Act of the Conference on Security and Cooperation in Europe: ILM, 14 (1975), p 1292; Cmnd 9066. For comment, see Ghebali, AFDI, 21 (1975), pp 73–127; Prevost, *ibid*, pp 129–53; Russell, AJ, 70 (1976), pp 242–72; Schweisfurth, ZöV, 36 (1976), pp 681–726; Fawcett, *Rev Belge*, 13 (1977), pp 5–9; Schachter, AJ, 71 (1977), p 296; Movchan, Hag R, 154 (1977), i, pp 1–44; Ninčić, *ibid*, pp 45–102. See also § 663, n 7. Support by a state for the Final Act was held by the ICJ to be an expression of *opinio juris*: *Military and Paramilitary Activities Case*, ICJ Rep, 1986, pp 3, 100, 107. As regards the human rights provisions of the Final Act see § 442, n 29. The process started by the Helsinki Final Act was carried forward by follow-up meetings held in Belgrade 1977–78, Madrid 1980–83 and Vienna 1986–89 (Cmnd 7126, 9066 and CM 649). A summit meeting in Paris in November 1990 adopted the Charter of Paris for a New Europe: ILM, 30 (1991), p 190. A further follow-up meeting is due to be held in Helsinki in 1992.

[4] See § 128, n 9. See also § 30, n 37, with particular reference to aggression. See also the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations: GA Res 42/22 (1987).

[5] See also p 991.

[6] See § 85.

[7] See § 107.

(7) States shall fulfil 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 traditional 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,[1] and a Programme of Action,[2] on the Establishment of a

[1] GA Res 3201 (S-VI). A further special session of the General Assembly, covering much the same ground as the 6th Special Session, was held in 1975; it adopted GA Res 3362 (S-VII) providing for further assistance to the development of developing countries by the promotion of international economic cooperation.

Much of the detailed work to put into effect the principles of the Declaration is carried out in the UN Conference on Trade and Development (UNCTAD) and the UN Industrial Development Organisation (UNIDO), as well as in certain of the specialised agencies and economic commissions. UNIDO was established on 1 January 1967 as an autonomous organisation within the UN to promote industrial development: GA Res 2089 (XX) (1965). In 1979 a constitution for UNIDO was adopted (ILM, 18 (1979), p 667), and UNIDO is now a specialised agency of the UN. Its 'primary objective' is 'the promotion and acceleration of industrial development in the developing countries with a view to assisting in the establishment of a new international economic order. The Organization shall also promote industrial development and co-operation on global, regional and national, as well as on sectoral levels'.

Note also the activities in this field of the Committee for Industrial Development (set up by the Economic and Social Council of the UN in 1960), and the Centre for Industrial Development

objections when pressed to extremes,[1] 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,[2] even though the Charter of the United Nations is professedly based on the principle of 'sovereign equality'[3] 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[4] and of the Organisation of African Unity;[5] 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.[6] 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;[7]
>
> (*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 168e: 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 leading industrialised countries – Canada, Federal Republic of Germany, France, Italy, Japan, the UK and the USA – whose leaders meet periodically to discuss mainly global economic matters.

3 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 Montivideo 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.

6 GA Res 2625 (XXV) (1970): see § 105.

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), at 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,[2] to one vote only.

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.[3] 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 constituted knows of no legislative process in the proper sense of the term, ie 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[1] is that – according to the rule *par in parem non habet imperium* – no state can claim jurisdiction over another.[2] 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 § 575.

3 See § 11, *n* 12, and particularly § 10, nn 30–32 as regards the possibility of so-called 'instant' custom.

1 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.

2 On the whole question, see Report by Matsuda and Diena for the League of Nations Codification Committee on 'The Competence of the Courts in Regard to Foreign States', C 204 M (1927) V, and AJ, 22 (1928), Special Suppl, pp 118–32, and comment by Kuhn, AJ, 21 (1927), pp 742–47.

The following, in addition to the works referred to below at n 20, and § 110, n 8, is a selection from the extensive literature on jurisdictional immunities of foreign states: Puente, *International Law as applied to Foreign States* (1928), pp 38–86; Spruth, *Gerichtsbarkeit über fremde Staaten* (1929); *Harv Research*, Draft Convention on Competence of Courts in regard to Foreign States, AJ, 26 (1932), Special Suppl, pp 453–736; Provinciali, *L'immunità giurisdizionale degli Stati stranieri* (1933); Allen, *The Position of Foreign States before National Courts, chiefly in Continental Europe* (1933); Stoupnitzky, *Statut International de l'URSS État commerçant* (1936); Fairman, AJ, 22 (1928), pp 569–85; Hervey, Mich Law Rev, 27 (1928–29), pp 751–75; Bosco, *Rivista*, 21 (1929), pp 35–62; Brinton, AJ, 25 (1931), pp 50–62; Feller, *ibid*, pp 83–96; Ténékidès, RG 38 (1931), pp 608–32; Fitzmaurice, BY, 14 (1933), pp 101–24; Van Praag, RI, 3rd series, 15 (1934), pp 652–82; Brookfield, JCL, 3rd series, 20 (1938), pp 1–15; Block, HLR, 59 (1946), pp 1060–86; Gmür, *Gerichtsbarkeit über fremde Staaten* (1948) and *Ann Suisse*, 7 (1950), pp 9–76; Loewenfeld, *Grotius Society*, 34 (1949), pp 111–26; Lémonon, *Annuaire*, 44, i (1952), pp 5–44 (with observations by other members of the Institute at pp 45–136; and see also *Annuaire*, 45, ii (1954), pp 200–27 for the adoption of a resolution on the subject; H Lauterpacht, BY, 28 (1951), pp 220–72; *International Law Association Report*, 45 (1952), pp 210–32; and Carabiber, *Revue hellénique de droit international*, 5 (1952), pp 22–41, and in *Clunet*, 79 (1952), p 440; Lalive, Hag R, 84 (1953), iii, pp 209–90; Cavaré, RG, 58 (1954), pp 177–207; Cardozo, HLR, 67 (1954), pp

simultaneously[3] – 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

608–18; Hanbury, *Current Legal Problems*, 8 (1955), pp 1–23; Garcia-Moro, Vir LR, 42 (1956), pp 335–59; Sucharitkul, *State Immunities and Trading Activities in International Law* (1959), Hag R, 149 (1976), i, pp 87–216, Neth IL Rev, 29 (1982), pp 252–64; van Panhuys, ICLQ, 13 (1964), pp 1193–213; Falk, *The Role of Domestic Courts in the International Legal Order* (1964), pp 139–69; Lillich, *The Protection of Foreign Investment* (1965), pp 3–44; Boguslavskiji, *Staatliche Immunität* (1965); Seidl-Hohenveldern in *Gedächtnisschrift Hans Peters* (1967); Schaumann and Habscheid, *Die Immunität ausländischer Staaten nach Völkerrecht und deutschen Zivilprozessrecht* (1968), pp 1–157; *L'Immunité de juridiction et d'execution des états* (Brussels-Louvain Colloquium, 1969) (1971); Dunbar, Hag R, 132 (1971), i, pp 203–362; Lissitzyn in *Transnational Law in a Changing Society* (eds Friedmann, Henkin and Lissitzyn, 1972), pp 188–201; Stähelin, *Die gewohnheitsrechtliche Regelung der Gerichtsbarkeit über fremde Staaten im Völkerrecht* (1969); various, Neth YBIL, 10 (1979), pp 3–289; Sinclair, Hag R, 167 (1980), ii, pp 117–281; Ress, ZöV, 40 (1980), pp 217–71; ILA, *Report of the 59th Conference* (1980), pp 208–62, and *Report of the 60th Conference* (1982), pp 5–10 (draft articles adopted by the ILA), 325–48; Sornarajah, ICLQ, 31 (1982), pp 661–86; Higgins, Neth IL Rev, 29 (1982), pp 265–76; UN Legislative Series, *Materials on Jurisdictional Immunities of States and their Property* (1982) (ST/LEG/SERIES B/20); Crawford, BY, 54 (1983), pp 75–118; Badr, *State Immunity* (1984); Singer, Harv ILJ, 26 (1985), pp 1–61; Damian, *Staatenimmunität und Gerichtszwang* (1985); Trooboff, Hag R, 200 (1986), v, pp 235–431; Belinfante, in *Realism in Law-Making* (ed Bos and Siblesz, 1986), pp 1–6; *Restatement (Third)*, i, pp 390–454; Schreuer, *State Immunity* (1988). See also n 13, for consideration of the topic by the ILC.

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.

3 As in *The Parlement Belge* (1880) 5 PD 197, 207, 214, 220; *The Cristina* [1938] AC 485, at p 498.

4 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 Corpn* (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'.

5 See § 460.

6 Eg as regards the application of the rule of absolute immunity or the rule of restrictive immunity whereby immunity is not granted for acts *iure gestionis*: see § 110.

Before the question of immunity can arise it must first be established that the court would have

these variations, which are now fewer than they once were, state practice is sufficiently established and generally consistent to allow the conclusion that, whatever the doctrinal basis may be, customary international law admits a general rule, to which there are important exceptions, that foreign states cannot be sued.[7]

That general rule has been reinforced by the conclusion in 1972 of the first general treaty providing for the immunity of foreign states from the jurisdiction of national courts, the European Convention on State Immunity;[8] it entered into force on 11 June 1976 and by the end of 1990 had been ratified by eight European states.[9] The Convention may be regarded as reflecting with sufficient general accuracy the prevailing rules of international law and the current practice of states in the field of state immunity. The law of state immunity has also been put

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 Council 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; Delaume, AJ, 74 (1980), pp 640–55; *Carey v National Oil Corpn 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 Europe Domestic International Sales Corporation v Terra*, ILM, 18 (1979), p 977; *Thos P Gonzalez Corpn v Consejo Nacional de Production de Costa Rica*, AJ, 74 (1980), p 939; *Chicago Bridge & Iron Co v Islamic Republic of Iran*, ILM, 19 (1980), 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 Bär et Cie*, ILR, 23 (1956), p 195; *Socialist People's Libyan Arab Jamahiriya v Libyan American Oil Co*, ILM, 20 (1981), p 151.

7 Thus Art 15 of the European Convention on State Immunity 1972, s 1604 of the Foreign Sovereign Immunities Act 1976 of the USA and s 1(1) 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 must fall if they are to be permitted.

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.

8 For the text of the Convention, see Cmnd 5081, which also, at pp 24–55, contains explanatory reports on the Convention and its Optional Protocol; TS No 74 (1979). For comment see Sinclair, ICLQ, 22 (1973), pp 254–83; Vallée, *Revue Trimestrielle de Droit Européen*, 9 (1973), pp 205–41; Wiederkehr, AFDI, 20 (1974), pp 924–43.

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.

9 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.[3] 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'.[4] Both the Declaration and the Programme of Action envisaged the later adoption of a Charter of Economic Rights and Duties of States[5] 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'.

established in 1961 on the recommendation of the Committee (GA Res 1712 (XVI) (1961)); and the work carried out under the UN Development Programme set up in 1965 and combining the activities previously undertaken within the Expanded Programme of Technical Assistance and the Special Fund (GA Res 2029 (XX) (1965)). A major Conference on International Economic Cooperation was held in Paris from 1975–77, at which representatives of the developed and developing countries participated. As to efforts to draw up a code of conduct to regulate the activities of transnational corporations, seen by some states as contributing to the inequitable balance between developed and developing countries, see § 582, n 18.

In 1978 the UN Commission on International Trade Law (UNCITRAL: on which see David, AFDI, 16 (1970), pp 453–67) decided that it should determine the legal implications of the new international economic order and established a working group to examine the matter: see Report of UNCITRAL to the General Assembly 1978 (Doc A/33/17), and the UN Secretary-General's general survey on the subject (Doc A/CN 9/171 (1979)). See also Selby, AJ, 74 (1980), pp 958–61; *Review of the Multilateral Treaty-Making Process* (UN Legislative Series, ST/LEG/SERIES B/21 (1985)), pp 371–82. The principles and norms of international law relating to the new international economic order have been the subject of discussion in the UN General Assembly since 1979 (see Res 34/150), but without so far leading to specific results (see, most recently, GA Res 44/30 (1989)).

2 GA Res 3202 (S-VI).

3 See generally on the new international economic order White, ICLQ, 24 (1975), pp 542–52; Kapteyn, Neth IL Rev, 25 (1978), pp 217–21; Wellenstein, *ibid*, 222–4; and discussion at *ibid*, pp 225–34; Brownlie, Hag R, 162 (1979), i, pp 255–71; Hossain (ed), *Legal Aspects of the New International Economic Order* (1980); Hague Academy Workshop 1980, *The New International Economic Order* (1981); Simmonds in *International Law: Teaching and Practice* (ed Bin Cheng, 1982), pp 67–76; Bermeio, *Vers un nouvel ordre économique international* (1982); Johnson, YB of World Affairs, 37 (1983), pp 204–23, and 38 (1984), pp 217–41; Akinsanya and Davies, ICLQ, 33 (1984), pp 208–17; Seidl-Hohenveldern, Hag R, 198 (1986), iii, pp 9–264; Anand, *International Law and the Developing Countries* (1987), pp 103–28; Makarczyk, *Principles of a New International Economic Order* (1988); de Waart, Peters and Denters (eds), *International Law and Development* (1988); and see n 6. The International Law Association has considered the legal aspects of the new international economic order at successive conferences since 1978: see ILA, *Report of the 58th Conference* (1978), pp 7–8; *Report of the 59th Conference* (1980), pp 263–311; *Report of the 60th Conference* (1982), pp 183–238; *Report of the 61st Conference* (1984), pp 107–53; *Report of the 62nd Conference* (1986), pp 409–87; *Report of the 63rd Conference* (1988), pp 764–834.

See also n 15, as to the right to development; and § 407, with particular reference to permanent sovereignty over natural resources, and the expropriation of foreign-owned property.

4 See § 407, n 42.

5 The proposal to prepare such a charter was initially made in Res 45 (III) (1972) of the UN Conference on Trade and Development: see also GA Res 3037 (XXVII) (1972).

That Charter was adopted by the General Assembly later in 1974,[6] 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; remedying 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);[7] 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 subregional, 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 improved technology, and the promotion of economic and social progress throughout the world, particularly for the benefit of developing countries.[8] 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.[9] Chapter III states that the seabed and ocean floor and the subsoil thereof, beyond the limits of national

6 GA Res 3281 (XXIX) (1974). See generally on the Charter, Rabasa, *AS Proceedings* (1974), pp 302–5; Castaneda, AFDI, 20 (1974), pp 31–56; Virally, *ibid*, pp 57–77; Feuer, RG, 79 (1975), pp 273–320; Tomuschat, ZöV, 36 (1976), pp 444–90; Meagher, *An International Redistribution of Wealth and Power* (1979); Chatterjee, ICLQ, 40 (1991), pp 669–84. See also n 3; and § 407, n 42, on permanent sovereignty over natural resources.

7 See § 407.

8 Articles 6, 8, 9, 11, 13–28.

9 Note also the similar provision for discrimination in favour of developing countries in Art 2.3 of the International Covenant on Economic, Social and Cultural Rights 1966: 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals'. See also Levi, YB of World Affairs, 32 (1978), pp 286–302; and § 114, n 9.

jurisdiction, as well as the resources of the area, are the common heritage of mankind, and that accordingly all states have certain responsibilities in respect of the exploration and exploitation of the area (Article 29);[10] and that all states have a responsibility for the protection, preservation and enhancement of the environment (Article 30). Chapter IV states the duty of all states to contribute to the balanced expansion of the world economy (Article 31), proscribes the use by any state of economic, political or any other type of measure 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 Charter (Article 34), a task entrusted in 1975 to the Economic and Social Council of the United Nations.[11]

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;[12] the Charter was adopted by 120 votes in favour, six against, with ten abstentions,[13] 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.[14] So too the 'right to development'[15] requires, for its

[10] See § 350.

[11] GA Res 3486 (XXX) (1975).

[12] See statements by the USA, Federal Republic of Germany, France, Japan and the UK, in ILM, 13 (1974), pp 744–66.

[13] For voting details see ILM, 14 (1975), pp 263–5. For the UK's reasons for voting against the Charter, see Cmnd 5907, pp 81–4.

[14] See § 407.

[15] As to the 'right to development', both as a human right and an economic right enjoyed by states and by individuals, see Bedjaoui, Hag R, 151 (1976), iii, pp 337, 428–39; Mutharika, *International Law of Development: Basic Documents* (6 vols, 1978–85); *The Right to Development at the International Level* (1980) (proceedings of a Workshop at the Hague Academy, October 1979); Mestdagh, Neth IL Rev (1981), pp 30–53; Israel, RG, 87 (1983), pp 5–41; van Dijk, *Israel Year Book on Human Rights*, 14 (1984), pp 221–48; Feuer, RG, 89 (1985), pp 822–5; Weeramantry, Ind JIL, 25 (1985), pp 482–505; Bulajić, *Principles of International Development Law* (1986); Cassese, *International Law in a Divided World* (1986), pp 351–75; Colliard, AFDI, 33 (1987), pp 614–28; Kiwanuka, Neth IL Rev, 35 (1988), p 257–72. See also the UN Secretary-General's Study (UN Doc E/CN 4/1334 (1979)), and GA Res 34/46 (1979). In 1986 the UN General Assembly adopted the Declaration on the Right to Development: GA Res 41/128. On the meaning of 'less developed countries' see de Lacharrière, AFDI, 17 (1971), pp 461–512.

counterpart, proper provision to protect the interests of donors of aid to developing countries and to provide investment guarantees for overseas investors.[16]

EQUALITY OF STATES IN INTERNATIONAL LAW

Harv Research (1932), pp 475–736 (a valuable treatise on the jurisdictional immunities of foreign states) Lawrence, *Essays*, pp 191–213 Nelson, *Die Rechtswissenschaft ohne Recht* (1917), pp 96–106 Dickinson, *The Equality of States in International Law* (1920) Rapisardi-Mirabelli, *Il principio dell' uguaglianza giuridica degli Stati* (1920) Goebel, *The Equality of States* (1923) Dupuis, *Le Droit des gens et les rapports des grandes puissances avec les autres états avant le pacte de la Société des Nations* (1921), pp 13–167 and 421–529 Korte, *Grundfragen der völkerrechtlichen Rechtsfähigkeit und Handlungsfähigkeit der Staaten* (1934) Weiss, Hag R (1923), pp 525–51 Armstrong, AJ, 14 (1920), pp 540–64 Charles de Visscher, RI, 3rd series, 3 (1922), pp 149–70, 300–35 Praag, *ibid*, 4 (1923), pp 436–54 Baker, BY (1923–24), pp 1–20 McNair, Mich Law Rev, 26 (1927), pp 131–52 Rappard, *Problems of Peace* (vol ix, 1934), pp 14–53 Fischer Williams, BY, 13 (1932), pp 35–7 Scott, Hag R, 42 (1932), iv, pp 566–83 Schindler, *ibid*, 46 (1933), iv, pp 260–70 Strupp, *ibid*, 47 (1934), i, pp 508–13 Bilfinger, ZöV, 4 (1934), pp 481–97 Myers, AJ, 31 (1937), pp 437–48 Kelsen, Yale LJ, 53 (1944), pp 207–20 King, AJ, 42 (1948), pp 811–32 Weinschel, AJ, 45 (1951), pp 417–42 Ch de Visscher, Hag R, 86 (1954), ii, pp 455–70 van Bogaert, RG, 59 (1955), pp 85–98 Korowicz, Hag R, 102 (1961), i, pp 34–62 Schaumann, *Die Gleichheit der Staaten* (1967) Anand in *International Studies*, 8 (1967), pp 213–41, 386–421, and Hag R, 197 (1986), ii, pp 9–228 Vitgal, *The Inequality of States* (1967) Friedman in *The Relevance of International Law* (eds Deutsch and Hoffman, 1968) Klein, *Sovereign Equality among States* (1974) Levi, YB of World Affairs (1978), pp 286–302 Lachs, Hag R, 169 (1980), iv, pp 77–84 Pechota in *The Structure and Process of International Law* (eds MacDonald and Johnston, 1983), pp 453–84 See also the literature quoted at § 109, n 2 on jurisdictional immunities of foreign states.

§ 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

[16] See eg the Convention establishing the Multilateral Investment Guarantee Agency 1985 (ILM, 24 (1985), p 1598); and see § 407, n 8.

on a statutory basis by a number of countries,[10] including the United Kingdom in the State Immunity Act 1978,[11] and the United States of America in the Foreign Sovereign Immunities Act 1976.[12] The general rule that states are

[10] Eg Canada – State Immunity Act 1982, ILM, 21 (1982), p 798; Australia – Foreign States Immunities Act 1985, ILM, 25 (1986), p 715 (and see also the Report of the Australian Law Reform Commission, ILM, 23 (1984), p 1398).

[11] In accordance with s 23 the Act entered into force on 22 November 1978. The principal provisions of the Act, whereby foreign states are not immune from the jurisdiction in certain specified circumstances, do not apply to proceedings in respect of matters that occurred before that date. See generally on the Act, Delaume, AJ, 73 (1979), pp 189–99; Mann, BY, 50 (1979), pp 43–62; Higgins, Neth YBIL, 10 (1979), pp 35, 42–52, and AFDI, 29 (1983), pp 23–35; Sinclair, Hag R, 167 (1980), ii, pp 117, 257–65; Dicey and Morris, Rule 20; Lewis, *State and Diplomatic Immunity* (3rd ed, 1990), pp 7–122.

As to the recognition and enforcement in the UK 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; Hanbury, *Current Legal Problems*, 8 (1955), pp 1–23; Dunbar, Hag R, 132 (1971), i, 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.

[12] ILM, 15 (1976), p 1388. For the draft of this legislation as presented to Congress, together with a section-by-section analysis of the draft, see *ibid*, p 88; see also *ibid*, p 1398, for the Congressional Judiciary Committee's Report on the Bill, and *ibid*, 12 (1973), p 118, for an earlier draft of the Bill. For comment see Delaume, AJ, 67 (1973), pp 745–56, and *ibid*, 70 (1976), pp 529–43, and *ibid*, 71 (1977), pp 399–422; Atkeson, Perkins and Wyatt, *ibid*, 70 (1976), pp 298–321; Brower, Bistline and Loomis, AJ, 73 (1979), pp 200–14; Meal and Trachtman, Harv ILJ, 20 (1979), pp 583, 584–601; Smit, *AS Proceedings* (1980), pp 49–70 (and other comments, pp 70–81); Sinclair, Hag R, 167 (1980), ii, pp 117, 246–57; Feldman, ICLQ, 35 (1986), pp 302–19. For proposed amendments, see Atkeson and Ramsey, AJ, 79 (1985), p 770–89, and for amendments adopted in 1988, see ILM, 28 (1989), p 396, and Kahale, *Journal of International Arbitration*, 6 (1989), No 2, pp 57–64.

For State Department regulations concerning service on foreign states, see ILM, 15 (1976), p 159; and *ibid*, p 1437, for the text of 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 ILJ, 20 (1981), pp 775–84. But cf the somewhat different conclusion reached by an English court in broadly analogous circumstances in *Westminster City Council v Government of the Islamic Republic of Iran* [1986] 1 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.

The Act does not apply to events pre-dating the so-called 'Tate letter' of 1952 (see § 110, n 9): *Jackson v People's Republic of China*, ILM, 25 (1986), p 1466; *Carl Marks & Co v Union of Soviet Socialist Republics*, AJ, 82 (1988), p 129. As to its possible application to events occurring in the period 1952–77 the matter would appear open; but see *Yessenin-Volpin v Novosti Press Agency* (1978) 443 F Supp 849.

As to the former rules applicable in the USA, see generally Hyde, i, §§ 246, 258; Whiteman, *Digest*, 6, pp 553–726; *Restatement* (2nd), pp 193–228. For a summary of sovereign immunity decisions of the Department of State between May 1952 and the entry into force of the Foreign Sovereign Immunities Act in January 1977, see *Digest of US Practice in International Law* (1977), pp 1017–89.

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.[13]

Immunity from jurisdiction is invoked primarily in proceedings in which a foreign state or government is in the position of defendant.[14] Other defendants may also benefit from state immunity. Thus a provincial authority (to be distinguished from a member state of a federation)[15] may sometimes be regarded as in effect part of the government of a state so as to partake of its immunity.[16]

[13] Article 6: YBILC (1986), ii, pt 2, p 8. The ILC began consideration of the topic in 1978. See the successive reports of the ILC's Special Rapporteur on this topic from 1979–91. For comment on the ILC's draft articles, see Greig, ICLQ, 38 (1989), pp 243–76, 560–88. The ILC adopted final draft articles at its 1991 session.

See also Art II of the draft articles for a Convention on State Immunity adopted by the ILA at its 60th Conference (1982), reprinted in ILM, 22 (1983), p 287; and Art 1 of the Inter-American Draft Convention on Jurisdictional Immunity of States, approved by the Inter-American Juridical Committee in 1983: *ibid*, p 292.

[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 sub-divisions of the state which are entitled to perform acts in the exercise of the sovereign authority of the state, (*c*) 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 of that government; but not to any entity ... 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 s 1603(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, Varges, Harv ILJ, 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 *Trawnik v Gordon Lennox* [1985] 2 All ER 368; and Heidelmeyer, ZöV, 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 *Rousse and Maber 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 impleading the state.[17] 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.[18] But in the absence of any such agreement entitlement to immunity will primarily depend upon an examination of the instruments by which the corporation is established, in order to determine its relationship to the state. A body which can be regarded as an organ of the state or a department of government will, especially if it has no separate legal personality, usually enjoy immunity;[19] its possession of a separate legal personality does 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.[20] 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.[21] In those jurisdictions which refuse immunity in matters *iure gestionis*, the possession of separate legal personality may indicate that the entity was created to act and was acting *iure gestionis*, or alternatively the finding that the matters in issue are *iure gestionis* can lead to a rejection of a plea of immunity irrespective of

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 s 14 of the State Immunity Act 1978 is to similar effect. For the USA s 1603(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 n 14, as to the ILC's draft articles 1986.

17 See *Rahimtoola v Nizam of Hyderabad* [1958] AC, 379; *Waltier v Thomson* (1960), ILR, 31, p 397; *Martin v Bank of Spain*, ILR, 1952, No 42; *Wacker v Bisson* (1965), AJ, 60 (1966), p 401; *Johnson v Turner*, ILR, 21 (1954), p 103; *Bradford v Director-General of Railroads of Mexico*, AD (1925–26), No 132; *Lamont v Travelers Insurance Co*, AD, 9 (1938–40), No 73; *Oliner v Canadian Pacific Railway*, AJ, 65 (1971), p 205; *Smith v Canadian Javelin Ltd*, ILM, 15 (1976), p 319. But compare *Pilger v US Steel Corpn*, AD, 3 (1925–26), No 131, where the English Public Trustee was allowed to be sued in an American court (see Mich Law Rev, 24 (1926), pp 729, 730); *Saorstat and Continental SS Co v Rafael de las Morenas*, AD, 12 (1943–45), No 25. As to the ILC's draft articles, 1986, see § n 14.

It is not always clear in some cases whether an action against a person who happens to be a diplomatic or consular officer of the defendant state is treated as involving diplomatic or consular immunity as opposed to immunity as an agent for his state; there is a borderline between the two which is not always easy to discern. See eg *Oster v Dominion of Canada*, ILR, 23 (1956), p 433; *Waltier v Thomson*, above; *Caravel Office Building Co and Hynning v Peruvian Air Attaché*, ILM, 14 (1975), p 1435; *Intpro Properties (UK) Ltd v Sauvel* [1983] QB 1019.

18 This is particularly likely where the body closely associated with a state is to be established either permanently or for a considerable time in another state: see § 568.

19 *Compania Mercantil Argentina v United States Shipping Board* (1924) 40 TLR 601; *Krajina v The Tass Agency* [1949] 2 All ER 274 (see Carter, ILQ, 3 (1950), pp 78–86); *Lahalle and Levard v American Battle Monuments Commission*, AD, 8 (1935–37), No 88; *Davies v The Tass Agency* (noted by Butler, MLR, 35 (1972), p 189); *Piasik v British Ministry of War Transport*, AD, 12 (1943–45), No 22; *Yessenin-Volpin v Novosti Press Agency and Tass*, ILM, 17 (1978), p 720.

Entitlement to immunity is, for those countries which distinguish between acts *iure imperii* and *iure gestionis*, dependent also on the proceedings relating to acts in the former category.

20 See *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438, holding that an organisation may be so closely linked to the state as to constitute a department of state, and that a state may confer separate legal personality upon such a department without thereby forfeiting the right to claim immunity in proceedings instituted against it (see Wedderburn, ICLQ, 6 (1957), pp 290–300, Cohn, LQR, 73 (1957), pp 26–9, and Mann, MLR, 20 (1957), pp 273–5 for comment): see also eg *Floridi v Sovexportfilm* (1951), AJ, 49 (1955), p 98; *Mellenger v New Brunswick Development Corpn* [1971] 2 All ER 593; *Matter of Sedco Inc*, ILM, 21 (1982), p 318 (as to Petroléos Mexicanos, the national oil company of Mexico); *First National City Bank v Banco para el Commercio Exterior de Cuba* (1983) 103 S Ct 2591, ILM, 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). Cf *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] 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 497; *Czarnikow Ltd v Rolimpex* [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 MV Americana*, AJ, 78 (1984), p 897 (as to a shipping line indirectly owned by the Italian Government).

See generally on immunities of semi-governmental corporations Kuhn, AJ, 39 (1945), pp 772–5; Fawcett, BY, 25 (1948), pp 34–51; Fensterwald, HLR, 63 (1950), pp 614–42; Shepard, *Sovereignty and State-Owned Commercial Entities* (1951); Friedmann, AJ, 50 (1956), at pp 482–7; Sucharitkul, *State Immunities and Trading Activities in International Law* (1959); Böckstiegel, *Der Staat als Vertragspartner Auslänsischer Privatunternehman* (1971); Schmitthoff, ICLQ, 7 (1958), pp 452–67; De Visscher, Hag R, 102 (1961), i, pp 418–26. *The Work of the Asian-African Legal Consultative Committee 1956–74* (1974, published by the Secretariat of the Committee) contains, *inter alia*, texts on the immunities of state trading corporations on which the Committee reached agreement. See also Moorthy, ICLQ, 30 (1981), pp 638–59, with particular reference to the Malaysian National Oil Corporation. Many of the works cited at n 2, discuss the position of semi-governmental corporations.

21 It was held in *Hannes v Kingdom of Roumania Monopolies Institute* (1940) 20 NYS (2*d*) 825; AD (1938–40), No 72, that an autonomous corporation created and controlled by a foreign government for exploiting commercial monopolies is not necessarily immune from suit. A corporation created by the state but possessing a distinct legal personality has been held not immune from suit unless it can be proved that the property which is the subject matter of the action is the property of the state: *Ulen & Co v (Polish) National Economic Bank* (1940) 24 NYS (2*d*) 201; AD (1938–40), No 74. As to immunities of corporations controlled by governments, see also *Re Distribution of Petroleum* (1952) 13 Fed R; AJ 47 (1953), p 502; ILR, 19 (1952), p 197; where a US court held that the Anglo-Iranian Oil Co, being in part ownership and control of the British Government, was immune from subpoena. See also *Coale v Soc Cooperative Suisse des Charbons*, AD, 1 (1919–22), No 88; *US v Deutsche Kalisyndikat Gesellschaft*, AD, 5 (1929–30), No 71; *National Iranian Oil Co v Saphire International Petroleum Ltd* (1963), ILR, 47, p 396; *Letelier v Chile*, AJ, 79 (1985), p 447; *Société Air Zaire v Gautier et van Impe*, RG, 88 (1984), p 977. In *First National City Bank v Banco para el Commercio Exterior de Cuba*, 103 S Ct 2591, ILM, 22 (1983), p 840, the US Supreme Court held that government instrumentalities established as separate juridical entities are presumed to have an independent status, but this presumption can be disregarded in the interests of justice; and see *Foremost-McKesson Inc v Islamic Republic of Iran*, AJ, 84 (1990), p 922. Questions as to the statal nature of an organisation may arise in other contexts relating to a state's international obligations: see eg *Foster v British Gas plc* [1988] ICR 584, holding that a body has a statal character if it is 'an independent public authority charged by the State with the performance of any of the classic duties of the State, such as the defence of the realm or the maintenance of law and order within the realm' (and see later proceedings, holding British Gas to be a public service body for the purposes in question: [1991] 2 WLR 258 (European Court of Justice, Case C 188/89), [1991] 2 WLR 1075 (House of Lords)).

There may be cases in which a court declines jurisdiction on the ground that the corporation, irrespective of its status as in effect part of the state, has acted as an agent of the state: *Martin v Bank of Spain*, ILR, 19 (1952), No. 42. See also n 17, as to the immunity of an agent of a state.

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 implead 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] or against

[22] See eg *Mirabella v Banco Industrial de la República Argentina*, AJ, 57 (1963), p 930; *Borga v Russian Trade Delegation*, ILR, 22 (1955), p 235; *Amkor Corpn v Bank of Korea*, AJ, 64 (1970), p 414; *Passelaigues v Mortgage Bank of Norway*, ILR, 22 (1955), p 227; *Chilean Copper Corpn Case*, ILM, 12 (1973), pp 182, 188–9; *Borg v Caisse Nationale D'épargne Française*, AD, 3 (1925–26), No 122; *Non-resident Petitioner v Central Bank of Nigeria*, ILM, 16 (1977), p 501.

[23] The ILC's draft Articles on Jurisdictional Immunities of States and their Property (YBILC (1986), ii, pt 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 comprehended within the meaning of the term 'State' for the purpose of those articles: Art 3.1(c). See also Art 7.3.

For the UK s 14(1) and (2) of the State Immunity Act 1978 are to similar effect. On the other hand, s 1603(a) and (b) of the Foreign Sovereign Immunities Act 1976 of the USA include an 'agency or instrumentality of a foreign State' within the meaning of the term 'foreign State', such an agency or instrumentality being defined as an entity which is a separate legal person, corporate or otherwise, and which is an organ of a foreign state or political sub-division thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political sub-division thereof, and which is neither a citizen of a state of the USA nor created under the laws of any third country.

[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 appears only to affect the law in this matter in relation to certain suits in admiralty: see s 1605(b).

The ILC's draft Articles on the Jurisdictional Immunities of States and their Property (YBILC (1986), ii, pt 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 property in its possession or control: Arts 7.2 and 3.

[25] *The Exchange v McFaddon* (1812) 7 Cranch 116, Scott, *Cases*, 300; *De Haber v The Queen of Portugal* (1851) 17 QB 171; *Vavasseur v Krupp* (1878) LR 9 Ch D 351; *The Constitution* (1879) 4 PD 39; *The Parlement Belge* (1879) 4 PD 129, (1880) 5 PD 197; *The Cristina* [1938] AC 485; *The Arantzatzu Mendi* [1939] AC 256; *Flota Maritima Browning de Cuba SA v SS Canadian Conqueror* (1962) 34 DLR 2d 628; AJ 57 (1963), p 440; *Spacil v Crowe*, ILM, 13 (1974), p 436 (see

a foreign state's bailee[26] or agent.[27] However, where a foreign state has an interest in trust or similar property, this is not generally sufficient to stay proceedings relating to the property.[28] Furthermore, where a state claims an interest in property which is the subject of proceedings to which it is not a party, the mere assertion of such an interest is not sufficient to oust the jurisdiction of the court: in order to have that effect the claim (unless admitted) must be supported by some evidence, although the state does not have to establish a conclusive title to the property in question.[29]

also *ibid*, p 120, and Leigh, AJ, 68 (1974), pp 280–9). See also below § 110, n 6. US courts have attached greater 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 *Velidor v L/P/G Benghazi*, ILM, 21 (1982), p 621. In *The Annette* [1919] P 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 Congreso del Partido* [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 act 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 Preuss, AJ, 35 (1941), pp 263–81.

The procedure whereby funds deposited with a third party to the defendant's credit may be attached in proceedings *quasi in rem* has been held by US courts to allow proceedings to be maintained against a foreign state defendant: see *Amoco Overseas Oil Co v Compagnie Nationale Algérienne de Navigation*, ILM, 18 (1979), p 109. But the use of attachment to found jurisdiction is now prohibited by the Foreign Sovereign Immunities Act 1976, s 1610. Pre-judgment attachment of assets in order to provide security for the plaintiff may be subject to stricter rules than attachment to found jurisdiction: see n 36.

See generally as to the grant of immunity on the basis of a foreign state's ownership, possession or control of property, Dunbar, Hag R, 132 (1971), i, pp 237–57, 285–351; Dicey and Morris, Rule 20, at pp 240, 249–53. As to the position generally of state-owned ships, see § 110, n 6, and § 565.

[26] *USA and France v Dollfus Mieg et Cie* [1952] AC 582. For comment see Carter, ILQ, 3 (1950), pp 78–86, and ICLQ, 1 (1952), pp 543–9.

[27] See n 17.

[28] *Larivière v Morgan* (1872) LR 7 Ch 550; LR 7 HL 423, 430; *Re Russian Bank for Foreign Trade* [1933] Ch D 745; *Nizam of Hyderabad v Jung* [1957] 1 Ch 185, 250, and on appeal *sub nom Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 420 (and comment by Mann, MLR, 21 (1958), pp 165–9); *Procureur Général v Vestwig*, AD, 13 (1946), No 32; *Institute Indo-Portuguese v Borges* (1958), ILR, 27, p 111; *Maharaj Indrajitsinghji v HH Maharaja Rajendra-singhji Vijaysinghji*, ILR, 22 (1955), p 244 (as to probate proceedings).

See generally Arts 10 and 14 of the European Convention on State Immunity 1972; Art 14.1(e) of the ILC's draft Articles on the Jurisdictional Immunities of States and their Property (YBILC (1986), ii, pt 2, p 8); and, for the UK, State Immunity Act 1978, s 6(2) and (3). For the USA, § 1605(a)(4) of the Foreign Sovereign Immunities Act 1976 is more limited.

The winding up of a company does not implead a foreign state which is simply a creditor: see *In re Rafidain Bank* (*The Times*, 22 July 1991), and State Immunity Act 1978, s 6(3).

[29] See *Haile Selassie v Cable and Wireless Ltd (No 1)* [1938] Ch 545, 839. See also *The Jupiter (No 2)* [1925] P 69; *The Jupiter (No 3)* [1927] P 122; *Lamont v The Travelers Insurance Company* (1939) 24 NE (2d) 81; AJ, 34 (1940), p 349; AD (1938–40), No 73; *Republic of Mexico v Hoffman* (1945) 324 US 30; AD, 12 (1943–45), p 143. See also *The Navemar* (1938) 303 US 68; AJ 32 (1938), p 381; AD (1938–40), No 68, on the authority and the degree of conclusiveness of the declara-

Even where a foreign state is properly subject to the jurisdiction of the local courts, execution of any judgment against the state may not as a rule be levied against its property,[30] unless it has separately waived its immunity from execution;[31] the waiver must usually be express, but in some circumstances

tions of the foreign government. In *The Kabalo* the court accepted the statement of the Belgian Ambassador as conclusive evidence of the legality of possession resulting from requisition by the Belgian Government – though not necessarily of the fact of possession: (1940) 67 Ll. L Rep, p 572; AD, 9 (1938–40), No. 92. See § 460 on the conclusiveness of the statement of the executive departments.

Although the foreign state does not have to establish title to the property, it must show its claim to be neither illusory nor founded on a title manifestly defective: *Juan Ismael & Co Inc v Government of Indonesia* [1955] AC 72, with comment by Carter, ICLQ, 4 (1955), pp 469–75; Compare *Indian National Steamship Co v Maux Faulbaum*, ILR (1955), p 248, and *Stephen v Zivnostenska Banka National Corpn*, AJ, 55 (1961), p 748, and 56 (1962), p 848. For the UK s 6(4) of the State Immunity Act 1978 requires 'prima facie evidence' in support of the foreign state's claim, as does Art 14.2 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property (YBILC, ii, pt 2, p 8). Note that the House of Lords has observed that the rule propounded in the *Juan Ismael* case was not to be extended further than was strictly necessary: *Shearson Lehman Brothers Inc v Maclaine Watson & Co Ltd (No 2)* [1988] 1 WLR 16, 29–31.

30 European Convention on State Immunity 1972, Art 23. Chapter III of the Convention imposes certain obligations on parties to give effect to judgments against them in conformity with the Convention. See also Arts 21–23 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property (YBILC (1986), ii, pt 2, p 8); as to the UK, State Immunity Act 1978, s 13(2)(b); and as to the USA, Foreign Sovereign Immunities Act 1976, §§ 1609–11. See also *Duff Development Co v Government of Kelantan* [1924] AC 797, and also Note (1) to that case in AD, 2 (1923–24), No 65; *Dexter and Carpenter v Kunglig Jarnvagsstyrelsen et al*, decided in 1930 by the US District Court of Appeals: 43 F (2d) 705; AD, 5 (1929–30), No 70 (with comment by Jessup and Deák, AJ, 25 (1931), pp 335–9); *Socifros v USSR*, AD, 9 (1938–40), No 80; *New York and Cuba Mail SS Co v Republic of Korea*, ILR, 22 (1955), p 220; *Weilamann v The Chase Manhattan Bank* (1959), ILR, 28, p 165; *Caisse Centrale de Cooperation Economique v Soc Midland International Service et Etat du Sénégal*, RG, 88 (1984), p 513; *Republic of Zaire v Duclaux*, Neth YBIL, 20 (1989), p 296 (as to bankruptcy proceedings brought against a foreign state). While the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (see § 407, n 49) excludes immunity from suit for disputes within its scope, it does not affect the rules in contracting states relating to immunity from execution: Arts 54(1) and 55.

As to the unlawfulness of a garnishee order served on a foreign state, see *Garnishee Order against Foreign Legation (Germany) Case* (1961), ILR, 32, p 122. As to the unlawfulness of garnishee proceedings served on a third party holding accounts maintained by the foreign state, see *Re the Republic of the Philippines*, AJ 73 (1979), pp 305, 703 (concerning an embassy account); *Alcom Ltd v Republic of Columbia* [1984] AC 580, refusing a garnishee order on an Embassy account unless established that the whole account was used for commercial purposes (see also Ghandi, MLR, 47 (1984), pp 597–603; Fox ICLQ, 34 (1985), pp 115–41). Cf *Birch Shipping Corpn v Embassy of Tanzania*, AJ, 75 (1981), p 373 (garnishee order allowed where embassy account is used, even if only in part, for commercial activity); *Re Prejudgment Garnishment against National Iranian Oil Co*, ILM, 22 (1983), p 1279 (immunity from garnishee order only to be granted in respect of assets serving activities pertaining to governmental functions). Garnishee proceedings against the assets of a state agency may be subject to less restrictive rules than those against state assets: see *Sonatrach v Migeon*, ILM, 26 (1987), p 998. As to embassy bank accounts see generally § 497, n 2.

The courts of a number (though only of a minority) of states have permitted execution. See H. Lauterpacht, BY, 28 (1951), pp 241–2. In 1951 a Belgian court, in a fully reasoned decision, affirmed its jurisdiction to order execution: *Société Commerciale de Belgique v L'Etat Hellénique, Clunet*, 79 (1952), p 244. In *Société Européenne d'Etudes et d'Entreprises v Yugoslavia* (1973), ILM, 14 (1975), p 71, the High Council of the Netherlands held that no rule of international law opposed every execution of foreign state assets situated in the territory of

waiver by implication is regarded as effective.[32] 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 *iure gestionis*.[33] The European Convention on State Immunity 1972 thus, under optional provisions of the Convention, permits execution against a state's 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.[34]

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,[35] either by express consent given in the context of a particular dispute

another state (at p 76). In Italy execution is, under a law of 1926, permitted with the authorisation of the Italian Ministry of Justice: see Condorelli and Sbolci, Neth YBIL, 10 (1979), pp 197–231, and *Socialist People's Libyan Arab Jamahiriya v Rossbeton*, AJ, 84 (1990), p 573. See also *Government of Peru v SA Sociedad Industrial Financiera Argentina SIFAR* (1958), ILR, 26, p 195.

31 See generally on immunity from execution Kuhn, AJ, 28 (1934), pp 119–22; Castel, AJ, 46 (1952), pp 520–6; Vennemann in *L'Immunité de Jurisdiction et d'Exécution des Etats* (Brussels-Louvain Colloquium 1969) (1971), pp 119–80; Sinclair, ICLQ, 22 (1973), at pp 273–6, and Hag R, 167 (1980), ii, pp 218–42; various contributors to Neth YBIL, 10 (1979), pp 3–289, commenting on the position in several states; Crawford, AJ, 75 (1981), pp 820–69; Fox, ICLQ, 34 (1985), pp 115–41. See n 36, as to waivers in relation to pre-judgment attachment of property.

32 See Art 23 of the European Convention on State Immunity 1972, and, for the UK, s 13(3) of the State Immunity Act 1978, which require the consent to execution to be express and in writing. As to the USA, see the Foreign Sovereign Immunities Act 1976, ss 1610–11. In *Flota Maritima Browning de Cuba SA v MV Ciudad de la Habana* (1963), ILR, 35, p 122, it was held by a US court that a state may waive its immunity from execution by implication: and the sections of the Foreign Sovereign Immunities Act just referred to permit, to the extent that they provide for waiver of immunity from execution, waiver 'either explicitly or by implication'.

33 See *UAR v Dame X*, AJ, 55 (1961), p 167; *Weinmann v Republic of Latvia* (1959), ILR, 28, p 385; *Tietz v People's Republic of Bulgaria, ibid*, p 369; *Socobelge v Greek State*, AJ, 47 (1953), p 508; *Englander v Statni Banka Ceskoslavenska*, RG, 73 (1969), p 1148; *Monopole des Tabacs de Turquie v Régie Co-Intéressée des Taacs de Turquie*, AD (1929–30), No 79; *State Immunity (Switzerland) (No 2) Case*, AD, 10 (1941–42), No 62; *Egyptian Delta Rice Mills Co v Comisaria General de Abastecimientos y Transportes de Madrid*, AD, 12 (1943–45), No 27; *Soviet Distillery in Austria Case*, ILR, 21 (1954), p 101; *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529; *Hispano Americana Mercantil SA v Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277; *Société Air Zaire v Gautier et van Impe*, RG, 88 (1984), p 977; *Eurodif et Sofidif v République Islamique d'Iran*, RG, 89 (1985), p 813, ILM, 23 (1984), p 1062; *Sonatrach v Migeon*, ILM, 26 (1987), p 998.

34 See Ch IV, especially Art 26. By the end of 1990 six of the states which by then had ratified the Convention had accepted these optional provisions. For the UK, see s 13(4) of the State Immunity Act 1978; note also s 14(3) relating to separate entities, and s 14(4) relating to property of a state's central bank or other monetary authority. In the USA, s 1610 of the Foreign Sovereign Immunities Act 1976 allows execution to be levied upon a foreign state's property used for a commercial activity if the property was used for the commercial activity upon which the claim was based; but note s 1611 which does not allow execution upon the property of a central bank or monetary authority held for its own account. See also Jayakumar, AJ, 64 (1970), pp 371–5, as to certain actions taken in Singapore against the Bank of China.

35 See the European Convention on State Immunity 1972, Art 2; and Art 8 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property (YBILC, ii, pt 2, p 8), and Art 19 as regards the effect of a state entering into an arbitration agreement. For the UK, see the State

which has already arisen, or by consent given in advance in a contract or international agreement.[36] 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.[37] A state may also be

Immunity Act 1978, s 2(1) and (2); for the USA, see the Foreign Sovereign Immunities Act 1976, § 1605(a)(1). But submission to the jurisdiction has been held not to involve submission in later proceedings which, though connected with the earlier proceedings, are distinct from them: *Duff Development Co v Kelantan Government* [1924] AC 797; cf *Sultan of Johore v Abubakar* [1952] AC 318.

[36] See eg *Proyecfin de Venezuela SA v Banco Industrial de Venezuela*, AJ, 79 (1985), p 1059. Under the State Immunity Act 1978, s 2(2), a provision in an agreement that it is to be governed by the law of the UK is not regarded as a submission to the jurisdiction. In *South Eastern Leasing Corpn v Stern Dragger Belogorsk*, ILM, 13 (1974), p 444, a US court held that no waiver in respect of vessels was involved in agreeing by treaty that vessels would enter US ports 'subject to applicable laws and regulations of the United States'. In *First Fidelity Bank NA v Government of Antigua and Barbuda*, AJ, 84 (1990), p 560, a waiver by an ambassador was set aside.

Under the former law of the UK agreeing in a contract to accept the jurisdiction of the English courts did not amount to a submission to the jurisdiction: *Kahan v Pakistan Federation* [1951] 2 KB 1003. See generally on waiver of sovereign immunity under the former law of the UK, Cohn, BY, 34 (1958), pp 260–73. US courts have taken the view that a waiver of immunity by prior contract to submit to the jurisdiction was ineffective where the State Department had suggested the grant of immunity: *Isbrandtsen Tankers Inc v President of India*, AJ, 66 (1972), p 396. The Foreign Sovereign Immunities Act 1976 distinguishes, in relation to attachment of or execution on assets, between pre-judgment attachment, for which the waiver must be 'explicit', and attachment in execution of a judgment, which can be explicit or by implication. The Act does not specify the circumstances which constitute an explicit waiver of immunity; the matter is for decision on the facts of each particular case. See the decision of the Court of Appeals, 2d Circuit, in *Libra Bank Ltd v Banco Nacional de Costa Rica*, ILM, 21 (1982), p 618; *Banque Compafina v Banco de Guatemala*, ILM, 23 (1984), p 782.

While a treaty provision may be sufficient to imply a waiver from pre-judgment attachment of assets, it may not be sufficient to meet the statutory requirement that such waiver be 'explicit': see *Reading and Bates Corpn v National Iranian Oil Co*, ILM, 18 (1979), p 1398 (on which see Jones, Harv ILJ, 21 (1980), pp 549–52); *Chicago Bridge & Iron Co v Islamic Republic of Iran*, ILM, 19 (1980), p 1436; *New England Merchants National Bank v Iran Power Generation and Transmission Co*, ILM, 19 (1980), p 1298; *S & S Machinery Co v Masinexportimport*, AJ, 77 (1983), p 880; *O'Connell Machinery Co v MV Americana*, AJ, 78 (1984), p 897; *Colonial Bank v Compagnie Gén'erale Maritime et Financière*, AJ, 81 (1987), p 422. Cf *Behring International Inc v Imperial Iranian Air Force*, ILM, 18 (1979), pp 1370, 1389; *American International Group Inc v Islamic Republic of Iran*, AJ, 75 (1981), p 371; *Harris Corpn v National Iranian Radio and Television*, ILM, 22 (1983), p 434; *Ferrostaal Metals Corpn v SS Lash Pacifico*, AJ, 81 (1987), p 665. Merely entering into a treaty dealing with the same subject matter as the claim does not constitute an implied waiver: see *Frolova v USSR*, AJ, 79 (1985), p 1057; cf *von Dardel v USSR*, AJ, 80 (1986), p 177.

[37] See decisions of US courts in *Ipitrade International SA v Federal Republic of Nigeria*, ILM, 17 (1978), p 1395; *Libyan American Oil Co v Socialist People's Libyan Arab Jamahirya* (1980), ILR, 62, p 220 (see also the *amicus curiae* brief for the US in the appeal against this decision, at ILM, 20 (1981), p 161: in the event the appeal did not proceed to judgment); *Birch Shipping Corpn v Embassy of Tanzania*, AJ, 75 (1981), p 373; *Liberian Eastern Timber Corpn v Government of the Republic of Liberia*, ILM, 26 (1987), p 695 (implying waiver in respect of registration and enforcement of the award, and denying it in respect of execution), and see Joyce, Harv ILJ, 29 (1988), pp 135–41. Certain aspects of the operation of the US Foreign Sovereign Immunities Act in relation to the consequences of a submission by a foreign state to arbitration were clarified by amendments adopted in 1988: see ILM, 28 (1989), p 396, and Kahale, *Journal of International Arbitration*, 6 (1989), No 2, pp 57–64.

See also the decision of a Swedish court in *Libyan American Oil Co v Socialist People's Arab*

considered to have waived its immunity by implication,[38] as by instituting or intervening in proceedings,[39] or taking any steps in the proceedings relating to the merits of the case.[40] 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

Republic of Libya, ILM, 20 (1981), p 893; and of an arbitration applying Swiss law, in *Westland Helicopters Ltd v Arab Organisation for Industrialisation*, ILM, 23 (1984), pp 1071, 1089, annulled by Swiss courts on the ground that a state has not expressly waived its immunity as a result of an arbitration agreement concluded by a separate international organisation of which it is a member: ILM, 28 (1989), pp 687, 691. Cf *Maritime International Nominees Establishment v Republic of Guinea*, ILM, 21 (1982), p 1355; ILM 22 (1983), p 86; and *Senegal v Seutin*, ILM, 29 (1990), p 1341, allowing immunity from enforcement of an ICSID award unless assets on which the award is to be enforced are held by the state for commercial purposes. See also the decision of the Paris Court of Appeals setting aside an arbitral award against Egypt (ILM, 22 (1983), p 752) on the ground that, on the facts, Egypt's association with the arbitration agreement did not make Egypt a party to it so as thereby to have waived its immunity: *Arab Republic of Egypt v Southern Pacific Properties (Middle East) Ltd*, ILM, 23 (1984), p 1048 (and see comment by Scibelli, Harv ILJ, 26 (1985), pp 263–71) and ILM, 26 (1987), p 1004; and cf, holding Egypt a party to the arbitration agreement, the decision of the District Court, Amsterdam, in *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, ILM, 24 (1985), p 1040.

See generally Oparil, *Journal of International Arbitration*, 3 (1986), No 4, pp 61–80; Fox, ICLQ, 37 (1988), pp 1, 10–18; Chukwumerije, *Anglo-American Law Review*, 19 (1990), pp 166–82. See also Art 19 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property as regards the effect of a state entering into an arbitration agreement: YBILC (1986), ii, pt 2, p 8. It may be noted that Art 55 of the Convention establishing the International Centre for the Settlement of Investment Disputes 1965 leaves questions of sovereign immunity in respect of the enforcement of awards under the Convention to the law of the state being asked to enforce the award.

[38] What acts constitute a waiver of immunity by implication depends upon the law of the state in which the proceedings are brought. In the UK only circumstances specified in the State Immunity Act 1978 as giving rise to no immunity can be regarded as involving an implied waiver, since by s 1 a state enjoys immunity except only as provided in the Act. By virtue of Art 15 the European Convention on State Immunity 1972 has a similar effect. In the USA s 1605(a)(1) of the Foreign Sovereign Immunities Act 1976 gives no indication of the circumstances which constitute waiver by implication. In some countries the assertion of jurisdiction over foreign states in respect of acts *iure gestionis* (see § 110) has been supported by implying a waiver of immunity from the circumstance that the foreign state has engaged in such activities: see eg *Storelli v French Republic*, AD, 2 (1923–24), No 66; *Borg v Caisse Nationale d'Epargne Française*, AD, 3 (1925–26), No 122.

[39] See European Convention on State Immunity 1972, Art 1.1; Art 9 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property (YBILC (1986), ii, pt 2, p 8); and for the UK, the State Immunity Act 1978, s 2(3). See also *Sultan of Johore v Abubakar* [1952] AC 318, and other cases cited at n 44. The making of a counter-claim by a state will involve a waiver of immunity not only with respect to the counter-claim but also to the principal claim: European Convention, Arts 1.1, 1.3 and 3.1.

[40] European Convention on State Immunity 1972, Art 3.1; Art 9 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property; and for the UK, the State Immunity Act 1978, s 2(3)(b). But where a state did not have knowledge of facts on which a claim to immunity could be based until after taking steps relating to the merits, it can later claim immunity based on those facts if it does so without delay: Art 3(1) of the European Convention, and s 2(5) of the State Immunity Act 1978. See also *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438, holding that entering an unconditional appearance and issuing a summons for an order to give security for costs, when this was done without full knowledge of the legal consequences and without the full authority of the sovereign, did not involve an implied waiver of immunity. See also *Canadian Overseas Ores Ltd v Compania de Acero del Pacifico SA*, AJ, 78 (1984), p 905; *Foremost-McKesson Inc v Islamic Republic of Iran*, AJ, 84 (1990), p 922.

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

[41] European Convention on State Immunity 1972, Art 15; and for the UK, State Immunity Act 1978, s 1(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 Drukker* [1928] Ch 877) and an order for discovery (*Prioleau v United States of America* (1866) LR 2 Eq 659; *Republic of Peru v Weguelin* (1875) LR 20 Eq 140).

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), ILR, 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 immunities to which it is otherwise entitled under international law. See *Telkes v Hungarian National Museum (No 2)*, AD (1941–42), No 169. See for comments thereon *Corn LQ*, 29 (1944), pp 390–400.

[44] European Convention on State Immunity 1972, Art 1.2; Art 10 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property (YBILC (1986), ii, pt 2, p 8). As to the UK, see the State Immunity Act 1978, s 2(6). See also *South African Republic v La Compagnie Franco-Belge* [1898] 1 Ch 90; *High Commissioner for India v Ghosh* [1960] 1 QB 134.

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 Belaiew* (1925) 42 TLR 21); but cf *Et Ve Balik Kurumu v BNS International Sales Corpn* (1960), ILR, 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 Badtts*, AD, 1 (1919–22), No 85; *Republic of China v Pang Tsu Mow* (1950) 105 F Suppl 411; *National City Bank v Republic of China* (1955), 348 US 356; *First National City Bank v Banco para el Comercio Exterior de Cuba* (1983), 103 S Ct 2591, ILM, 22 (1983), p 840; *Ministry of Supply, Cairo v Universe Tankships Inc*, AJ, 78 (1984), p 232; *Islamic Republic of Iran v Boeing Co*, AJ, 80 (1986), p 347. By instituting proceedings before one tribunal a state does not on the analogy of a counter-claim lay itself open to proceedings arising out of the same circumstances before another tribunal: see *Dessaulles v Republic of Poland*, AD, 12 (1943–45), No 24; *Mehr v Republic of China*, AJ, 50 (1956), p 964; *Republic of Iraq v First National City Trust Co* (1963), ILR, 34, p 81.

[45] See eg *National City Bank v Republic of China*, ILR, 22 (1955), p 210, in which the US Supreme Court allowed a counter-claim arising out of circumstances largely separate from those raised by the foreign state's original institution of proceedings; for comment see Looper, AJ, 50 (1956), pp 647–53, and in ICLQ, 5 (1956), pp 276–82; see also *Wacker v Bisson* (1965) ILR, 42, p 244 (waiver extends to separate action to seek review of extradition proceedings initiated by the foreign state); *Banco Nacional de Cuba v First National City Bank of New York*, ILM, 12 (1973), p 636 (on which see also § 112, n 22).

The European Convention on State Immunity 1972, Art 1.2, appears to allow a counter-claim which does not arise out of the circumstances of the principal claim if it concerns a matter in respect of which, under the Convention, the foreign state would not have been entitled to immunity if sued in separate proceedings.

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[1] 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,[2] 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] In

[46] See eg, as to the UK, State Immunity Act 1978, s 2(6).

[1] It has also been held that jurisdictional immunity does not prevent statutes of limitation from running against foreign states: *Guaranty Trust Company of New York v United States* (1938) 304 US 126; AJ, 32 (1938), p 848; AD (1938–40), No 69. See also *Federal Motorship Corpn v Johnson and Higgins* (1948) 77 NYS (2d) 52; AD (1948), No 39.

It has sometimes been asserted that a foreign state does not enjoy immunity in respect of acts in clear violation of international law. In relation to property taken in violation of international law, and subsequently in the USA in connection with the state's commercial activities, the lack of immunity is 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 1277; *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 Comermex*, 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 an alien for a tort only, committed in violation of the law of nations or a treaty of the United States', 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 Corpn* (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 93.

[2] See § 109, n 28.

[3] See the European Convention on State Immunity 1972, Art 9; Art 14.1 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property (YBILC (1986), ii, pt 2, p 8); and, for the UK, the State Immunity Act 1978, s 6(1). Note also the remarks of Lord Simon in delivering the advice of the Judicial Committee of the Privy Council in *Sultan of Johore v Abubakar* [1952] AC 318, 342–4. See also *Foreign State (Legation Buildings) Immunities Case*, AD, 4 (1927–28), No 113; *Limbin Hteik Tin Lat v Union of Burma* (1954), ILR, 32, p 124. For a survey of earlier cases see Fairman, AJ, 22 (1928), pp 567–8. See also the two judgments of the Supreme Court of Czechoslovakia of April 1928 and December 1929, as reported in AD, 4 (1927–28), Nos 111 and 251. See, as to the first, Deák, AJ, 23 (1929), pp 582–94, and Bosco, *Rivista*, 21 (1929), p 48. See also *Halig Ltd v Polish State*, for a refusal to entertain an action brought by a landlord against the

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.[4] 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.[5] Special arrangements have also been made by treaty for withholding, as between the contracting parties, jurisdictional immunity from state-owned ships engaged in commerce.[6] As regards proceedings against foreign states arising out of their tortious acts, a degree of local jurisdiction is often asserted.[7]

More far-reaching, however, has been the distinction drawn by an increasing number of states between the acts of a state in its sovereign capacity (*acta jure imperii*) and those of a private law or commercial character (*acta jure gestionis*), immunity not being granted for the latter.[8] The adoption of this restrictive attitude to state immunity has been encouraged by the circumstance that the vast expansion of activities of the modern state in the economic sphere has tended to render unworkable a rule which granted to the state operating as a trader a privileged position as compared with private traders. Most states have now abandoned or are in the process of abandoning the rule of absolute immunity, and now accept that, for what are usually described as acts of a private law or commercial nature, a foreign state may be subject to the jurisdiction of the courts: immunity from suit being restricted to proceedings relating to its acts *jure imperii*. The United States of America adopted the restrictive approach to state immunity in 1952.[9] The rule of absolute immunity survived, but subject to

Polish State because of the exhibition of the insignia of Poland: AD, 4 (1927–28), No 104. See *Riccio v Little* concerning the British cemetery in Naples owned by the British Government: it was held that Italian courts had no jurisdiction to entertain an action brought against the persons administering the cemetery on behalf of the British authorities: AD, 7 (1933–34), No 68. See also *Rossignol 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 *Mahe 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 Corpn*, ILR, 26 (1958–II), 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 (Germany) Case* (1962), ILR, 38, p 162; and in proceedings in respect of state-owned premises which were, but had permanently ceased to be, diplomatic premises, see *Tietz v People's Republic of Bulgaria* (1959), ILR, 28, p 369; *Weinmann v Republic of Latvia* (1959), *ibid*, p 385; *Westminster City Council v Government of the Islamic Republic of Iran* [1986] 1 WLR 979; and see § 494, nn 7, 33 and 34.

4 See § 109, n 29.

5 But note that in *Victory Transport Inc v Comisaria General de Abastecimientos y Transportes* (1964), ILR, 35, p 110, public loans were included in the list of acts considered to be acts *iure imperii*. But cf *Carl Marks & Co v Union of Soviet Socialist Republics*, AJ, 82 (1988), p 129. Public loans are not as such a matter in respect of which courts have jurisdiction by virtue of the European Convention on State Immunity 1972. The cancellation of bonds by a state has been held to be an act *iure imperii*: *Brasseur v Republic of Greece*, AD, 6 (1931–32), No 85.

The House of Lords has held that a British Government loan contracted in the USA was, in the circumstances of the case, governed by subsequent US legislation. It declined to accede to the view, approved by the Court of Appeal, that, as states are sovereign, loans contracted by them abroad must invariably be governed by their own law: *R v International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] AC 500; AD, 8 (1935–37), No 6. This decision is not wholly inconsistent with the judgment of the PCIJ in the *Serbian and Brazilian Loans Cases*, PCIJ Series A, Nos 20, 21; AD, 5 (1929–30), No 278. The decisions of the Supreme Courts of Sweden and Norway, given in 1937, equally denied that such governmental contracts were immune from the legislation of the state where the contract was made. See AD, 8 (1935–37), Nos 7 and 8 respectively. These, and similar, cases arose in connection with the Joint Resolution of the US Congress which declared any provision requiring payment in gold or in a particular kind of coin or currency to be contrary to public policy. See Plesch, *The Gold Clause* (1936); Domke, *Clunet*, 63 (1936), pp 547ff; Bagge, *RI*, 64 (1937), pp 791, 816; Jèze, Hag R, 7 (1925), p 174. See also on the law governing state contracts Mann, BY, 21 (1944), pp 11–33, and in BY, 35 (1959), pp 34–57; Lalive, ICLQ, 13 (1964), pp 987–1021; Ramazani, ICLQ, 11 (1962), pp 503–18; Jennings, BY, 37 (1961), pp 156–82. See also § 12, n 12. See also Nussbaum, *Money in the Law* (2nd ed, 1950), pp 414–45, and Mann, *The Legal Aspects of Money* (4th ed, 1982), pp 140–56, for an examination of the international aspects of gold clauses.

6 See § 565. The European Convention on State Immunity 1972 does not apply to proceedings in respect of the operation of seagoing vessels owned or operated by a state: Art 30. For the UK s 10 of the State Immunity Act 1978 allows an action *in rem* against a ship belonging to a foreign state, or an action *in personam* for enforcing a claim in connection with such a ship, if at the time the cause of action arose the ship was in use or intended for use for commercial purposes.

On the other hand, the ILC's draft Articles on Jurisdictional Immunities of States and their Property (YBILC (1986), ii, pt 2, p 8), do contain provisions governing this matter, in effect excluding immunity 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.

7 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 *Liu v Republic of China*, ILM, 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.

8 See in particular Fox, AJ, 35 (1941), pp 632–40; Fensterwald, Harv Law Rev, 63 (1950), pp 614–42; Fawcett, BY, 25 (1948), pp 34–51; Sucharitkul, *State Immunities and Trading Activities in International Law* (1959); Dunbar, Hag R, 132 (1971), i, pp 205–29; Crawford, BY, 54 (1983), pp 75–118; Fox in *International Economic Law and Developing States* (ed Fox, 1988), pp 63–78. See also the survey of the position in various countries by H Lauterpacht, BY, 28 (1951), pp 250–72. The 'Tate letter' (n 9) refers to the practice of 28 states. See also the literature referred to at § 109, nn 2 and 20, much of which treats of this distinction. The abandonment of immunity in respect of acts of a non-public nature was advocated by the International Law Association in 1952 (see ILA *Report of the 45th Conference* (1952), pp 210–32), again in 1982 (ILA *Report of the 60th Conference* (1982), pp 5–10, 325ff.) and by the Institut de Droit International in 1954 (see *Annuaire*, 45, ii (1954), pp 200–27). As to the relationship between acts of a commercial character (and the absence of immunity in respect of them) and the needs of states to secure their economic development, see Delaume, AJ, 79 (1985), pp 319–46.

9 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 Whiteman, *Digest*, 6, pp 569–71. See Bishop in AJ, 47 (1953), pp 93–106, and Drachster, AJ, 54 (1960), pp 790–800. 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 immunity when engaged in an essentially commercial activity: *Victory Transport Inc v Comisaria General de Abastecimientos y Transportes* (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 states[12] 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.

For application of s 1605(a)(2), as to the nature of commercial activity, see eg *National American Corpn v Federal Republic of Nigeria*, ILM, 17 (1978), p 140, and *Texas Trading & Milling Corpn v Federal Republic of Nigeria*, ILM, 20 (1981), p 620 (purchase of cement, even if for purposes connected with the armed forces, not subject to immunity); *International Association of Machinists and Aerospace Workers v OPEC* (1979) 477 F Supp 553 (noted by Crocker, ICLQ, 29 (1980), pp 508–10), AJ, 76 (1982), p 160 (price-fixing by states as part of their economic policies a commercial activity); *American International Group Inc v Islamic Republic of Iran*, AJ, 75 (1981), p 371 (state insurance monopoly is engaged in commercial activity: immunity denied); *De Sanchez v Banco Central de Nicaragua*, AJ, 80 (1986), p 658 (cheque issued, and later repudiated, by Central Bank as part of its governmental function justifies immunity); *Ministry of Supply, Cairo v Universe Tankships Inc*, AJ, 78 (1984), p 232 (act abroad of foreign state, if integral part of its commercial transactions in the forum state, does not enjoy immunity); *Transamerican Steamship Corpn v Somali Democratic Republic*, AJ, 76 (1986), p 357 (state's active assistance to an agency in its commercial activities is itself a commercial activity for which it does not enjoy immunity); *Gemini Shipping Inc v Foreign Trade Organisation for Chemicals and Foodstuffs*, ILM, 20 (1981), p 650 (guarantees by state agencies, which are 'part and parcel' of purchase by them of rice, are a commercial activity); *Velidor v L/P/G Benghazi*, ILM, 21 (1982), p 621 (claim for wages by seamen on vessel, owned by foreign state agency, calling at US ports in pursuit of commercial activity does not attract immunity); *Callejo v Bancomer SA*, ILM, 24 (1985), p 1050 (commercial banking services not entitled to immunity); *West v Multibanco Comermex*, AJ, 81 (1987), p 660 (dealings in certificates of deposit are a commercial activity); *Practical Concepts Inc v Republic of Bolivia*, AJ, 81 (1987), p 952 (commercial nature of contract determined by its central, not its auxiliary, provisions); *Carl Marks & Co v Union of Soviet Socialist Republics*, AJ, 82 (1988), p 129 (issuance of bonds by a government constitutes a commercial activity, but also holding that the Act did not operate retroactively so as to allow proceedings in respect of a commercial activity undertaken when the rule of absolute immunity prevailed). See also *Colonial Bank v Compagnie Générale Maritime et Financière*, AJ, 81 (1987), p 422. See also literature cited at § 109, n 11. As to the assertion of 'long arm' jurisdiction in this provision, concerning acts abroad having a 'direct effect' in the USA, see § 139, n 42.

10 This was so in particular with regard to foreign public vessels engaged in commerce. In *The Cristina* [1938] AC 485 the majority of the House of Lords expressed views not favourable to immunity from jurisdiction in such cases. See also the observations, on the latter case, of Evershed MR in the *Dollfus Mieg Case* [1950] 1 Ch 333 and Lord Simon in *Sultan of Johore v Abubakar* [1952] AC 318. In delivering the Opinion of the Judicial Committee of the Privy Council in *Sultan of Johore v Abubakar* (above) Lord Simon attached importance to dispelling the view that there exists 'any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances'; similarly Lord Denning in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 415, and in *Thai-Europe Tapioca Service Ltd v Government of Pakistan* [1975] 3 All ER 961 (but the decision in that case continued the rule of absolute immunity in proceedings *in personam*). And see *Civil Air Transport Incorporated v Central Air Transport Corpn* [1952] 2 All ER 733, where an Order in Council was issued to the effect that the plea of immunity shall not constitute a bar to the jurisdiction of the court. See 'Aristeides', ILQ, 3 (1950), pp 159–177, and the comment by Johnson, BY, 29 (1952), pp 464–70. For a summary of British judicial criticisms of the rule of absolute immunity see Sinclair, ICLQ, 22 (1973), at pp 255–61. In 1975 the Privy Council adopted the restrictive view of sovereign immunity as regards

jurisdiction over foreign states in respect of their acts *jure gestionis* include Italy,[13] Belgium,[14] Austria,[15] Egypt,[16] Switzerland,[17] the Federal Republic of

proceedings *in rem* against vessel owned by a foreign state but not in its possession at the relevant times: *The Philippine Admiral* [1976] 1 All ER 78. In *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] 1 All ER 881 the Court of Appeal was prepared to apply the restrictive view of sovereign immunity to other types of proceedings. For comment on these two cases see White, ICLQ, 26 (1977), pp 674–80; Markensinis, Camb LJ, 36 (1977), pp 211–16; Higgins, AJ, 71 (1977), pp 423–37; Crawford, BY, 47 (1974–75), pp 365–9, and 48 (1976–77), pp 353–62; Johnson, Aust YBIL, 6 (1974–75), pp 1–51. See also *The Uganda Co (Holdings) Ltd v Government of Uganda* [1979] 1 Lloyd's Rep 481 (with comment by Crawford, BY, 50 (1979), pp 218–21; Higgins, AJ, 73 (1979), pp 465–70); *Planmount Ltd v Republic of Zaire* [1981] 1 All ER 1110; *I Congreso del Partido* [1983] 1 AC 244, confirming the decisions in *The Philippine Admiral* and *Trendtex Trading Corpn v Central Bank of Nigeria* (above) as to the position at common law; although decided by the House of Lords after the entry into force of the State Immunity Act 1978, the case involved proceedings begun, and thus the position at common law, prior to the Act (for comment see Crawford, BY, 52 (1981), pp 314–19; Fox, LQR, 98 (1982), pp 94–108; Mann, ICLQ, 31 (1982), pp 573–5).

11 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 1978, in accordance with s 23(5). It does not apply to proceedings in respect of matters occurring before that date: s 23(3).

The Act, in ss 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, trade marks, etc; membership of bodies corporate, etc; arbitrations; ships used for commercial purposes; and value added tax, customs duties, etc. The basic 'commercial activity' exception 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 wholly or partly in the United Kingdom.' The term 'commercial transaction' is 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 role in managing the international tin market) did not have to be 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 *Maclaime Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523. See also § 7, n 21.

12 For summaries of the position in a number of states, see Neth YBIL, 10 (1979), pp 35–289; Sinclair, Hag R, 167 (1980), ii, pp 121–34, 146–96; UN Legislative Series, *Materials on Jurisdictional Immunities of States and the Property* (ST/LEG/SERIES B/20) (1982); Lewis, *State and Diplomatic Immunities* (2nd ed, 1985), pp 138–56. See also n 8. The Commission of the European Communities has subscribed to the restrictive rule of immunity: *Re Aluminium Imports from Eastern Europe* [1987] 3 CMLR 813, 875–6.

13 Italian courts have for long refused to grant immunity to foreign states in respect of their acts *iure gestionis*, and there have been many decisions to that effect, amongst which see *Storelli v French Republic*, AD, 2 (1923–24), No 66; *Perrucchetti v Puig y Cassaro*, AD, 4 (1927–28), No 247; *De Semenoff v Railway Administration of the Norwegian State*, AD, 8 (1935–37), No 92; *Government of Bolivia v Italian Association for Aeronautical Exports*, AD, 15 (1948), No 41; *La Mercantile v Kingdom of Greece*, ILR, 22 (1955), p 240; *Hungarian People's Republic v Onori*, ILR, 23 (1956), p 203; *Hungarian Papal Institute v Hungarian Institute (Academy) in Rome* (1960), ILR, 40, p 59.

14 As in Italy, Belgian courts have for a long time drawn a distinction between acts *iure imperii* and those *iure gestionis*, denying immunity in respect of the latter. Among the many decisions to that effect see *Soc Monnoyer et Bernard v France*, AD, 4 (1927–28), No 112; *Brasseur v Republic of Greece*, AD, 6 (1931–32), No 85; *SA 'Dhlellemes et Masurel' v Banque Centrale de la République de Turquie* (1963), ILR, 45, p 85.

Germany,[18] France,[19] the Netherlands,[20] Canada,[21] Australia[22] and Pakistan.[23] A few countries, however, seem still to apply the rule of absolute immunity.[24]

The general abandonment of the rule of absolute immunity was reflected in the European Convention on State Immunity 1972.[25] That Convention provides, in Article 15, that a foreign state enjoys immunity from local courts in all circumstances except those specified in other provisions of the Convention. Those circumstances include most of those which would be regarded as acts *jure gestionis*, as well as certain others, such as waiver of immunity, which are

15 See generally Suy, ZöV, 27 (1967), pp 660–92. See also *Collision with Foreign Government-owned Motor Car (Austria) Case* (1960), ILR, 40, p 73 (with comment by Abel, ICLQ, 11 (1962), pp 840–3); *Dralle v Czechoslovakia*, ILR, 17 (1950), No 41 (with comment by Abel, AJ, 45 (1951), pp 354–7).

16 See Brinton, *The Mixed Courts of Egypt* (revised ed, 1968), ch 12 (as to the position in the Mixed Courts); *Borg v Caisse Nationale d'Epargne Française*, AD, 2 (1925–26), No 122; *Monopole des Tabacs de Turquie v Régie Co-Intéressée des Tabacs de Turquie*, AD, 5 (1929–30), No 79; *Egypt Delta Rice Mills Co v Comisaria General de Abastecimientos y Transportes de Madrid*, AD, 12 (1943–45), No 27; *Federated People's Republic of Yugoslavia v Kafr El-Zayat Cotton Co*, ILR, 18 (1951), No 54.

17 Eg *State Immunity (Switzerland) (No 2) Case*, AD, 10 (1941–42), No 62; *UAR v Dame X*, AJ, 55 (1961), p 167; *Arab Republic of Egypt v Cinetelevision International Registered Trust* (1965), ILR, 65, p 425.

18 Eg *Re Danish State Railways in Germany*, ILR, 20 (1953), p 178; decisions of the Federal Constitutional Court, 1962–63, referred to in AJ, 59 (1965), p 653, including *Claim Against the Empire of Iran Case* (1963), ILR, 45, p 57 (and see Mann, MLR, 27 (1964), pp 81–3); *Nonresident Petitioner v Central Bank of Nigeria*, ILM, 16 (1977), p 501; and the circular issued by the Ministry of Foreign Affairs in 1973, ILM, 13 (1974), p 217. See also Schaumann and Habscheid, *Die Immunität ausländischer Staaten nach Völkerrecht und deutschen Zivilprozessrecht* (1968); Domke, AJ, 48 (1954), pp 302–4. As to earlier position in Germany see Liszt, § 13(iv), and Krückmann in *Zeitschrift für Ostrecht*, i (1927), pp 161–92. See also *The Visurgis* and *The Siena*, AD, 9 (1938–40), No 94.

19 Eg *Etat Roumain v Pascalet*, AD, 2 (1923–24), p 132; *Soc Immobilière des Cités Fleuries Lafayette v United States of America* (1960), ILR, 42, p 123; *Soc Bauer-Marchal et Cie v Gouvernement Turc* (1965), ILR, 47, p 155; *Administrations des Chemins de Fer Iraniens v Soc Levant Express Transport*, RG, 73 (1969), p 883.

20 Eg *De Froe v The Russian State*, AD 6 (1931–32), No 87; *Krol v Bank Indonesia*, ILR, 26 (1958–II), p 180; *Soc Européennes d'Etudes et d'Entreprises v Yugoslavia* (1973), ILM, 14 (1975), p 71, ILM, 24 (1985), pp 345, 348–9.

21 State Immunity Act 1982; ILM, 21 (1982), p 798. As to the earlier law, which applied the rule of absolute immunity, see Kos-Rabcewicz-Zubkowski, Can YBIL, 6 (1968), pp 242–51, as to decisions in courts in Quebec. In *Flota Maritima Browning de Cuba SA v SS Canadian Conqueror* (AJ, 57 (1963), p 440) the Canadian Supreme Court left the matter open, although leaning towards a restrictive approach to sovereign immunity. That Court's decision in *Le Gouvernement de la République Democratique du Congo v Venne* (1972) 22 DLR (3d) 669 is similarly inconclusive: see Castel, Can YBIL, 9 (1971), pp 159–72. But the restrictive rule was adopted in *Zodiak International Products Inc v Polish People's Republic* [1977] 81 DLR 656.

22 Foreign States Immunities Act 1985, s 11; ILM, 25 (1986), p 715.

23 See *Qureshi v USSR*, ILM, 20 (1981), p 1060; State Immunity Ordinance 1981, s 5.

24 As to the USSR, see Boguslavsky, Neth YBIL, 10 (1979), pp 167–77. While India still applies the rule of absolute immunity, the trend is towards the restrictive rule: see Agrawala in *Essays on International Law* (ed Nawaz, 1976), pp 314–36; *United Arab Republic v Mirza Ali Akbar Kashani* (1961), ILR, 64, p 394, and on appeal (1965), *ibid*, p 489; *German Democratic Republic v The Dynamic Industrial Undertaking Ltd* (1970), *ibid*, p 504; *Union of India v Chinoy Chablani and Co* (1976), *ibid*, pp 534, 537.

25 See § 109, n 8.

generally admitted to permit proceedings against a foreign state.[26] 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); 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 office, 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 forum (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); 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 submit to arbitration 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.[27] 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 3(2)), contracts of employment[28] (Article 12), personal injuries[29] and damage to

26 See § 109, n 35ff.; see also this §, n 2, as to the administration of trust property or the estate of a bankrupt, in which a foreign state has an interest.

27 YBILC (1986), ii, pt 2, p 8. See also Art III of the draft Articles for a Convention on State Immunity, adopted by the International Law Association at its 60th Conference (1982), reprinted in ILM, 22 (1983), p 287; and Art 5 of the Inter-American Draft Convention on Jurisdictional Immunity of States, adopted by the Inter-American Juridical Committee in 1983: *ibid*, p 292.

28 See eg *De Decker v USA* (1956), ILR, 23, p 209; *State Bank of India v Chicago Joint Board, Amalgamated Clothing and Textile Workers Union*, ILM, 16 (1977), p 853; *Sengupta v Republic of India* [1983] ICR 221, BY, 54 (1983), p 279.

29 The analogous provision of the US Foreign Sovereign Immunities Act 1976, excluding immunity where money damages are sought against a foreign state for personal injury or death, or damages to or loss of property, occurring in the US and caused by the tortious act of the state or its officials acting within the scope of their office or employment, has been held to exclude immunity where the foreign state is sued for damages resulting from an alleged political assassination in the US by agents of the defendant state: *Letelier v Republic of Chile*, ILM, 19 (1980), pp 409, 1418 (on which see Petri, Harv ILJ, 21 (1980), pp 793–8). See also *Gerritsen v de la Madrid*, AJ, 71 (1987),

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* is adopted, it not infrequently happens that courts (even in the same country) reach apparently inconsistent conclusions.[30] Acts which have been held to be governmental or sovereign[31] 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;[32] acts of armed forces during a coup (including torture);[33] nationalisation of foreign property;[34] the supply of tobacco for the armed forces;[35] a contract in furtherance of a national interest in the pursuit of a claim to territory;[36] establishing and operating a naval base;[37] a lease of premises for a State Tourist Office;[38] and contracts for the purchase of equipment for a state's armed forces.[39] On the other hand, acts *jure gestionis* have

p 947. The same provision was held not to exclude immunity in respect of damage occurring in a foreign state's territorial waters: *Perez v The Bahamas*, AJ, 76 (1982), p 173.

30 Purchase of goods to be resold to nationals was held by one French court to be an act *jure gestionis* (*Roumania (State of) v Pascalet*, AD, 2 (1923–24), No 68), by another to be an act *jure imperii* (*Lakhowsky v Swiss Federal Government*, AD, 1 (1919–22), No 83).

Compare *Kingdom of Roumania v Guaranty Trust Co of New York* (2nd) 250 Fed 341, 343, where the court held that the purchase of shoes for the army constitutes the exercise of the 'highest sovereign function of protecting itself against the enemies'. An Italian court considered a similar transaction to be an act of a private law nature and, as such, outside the principle of jurisdictional immunity (*Governo Rumeno v Trutta, Giurisprudenza Italiana* (1926) (1), p 774).

31 There is room for the view that any activity of a state – even if ostensibly of a private law nature – is performed *jure imperii* as aiming at the welfare of the state. See eg, for this line of reasoning the decision of the Court of Appeal of Bordeaux in *Robine v British Consul* where the Court declined jurisdiction in an action relating to a lease of consular premises: ILR, 17 (1950), No 38. In *Victory Transport Inc v Comisaria General de Abastecimientos y Transportes* (1964), ILR, 35, p 110, a US Court of Appeals adopted the view that acts *iure imperii* were limited to internal administrative acts, such as expulsion of aliens; legislative acts, such as nationalisation; acts concerning the armed forces; acts concerning diplomatic activity; and public loans.

32 *Martin v Bank of Spain*, ILR, 19 (1952), No 42.

33 *Siderman v Republic of Argentina*, AJ, 79 (1985), p 1065 (and comment by Diterich, Harv ILJ, 26 (1985), pp 594–600).

34 *Alberti v Empresa Nicaraguense de la Carne*, ILM, 22 (1983), p 835.

35 *Guggenheim v Etat de Vietnam*, AJ, 56 (1962), p 1112; cf cases at n 30, as to purchase of shoes for the army.

36 *Heaney v Government of Spain and Gomero*, AJ, 66 (1972), p 189.

37 *Francischiello v Government of the USA* (1959), ILR, 28, p 158.

38 *Etat Espagnol v SA de l'Hotel George V*, RG, 77 (1972), p 592.

39 *Aerotrade Inc v Republic of Haiti*, ILM, 13 (1974), p 969; the court considered it 'largely irrelevant' how the equipment might be used after delivery.

been held to include leasing property to be used for diplomatic purposes;[40] operating a hostel for students at a state-owned academy;[41] and entering into a contract for the repair of embassy premises,[42] or for the construction of a railway,[43] or for the purchase of cement even if for the use of armed forces.[44]

§ 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 action by its executive authorities affecting the property in its territory in foreign states.

Usually state property in another state will be diplomatic[1] or consular[2] property, or the property of visiting armed forces,[3] or the property of state agencies covered by special agreements.[4] 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,[5] or bank accounts in the state's name and used for purposes ranging from commercial investment to reserves for the state's currency.[6] 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

40 *Nashashibi v Consul General of France in Jerusalem*, ILR, 26 (1958–II), p 190; *UAR v Dame X*, AJ, 55 (1961), p 167; cf *Robine v British Consul*, ILR, 17 (1950), No 38. See also *Intpro Properties (UK) Ltd v Sauvel* [1983] QB 1019 (no immunity in respect of property leased as the private residence of a diplomatic agent). See also *Sengupta v Republic of India* [1983] ICR 221, BY, 54 (1983), p 279 (contract of employment at a foreign diplomatic mission).

41 *Hungarian People's Republic v Onori*, ILR, 23 (1956), p 203.

42 *Claim against the Empire of Iran* (1963), ILR, 45, p 57 (and see Mann, MLR, 27 (1964), pp 81–3); *Planmount Ltd v Republic of Zaire* [1981] 1 All ER 1110.

43 *Société Européenne d'Etudes et d'Entreprises v Yugoslavia* (1973), ILM, 14 (1975), p 71.

44 *National American Corpn v Federal Republic of Nigeria and Central Bank of Nigeria*, ILM, 16 (1977), p 505 (it being held irrelevant in the circumstances that the contract had been signed by the Minister of Defence) ILM, 17 (1978), p 1407; see also *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] 1 All ER 881; *Non-resident Petitioner v Central Bank of Nigeria*, ILM, 16 (1977), p 501.

1 See §§ 494, 497.

2 See § 550.

3 See §§ 556–64. See above § 298, as to wrecks of state ships on the seabed.

4 See § 568.

5 See eg as to the former Iranian Embassy premises in London, *Westminster City Council v Government of the Islamic Republic of Iran* [1986] 1 WLR 979. In 1988 the UK Government took possession of the former Cambodian Embassy premises in London: see the Diplomatic and Consular Premises (Cambodia) Order 1988 (SI 1988 No 30), made under the Diplomatic and Consular Premises (Protection) Act 1987. For an unsuccessful attempt to seek judicial review of that Order, see *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Samuel* (1989), ILR, 83, p 232. See also § 494, n 7.

6 See § 109, n 30.

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.[7] In 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 kinds mentioned above would either require the institution of judicial proceedings, or would offer the foreign state the possibility of resisting the action contemplated by having recourse to the courts. This would raise considerations of sovereign immunity generally and of limitations on execution upon state property,[8] 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 impropriety 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(5), 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 Corpn* [1990] 1 All ER 173, 189–90.

In *Municipality of the City and County of St John, Logan and Clayton v Fraser-Brace Overseas Corpn* property held by a Canadian firm on behalf of the US Government for defence purposes was held immune from taxation: ILR, 26 (1958–II), p 165. See also *Yin-Tso Hsiung v Toronto*, ILR, 17 (1950), No 40, and §§ 505 and 550(5), as to taxation of diplomatic and consular property. Compare *Gobierno de Italia en Suc 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, p 652. See generally Bishop, AJ, 46 (1952), pp 239–58, esp 247–54; Paone, Ital YBIL, 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 does not permit immunity to be invoked 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,[9] or even if they are engaged in a lesser degree of armed conflict or hostilities.[10] 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,[11] 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.[12]

§ 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[1] or the official or officially avowed acts of its agents,[2] at any rate

[9] See vol II of this work (7th ed).

[10] As to action taken by Argentina in relation to British property, including Crown property, at the time of the hostilities between the UK and Argentina over the Falkland Islands in 1982, see Williams and Gooding, Neth IL Rev, 35 (1988), pp 73–9. See also, for economic measures taken against Argentina, UKMIL, BY, 53 (1982), pp 508–16; Acevedo, AJ, 78 (1984), pp 323–44; David, *Rev Belge*, 18 (1984–85), pp 150–65.

[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. The Order had the effect of denying Iran the benefit of immunity from pre-judgment attachment which it would otherwise have enjoyed: see *New England Merchants National Bank v Iran Power and Generating Co*, ILM, 19 (1980), at p 1312ff. See also the Statements of Interest submitted on behalf of the US, following the US-Iran agreement of 1981, in cases where Iranian assets had been attached: ILM, 20 (1981), pp 171, 363. For a series of Executive Orders covering Iranian assets pursuant to the settlement, see *ibid* pp 282, 286, 412, 414; and *Electronic Data Systems Corpn Iran v Social Security Organisation of the Government of Iran*, *ibid*, p 344, questioning their constitutional validity in relation to the consequences of judgments already delivered affecting Iranian assets. See also *Dames and Moore v Regan* (1981) 453 US 654; *Persinger v Iran*, ILM, 22 (1983), p 404, and ILM, 23 (1984), p 384. See also § 129, n 14, para 5. For similar measures taken by the UK see Iran (Temporary Powers) Act 1980, and UKMIL, BY, 51 (1980), pp 412–14.

Similarly the USA imposed restraints on Libyan property in 1986: see § 129, n 15, para 3.

[12] See generally as to measures of economic coercion against other states, § 129, nn 13, 14.

[1] Assuming that the state and its government have been recognised by the state of the forum: see § 47, nn 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), ILR, 61, p 35) as may a protected state (*Occidental Petroleum Corpn v Buttes Gas & Oil Co* (1972), ILR, 57, pp 13, 31; *Buttes Gas & Oil Co v Hammer* [1981] 3 WLR 787); but not a city council (*Re Adoption by McElroy* (1975), ILR, 66, p 163).

See, as to the rule generally, *The Exchange v McFaddon* (1812) 7 Cranch 116, Scott, *Cases*, 300; *Underhill v Hernandez* (1897) 168 US 250, 18 Sup Ct 83; *Wulfsohn v Russian Socialist Republic* (1923) 234 NY 372, 138 NE 24; *A M Luther Co v Sagor & Co* [1921] 3 KB 532; *Russian Commercial and Industrial Bank v Comptoir d'Escompte* [1923] 2 KB 630, and *Banque Internationale v Goukassow*, *ibid*, p 682 (both reversed, but without affecting the principle stated in the text, [1925] AC 112 and 150); *Re Helbert Wagg & Co* [1956] Ch 323; *Bank Indonesia v Senembah Maatschappij and Twentsche Bank* (1959), ILR, 30, p 28; *Pons v Republic of Cuba* (1961), ILR, 32, p 10; *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398; ILR, 35, p 2; *Époux Reynolds v Ministre des Affaires Etrangères* (1965), ILR, 47, p 53; *French v Banco*

insofar as those acts involve the exercise of the state's public authority,[3] purport to take effect within the sphere of the latter's own jurisdiction[4] and are not in themselves contrary to international law.[5] 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 the government of another done within its own territory. Redress of grievances by

Nacional de Cuba (1968), ILR, 66, p 6; *First National City Bank v Banco Nacional de Cuba* (1972), ILR, 66, p 102; *Hunt v Mobil Oil Corpn* (1977), ILR, 66, p 288, review denied, ILM, 16 (1977), p 1376; *W S Kirkpatrick & Co Inc v Environmental Tectonics Corpn International*, ILM, 29 (1990), p 182.

See generally on the act of state doctrine, Mann, LQR, 59 (1943), pp 42–57 and 155–71 (reprinted in *Studies in International Law* (1973), pp 420–65); Hag R, 132 (1971), i, pp 107, 145–56; and *Foreign Affairs in English Courts* (1986), pp 164–90; Zander, AJ, 53 (1959), pp 826–52; Hyde, *ibid*, pp 635–8; Reeves, AJ, 54 (1960), pp 141–56; Falk in *Essays on International Jurisdiction* (1961); *The Role of Domestic Courts in the International Legal Order* (1964), pp 139–45; and *Status of Law in International Society* (1970), pp 426–42; van Panhuys, ICLQ, 13 (1964), pp 1193–213; Spiro, ICLQ, 16 (1967), pp 145–56; Dicey and Morris, Rule 87; Jacobs, King and Rodriguez, Harv ILJ, 18 (1977), pp 677–97; Meal and Trachtman, *ibid*, 20 (1979), pp 583, 627–54; Ebenroth and Teitz, *Banking on the Act of State* (1985); *Restatement (Third)*, i, pp 366–89; Kirgis, AJ, 82 (1988), pp 58–61; and much of the literature cited below, n 21, in connection with the *First National City Bank* case, and § 113, n 9, in connection with the *Sabbatino* case.

See also § 378, as to the grant of a state's nationality; and § 380, as to the creation and dissolution of companies.

2 Where the act which it is sought to put in question is raised in proceedings against a foreign state's officials, or against the foreign state itself, the issue will fall to be considered in the light of the applicable rules of sovereign immunity: see §§ 109–10; and Akehurst, BY, 46 (1972–73), 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.

3 See *Alfred Dunhill of London Inc v Republic of Cuba* (1976), ILR, 66, p 212, denying the applicability of the rule to an act committed by a foreign state in the course of its commercial operations; *National American Corpn v Federal Republic of Nigeria*, ILM, 17 (1978), p 1407; *Timberlane Lumber Co v Bank of America* (1976), ILR, 66, p 270. But cf *Van Bokkelen and Rohr SA v Grumman Aerospace Corpn* (1977), ILR, 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 Jiminez v Aristeguieta* (1962), ILR, 33, p 353. In such cases the burden of proof is on the Head of 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)* (1986), ILR, 81, p 581, decided by the US Court of Appeals for the Second Circuit. But cf the 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 ILJ 29 (1988), pp 127–34.

4 Thus foreign legislation may be questioned in so far as it is alleged to affect property or interests outside the foreign state's territory: see eg *United Bank Ltd v Cosmic International Inc* (1976), ILR, 66, p 246; *Allied Bank International v Banco Credito Agricola de Cartago*, ILM, 24 (1985), p 762; *Airline Pilots Association International v TACA International Airlines*, AJ, 79 (1985), p 737; *Letelier v Republic of Chile*, ILM, 19 (1980), pp 409, 1418. As to the non-recognition of the effects of confiscatory laws on property outside the state enacting such laws, see § 144.

In many cases acceptance by the courts of one state of the consequences of the application of a foreign state's laws to property or rights located within its territory will follow from the rules of private international law applied by those courts, without reference to – but in implicit reliance on – the principle stated in the text.

5 See § 113.

> reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'[6]

The principle applies where the foreign state is itself a party to the proceedings or where its actions are challenged in proceedings to which it is not a party. The principle has since been developed so as (following the evolution of the law relating to sovereign immunity) to be held inapplicable to an act of a foreign state in the course of its commercial activities,[7] and, on the other hand, to cover not only direct questioning of the legality of a foreign state's acts but also proceedings which would require the court to determine the sovereign rights of other states or otherwise enter upon areas of international political sensitivity for which municipal courts are ill-equipped.[8]

This is not to say that a foreign state's official acts, usually legislative,[9] are

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 3.

8 *Hunt v Mobil Oil Corpn* (1977), ILR, 66, p 288 (motives for nationalisation); *Occidental of Umm al Qaywayn v A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis* (1978), ILR, 66, p 329 (title to oil dependent on sovereignty over disputed areas); *Clayco Petroleum Corpn v Occidental Petroleum Corpn*, AJ, 78 (1984), p 445 (claims necessitating scrutiny of sovereign decisions allocating oil concessions); *Saltany v Reagan* (1988), ILR, 80, p 19 (foreign state's grant of permission for the use of its territory by armed forces). But if the proceedings, while touching on a foreign state's acts, do not necessitate direct judicial inquiry into acts of a foreign state, the proceedings are not barred: *Reavis v Exxon Corpn* (1977), ILR, 66, p 317; *Industrial Investment Development Corpn v Mitsui & Co Ltd* (1979), *ibid*, p 386; *Northrop Corpn v McDonnell Douglas Corpn*, AJ, 77 (1983), p 882; *Garcia v Chase Manhattan Bank*, AJ, 79 (1985), p 454; *Associated Containers Transportation (Australia) Ltd v USA*, ILM, 22 (1983), p 824; *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* [1983] 2 Lloyd's Rep 171; ILR, 64, p 368. In *W S Kirkpatrick & Co Inc v Environmental Tectonics Corpn International*, ILM, 29 (1990), p 182, the US Supreme Court emphasised the need 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 Amalgamet Inc*, AJ, 82 (1988), p 837.

9 Eg bank refusal to exchange currency because of local law (*French v Banco Nacional de Cuba* (1968), ILR, 66, p 6); government order prohibiting oil sales (*Interamerican Refining Corpn v Texaco Maracaibo Inc* (1970), ILR, 56, p 30); grant and withholding of visas (*South African Airways v New York State Division of Human Rights* (1970), ILR, 56, p 25); vesting of stock under trading with the enemy legislation (*Oliner v Canadian Pacific Railway Co* (1970), ILR, 56, p 222); nationalisation of property (*Libyan American Oil Co v Socialist People's Libyan Arab Jamahirya* (1980), ILR, 62, p 220; *Empresa Cubana Exportadora Inc v Lamborn & Co*, AJ, 76 (1982), p 162; *Spa Imprese Marittime Frasinetti v Repubblica Araba di Libia*, AJ, 77 (1983), p 163); military procurement decisions (*Northrop Corpn v McDonnell Douglas Corpn*, AJ, 77 (1983), p 882); actions determining the extent of a state's territorial rights (*Buttes Oil & Gas Co v Hammer* [1981] 3 WLR 787; *Occidental Petroleum Corpn v Buttes Gas and Oil Co*, AJ, 65 (1971), p 815); promulgation of exchange controls (*Braka v Bancomer*, ILM, 24 (1985), p 1047; *Callejo v Bancomer*, *ibid*, p 1050); operation by foreign officials of their state's banking regulations (*West v Multibanco Comermex*, AJ, 81 (1987), p 660); grant of extradition by another state to the forum state (*van Den Branden* (1969), ILR, 69, p 223; *Glaser v Procurator-General of the Canton of Berne* (1964), ILR, 72, p 597; *In the Trial of F E Steiner* (1971), ILR, 74, p 478; *Ministère Public v Desmedt and Boon* (1974), ILR, 77, p 394; *'Baader–Meinhof' Group Terrorist Case* (1977), ILR, 74, p 493). Failure to act may involve an act of state: *D'Angelo v Petroleos*

never from any point of view subject to examination. This often happens, for example,[10] in order to determine whether a law is confiscatory, or a penal or revenue law, and thus to be denied extra-territorial operation[11] 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.[12] Nevertheless, generally, and subject to limits which may vary from one state to another, the lawfulness[13] 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 known differently in other states.[14] In particular, English law uses that term in a somewhat different sense;[15] nevertheless, substantively the same general rule of

Mexicanos (1976), ILR, 66, p 257; *Associacion de Reclamantes v United Mexican States*, ILM, 22 (1983), pp 625, 643.

Issuance of a patent (*Mannington Mills Inc v Congoleum Corpn* (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 Corpn v Business Systems Inc*, AJ, 82 (1988), p 587.

10 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 Effects of War* (4th ed, 1966), pp 438–40; Lipstein, BY, 42 (1967), pp 265–70; *Shapleigh v Mier* (1937) 299 US 468, AD, 8 (1935–37), No 14 and note thereto); *Princess Paley Olga v Weisz* [1929] 1 KB 718; *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 *Buck v Attorney-General* [1965] Ch 745, 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 otherwise properly before the court. In *Filartiga v Pena-Irala* a finding that a foreign official's acts were in violation of his state's constitution and laws was decisive in rejecting the relevance of the act of state doctrine to those acts: AJ, 75 (1981), p 149.

11 As to the extra-territorial application of such laws see below, § 144.

12 See § 113.

13 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 Petroleos Mexicanos* (1976), ILR, 66, p 257.

14 See eg *Iranian Mixed Marriage Case* (1967), ILR, 57, p 10 (Federal Republic of Germany); and note the recognition of the doctrine by Mahmassani, sole arbitrator, in *Libyan American Oil Co v Government of the Libyan Arab Republic* (1977), ILR, 62, pp 140, 199.

15 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 *Buron v Denman* (1848) 2 Ex 167; *Walker v Baird* [1892] AC 491; *Salaman v Secretary of State for India* [1906] 1 KB 613; *Johnstone v Pedlar* [1921] 2 AC 262; *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB, at pp 290,

judicial restraint is applied by English courts[16] 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.[17] Considerations of public policy have often prevented a full recognition of the validity of foreign legislation.[18] There is probably no international judicial authority in support of the proposition that recognition of foreign official acts is affirmatively prescribed by international law.[19] The United States

297; *Nissan v Attorney-General* [1970] AC 179. For a decision of the High Court, Pakistan, using 'act of state' in this sense, see *Carl Zeiss Stiftung of Heidenheim v Carl Zeiss Stiftung of Jena* (1967), ILR, 71, pp 4, 33. Similarly an act by the Crown in exercise of the royal prerogative in the annexation of foreign territory is an 'act of state' and not within the jurisdiction and control of the English courts, even in proceedings brought by a British subject: *Secretary of State for India v Kamachee Boye Sahaba*, 13 Moo PC 22; *Doss v Secretary of State for India* (1875) LR 19 Eq 509; *Cook v Sprigg* [1899] AC 572; *Sobhuza II v Miller* [1926] AC 518. See generally W Harrison Moore, *Act of State in English Law* (1934); Wade, BY, 15 (1934), pp 98–112; Holdsworth, Col Law Rev, 41 (1941), pp 1313–31; McNair, *Opinions* (vol 1, 1956), pp 111–17; Collier, Camb LJ (1968), pp 102–30; Gilmour, *Public Law* (1970), pp 120–52; Wade and Phillips, *Constitutional and Administrative Law* (9th ed, 1977), pp 299–303; Cane, ICLQ, 29 (1980), pp 680–700; F A Mann, *Foreign Affairs in English Courts* (1986), pp 183–90; Singer, AJ, 75 (1981), pp 282–323.

16 See the decision of the Court of Appeal in *Buck v Attorney-General* [1965] 1 Ch 745, 768, 770–71; see also *Buttes Gas and Oil Co v Hammer* [1981] 3 WLR 787, in which the House of Lords held that proceedings directly raising issues as to the sovereignty of a foreign state over territory, the extent of its territorial sea and of its continental shelf jurisdiction raised issues which were inherently non-justiciable in municipal courts. For comment see Insley and Wooldridge, ICLQ, 32 (1983), pp 62–81; Crawford, BY, 53 (1982), pp 259–68; Collier, Camb LJ, 41 (1982), pp 18–21; and on non-justiciability see Mann, *Foreign Affairs in English Courts* (1986), pp 63–83. In substantially similar proceedings in the USA the act of state doctrine was also applied so as to exclude inquiry into the foreign state acts in question: *Occidental Petroleum Corpn v Buttes Gas & Oil Co* (1972), ILR, 57, p 13. See also the Court of Appeal's decision in *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* [1983] 2 Lloyd's Rep 171; ILR, 64, p 368, and the decision of the House of Lords in *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] 1 AC 368, 431. But an English court will disregard a foreign state's laws operating within its own territory to the extent that taking cognizance of it would be inconsistent with the foreign policy of the UK, as put in evidence by a certificate from the Foreign Office: *GUR Corpn v Trust Bank of Africa Ltd* [1987] 1 QB 599.

See also *Szalatnay-Stacho v Fink* [1947] KB 1, and comment by Kuhn, AJ, 42 (1948), pp 108–11, and Kingh, *ibid*, pp 811–31; and *Fayed v Al-Tajir* [1987] 2 All ER 396, both cases concerning the possibility of inquiry by the courts into documents passing between foreign government officials. See also the judgment of the Court of Appeal in *Shearson Lehman Brothers v Maclaine Watson & Co Ltd* (1987), ILR, 77, pp 107, 132, holding that English courts could not undertake an inquiry into the question whether a foreign state or its representative had acted in breach of confidence in disseminating documents received from an international organisation.

See generally as to the position in English Law, Dicey and Morris, Rule 3(2), pp 100–1, 109–12; F A Mann, LQR, 59 (1943), pp 42–57, 155–71 (reprinted in *Studies in International Law* (1973), pp 420–65), and *Foreign Affairs in English Courts* (1986), pp 176–82; Singer, AJ, 75 (1981), pp 283–323. See also *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, and § 19, n 23ff., as to the non-justiciability in English courts of rights alleged to arise from treaties.

17 See § 1, n 10.

18 See § 113, n 6.

19 See Akehurst, BY, 46 (1972–73), pp 145, 245–50, for discussion of decisions of national courts in various States. See § 113, as to foreign legislation which is contrary to international law. In *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398; ILR, 35, p 2, the US Supreme Court found

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,[20] 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.[21] 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 inapplicable because of the act of state doctrine.[22] The Italian Court of Cassation has, however, held the non-

that the act of state doctrine was not 'compelled either by the inherent nature of sovereign authority ... or by some principle of international law'.

20 The doctrine of the immunity of foreign sovereigns is regarded as stemming from the same roots: see cases cited in the next note. As to the relationship between sovereign immunity and the act of state doctrine see van Panhuys, ICLQ, 13 (1964), pp 1193–213; Singer, AJ, 75 (1981), pp 283, 296–301; Halberstam, *AS Proceedings*, 1989, pp 487–92. See also *Alfred Dunhill of London Inc v Republic of Cuba* (1976), ILR, 66, p 212, where the US Supreme Court held that the act of state doctrine, like the rules as to sovereign immunity, did not apply 'to acts committed by foreign sovereigns in the course of their purely commercial operations'. Note also § 113, n 12, as to s 1605(a)(3) of the Foreign Sovereign Immunities Act 1976. Whereas sovereign immunity goes to the jurisdiction of the court, act of state involves questions of non-justiticiability or judicial prudence. See *International Association of Machinists and Aerospace Workers v OPEC* (1981), ILR, 66, p 413. Another US Court of Appeals, while agreeing that sovereign immunity related to the court's jurisdiction, considered act of state to relate to private international law and the limits of questioning the validity of an otherwise applicable rule of foreign law: *Empresa Cubana Exportadora Inc v Lamborn & Co* (1981), ILR, 66, p 404. See also *D'Angelo v Petroleos Mexicanos* (1974), ILR, 66, p 159.

21 *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398, ILR, 35, p 2; *First National City Bank v Banco Nacional de Cuba* (1972), ILR, 66, p 102. But mere embarrassment will not allow for the application of the act of state doctrine if the validity or legality of a foreign state's act within its territory is not in issue: *W S Kirkpatrick & Co Inc v Environmental Tectonics Corpn International*, ILM, 29 (1990), p 182.

22 *First National City Bank v Banco Nacional de Cuba* (1972), ILR, 66, p 102. For comment see Lowenfeld, AJ, 66 (1972), pp 795–814, and Laylin, *ibid*, pp 823–9; and for comment on earlier stages of the case see Delson, *ibid*, pp 82–93; Metzger, *ibid*, pp 94–101; and Note in Harv ILJ, 12 (1971), pp 557–78. For the decision of the Court of Appeals consequent upon the Supreme Court decision, see ILM, 12 (1973), p 636. The Supreme Court's decision adopted and approved the so-called 'Bernstein exception' to the act of state doctrine. This arose from the decision in *Bernstein v Van Heyghen Frères* (1947) 163 F 2d 246, AD (1947), No 5, which gave effect to oppressive legislation of the National-Socialist regime in Germany in relation to German nationals; this was followed by an announcement of the State Department in the sense that the policy of the Executive, in cases of this description, was 'to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials' (see Bishop, *International Law Cases and Materials* (1953), p 627, *Bulletin of State Dept*, 20 (1949), p 592 and Woolsey, AJ, 44 (1950), p 137); see also the later decision of the same court in *Bernstein v NV Nederlandsche-Amerikaansche Stoomvart-Maatschappij* (1954), 210 F 2d 375; *Claim of Arnold Bernstein*, AJ, 61 (1967), p 1069). See also *Claim of Herbert Brower*, AJ, 58 (1964), p 505; *Banco Nacional de Cuba v Chase Manhattan Bank* (1981), ILR, 66, p 421; *Williams v Curtiss-Wright Corpn*, AJ, 77 (1983), p 624. As to the operation of the 'Bernstein exception', in the *Sabbatino* cases, see Simmonds, ICLQ, 14 (1965), pp 463–4, 468–70, 476. It is not necessary for the Executive actually to issue a 'Bernstein letter' if there have been appropriate executive pronouncements in other similar cases: *Banco Nacional de Cuba v Chemical Bank New York Trust Co*, AJ, 79 (1985), p 458. See, in relation to foreign expropriations, the State Department's letter of 19 November 1982, to the US Solicitor General: ILM, 22 (1983), p 207. The doubts expressed as to the continued applicability of the 'Bernstein exception' in *Hunt v Coastal States Gas Producing Co* (1978), ILR, 66, p 338, would appear to be misplaced.

justiciability of acts of foreign states to be a principle of international law, forming part of the Italian legal system.[23]

§ 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,[1] 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.[2]

The matter most frequently arises in connection with the seizure of property without compensation,[3] and courts have varied in their approach and their conclusions.[4] 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,[5] or that to give

23 *Spa Imprese Marittime Frasinetti v Repubblica Araba di Libia*, AJ, 77 (1983), p 163. See to similar effect a decision of the Court of Appeal, Bordeaux, in *Lafuente v Llagunoy Duranona*, AD (1938–40), No 55.

1 See § 112.

2 See Fachiri, BY, 12 (1931), pp 95–106; Wortley, *Grotius Society*, 33 (1948), pp 31–34; Morgenstern, ILQ, 4 (1951), pp 326–44. See also Re, *Foreign Confiscations* (1951), and Mann, LQR, 59 (1949), pp 42–57, 155–71, and *ibid*, 70 (1954), pp 181–202; and BY, 48 (1976–77), pp 1, 28–65; Wortley, Hag R, 94 (1958), ii, pp 195–204; Zander, AJ, 53 (1959), pp 826–52, especially pp 839ff.; Reeves, AJ, 54 (1960), pp 141–56; Domke, *ibid*, pp 305–23; Baade, *ibid*, pp 801–35; Wortley, 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; Akehurst, BY, 46 (1972–73), pp 145, 251–7; Weil, AFDI, 23 (1977), pp 9–52; Hofmann, ZöV, 49 (1989), pp 41–58. See also the summary of the position adopted in a number of states in ILA, *Report of the 63rd Conference* (1988), pp 722–47. Note also § 54, as to circumstances in which a duty of non-recognition might arise. See also n 9, in connection with the *Sabbatino* case; § 112, n 3, as to foreign acts of state; and n 6, and § 144, as to confiscatory legislation.

3 See § 407 (as 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 Morgenstern, BY, 28 (1951), pp 291–322, and McNair and Watts, *Legal Effects of War* (4th ed, 1966), pp 366–423.

4 In relation to giving effect to a foreign expropriatory law, important factors which can affect the court's decision include: whether the property expropriated was at the time of expropriation situated within the jurisdiction of the expropriating state; whether the property was at the time owned by a national of that state; and whether 'giving effect' to the law is a matter of the court enforcing within its jurisdiction the operation of a foreign expropriatory law or merely of its acknowledging or applying there the consequences of the law's fully executed operation elsewhere (particularly within the territory of the expropriating state).

5 See § 144.

effect to it would be contrary to the public policy of the forum.[6] Similarly, where effect is given to the law, the court may not have expressly considered its possible incompatibility with international law,[7] or may have inquired into the matter

[6] 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. This, in particular, is the consistent attitude of French courts. See eg *Union des Républiques Socialistes Soviétiques v Intendant Général*, Sirey (1929), pt I, p 217; AD, 4 (1927–28), No 43 (and the comment thereon and other similar cases by Domke, AJ, 36 (1942), pp 26–29); *Société Potasas Ibericas 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, *Grotius Society*, 35 (1949), pp 174–6, 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 distinguishable 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 recognised in France of a dispossession by a foreign state without an equitable indemnity, see *Braden Copper Co v Le Groupement d'Importations des Métaux*, ILM, 13 (1973), pp 186, 189; *Carl Zeiss Heidenheim v VEB Carl Zeiss Jena* (1975), ILR, 73, p 580. For similar decisions in the USA, see *Menendez v Saks and Co* (1973), ILR, 66, p 126; *Maltina Corpn v Cawy Bottling Co* (1972), ILR, 66, p 92; *Zeevi and Sons Ltd v Grindlays 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 recognition would violate basic principles of German public policy, and although a foreign confiscatory law discriminating against foreigners could be contrary to German public policy, in order to be refused recognition the violation of public policy must substantially affect the German legal system: see *Sociedad Minera el Teniente SA v Norddeutsche Affinerie AG* (1973), ILR, 73, p 230 (and comment by Seidl-Hohenveldern, AJ, 69 (1975), pp 110–19); and *NV Verenigde Deli-Maatschapijen v Deutsche-Indonesische Tabak-Handelsgesellschaft mbH* (1959), ILR, 28, p 16.

As to Italy, see *Vaghi v Reischbank*, AD, 9 (1938–40), No 56; *Koh-I-Noor Tužkárna L & C Hardtmuth Narodni Podnik v Fabrique de Crayons Hardtmuth L & C, Srl*, ILR, 26 (1958-II), p 44, and (1960), ILR, 40, p 17. As to Belgium, see the *Urrutia Case*, AD, 8 (1935–37), No 94, and *Wilkening v Belgian State*, AD, 15 (1948), No 66 (as to naturalisation); *Sarl 'Koh-I Noor-L et C Hardtmuth' v SA Agebel and Soc de Droit Tchécoslovaque Entreprise Nationale Koh-I Noor* (1959), ILR; 47, p 31. See as to the Netherlands, *The Baurdo*, AD, 8 (1935–37), No 73 and the note thereto; the case of *Trust-Maatschappij Helvetia*, AD, 7 (1933–34), No 33; *Indonesian Corpn PT Escomptobank v NV Assurantie Maatschappij de Nederlanded van 1845* (1964), ILR, 40, p 7: *Czechoslovak National Corpn Batá v Batá-Best BV* (1975), ILR, 74, p 102.

There would appear to be no decisive 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 *Huntingdon v Attrill* [1893] AC 150; *Apt v Apt* [1947] P 127. It is possible that, 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 *Re Helbert Wagg & Co* [1956] Ch 323, 349, 352; Dicey and Morris, pp 97–8.

See generally on the application of public policy in relation to the non-application of foreign laws, Kahn-Freund, *Grotius Society*, 39 (1954), pp 39–69, and Holder, ICLQ, 17 (1968), pp 926–52.

[7] Thus some Belgian and Dutch courts acknowledged the effects of expropriation without compensation in relation to aliens in the matter of Mexican expropriations of foreign oil companies: see AD, 9 (1938–40), Nos 11 and 12. It does not appear that the question of compatibility with international law was raised in these cases. Often a court will make no reference to international law for the simple reason that on the facts before it there is no question of the foreign expropriation law being contrary to international law. Thus *Underhill v Hernandez* (1897) 168 US 250; *Oetjen v Central Leather Co* (1918) 246 US 297; *Ricaud v American Metal Co* (1917) 246 US 304; and, in particular, *Luther v Sagor* [1921] 3 KB 532, frequently referred to in support of the proposition that courts must not question the legislation of foreign countries, are not germane to the present issue. There was no question, in these cases, of foreign legislative acts contrary to international law. It will also be noted that in most of these cases the refusal of courts to examine the validity of the foreign legislation in question was due to the fact that they were concerned with claims or property of the nationals of the legislating country (and that, apparently for that reason, the question of violation of international law was not at issue). See, eg the qualifying statement by Russell LJ in *Princess Olga Paley v Weisz* that 'this Court will not enquire into the legality of acts done by a foreign Government against its own subjects in respect of property situate in its own territory' [1929] 1 KB, at p 736; and to the same effect: *United States v Belmont* (1937) US 324; *Salimoff v Standard Oil Co* (1933) 262 NY 220; *Oetjen v Central Leather Co* (1918) 246 US 297; *Eastern States Petroleum Co v Asiatic Petroleum Corpn* (1939) 28 F Suppl 279; AD, 9 (1938–40), No 35. A critical review of many of the cases cited is given by Lipstein, *Grotius Society*, 35 (1949), pp 157–87. See the remarks of Upjohn J in *Re Helbert Wagg & Co Ltd* [1956] Ch 326, 346–9, suggesting that the cases were not limited to laws affecting the property of nationals of the expropriating state.

and concluded that the law, or at least its application in the case before the court, did not involve any violation of international law.[8] However, in *Banco Nacional de Cuba v Sabbatino*[9] the United States Supreme Court denied the permissibility even of making such an inquiry, thus precluding any possible finding that a foreign law in violation of international law should be denied effect. The Court held that in the absence of a treaty or other unambiguous agreement[10] regarding the controlling principles of international law[11] (and the Court regarded matters of expropriation without compensation as not yet the subject of any such unambiguous agreement) the act of state doctrine prevented the Court from examining the validity of a taking of property within its own territory by a

[8] *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 gave rise, with a different result, to *The Rose Mary* case, n 16); *F Palicio Compania SA v Brush* (1966), ILR, 42, p 41; *Attorney-General of the United States v NV Bank voor Handel en Scheepvaart* (1969), ILR, 74, p 150; *Retroactivity of Laws Case* (1972), ILR, 71, p 37.

[9] (1964) 376 US 398; ILR, 35, p 2. The *Sabbatino* case, in its various stages, was the subject of extensive comment, amongst which see Coerper, AJ, 56 (1962), pp 143–8; Stevenson, AJ, 57 (1963), pp 97–9; Zander, ICLQ, 12 (1963), pp 668–71; Stevenson, AJ, 58 (1964), pp 707–11; Falk, *ibid*, pp 935–51, and *The Role of Domestic Courts in the International Legal Order* (1964), pp 64–138; Wright, AJ, 59 (1965), pp 304–15; Simmonds, ICLQ, 14 (1965), pp 452–92; Falk, *The Aftermath of Sabbatino* (1965), and *The Status of Law in International Society* (1970), pp 403–25; Mooney, *Foreign Seizures: Sabbatino and the Act of State Doctrine* (1967); F A Mann, Vir Law Rev (1965), p 604 (reprinted in *Studies in International Law* (1973), pp 466–91); Lillich, *The Protection of Foreign Investment* (1965), pp 45–113; Halberstam, AJ, 79 (1985), pp 68–91.

[10] For application of the 'treaty exception' in the context of expropriation of property and a treaty providing for 'prompt payment of just and effective compensation', see *Kalamazoo Spice Extraction Co v Provisional Military Government of Socialist Ethiopia*, ILM, 23 (1984), p 393.

[11] The Court referred to 'controlling legal principles' in general, but it seems clear that in the 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

[12] 22 USC § 2370(e)(2), on which see Levie, AJ, 59 (1965), pp 366–70; Lowenfeld, *ibid*, pp 8899–908; Lillich, *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), ILR, 66, p 6; *Present v United States Life Insurance Co*, AJ, 62 (1968), p 494; *Menendez v Saks & Co* (1973), ILR, 66, p 126; *Hunt v Coastal States Gas Producing Co* (1978), ILR, 66, pp 338, 361; *Libyan American Oil Co v Socialist People's Libyan Arab Jamahiriya* (1980), ILR, 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 comment 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, s 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 Whitlock & Co* (1967), ILR, 43, p 12; *certiorari* denied, AJ, 62 (1968), p 783.

[15] See eg cases cited at n 8, and nn 16 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), ILR, 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 cognizable in Italian courts even to consider their conformity with international law: *Spa Imprese Marittime Frassinetti v Repubblica Araba di Libia*, AJ, 77 (1983), p 163.

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 law 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 law[18] and although in some countries courts have in fact the power to refuse to give effect to national legislation contrary to international law[19] – 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-

[16] See eg *Wolff v Oxholm* (1817) 6 Maule and Selwyn 92; *Re Krupp* [1917] 2 Ch 188; *Confiscation of Property of Sudeten Germans Case*, AD (1948), No 12; *Nisyros Mines Case*, ILR, 19 (1952), No 27; *Anglo-Iranian Oil Co v Jaffrate (The Rose Mary)* [1953] 1 WLR 246 (on which case note the comments in *Re Helbert Wagg & 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), ILR, 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); *Blanco 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 Senembah Maatschappij and Twentsche Bank* (1959), ILR, 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.

[17] *Banco Nacional de Cuba v Sabbatino* (1964), 376 US 398; ILR, 35, p 2; *NV Verenigde Deli-Maatschappijen v Deutsch -Indonesische Tabak-Handelsgesellschaft mbH* (1959), ILR, 28, p 16; *Soc Minera el Teniente SA v AG Norddeutsche Affinerie* (1973), ILR, 73, p 230, and ILM, 13 (1974), p 1115 (and see comment by Seidl-Hohenveldern, AJ, 69 (1975), pp 110–19); and see *Foreign Judgments (Treaty of Lausanne) Case*, ILR, 19 (1952), No 9, at p 23, for recognition of a judgment of a foreign court given in violation of a treaty binding on the two states concerned. Note also *Wandel-Hirschberg v Jacobsfeld-Yakurska*, ILR, 26 (1958-II), p 702, drawing a distinction between foreign laws affecting rights of property and those affecting personal status.

[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;[20] 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.[21] 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.[22] 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.[1] The freedom of a state to grant preferential treatment to certain states, or to impose

[20] This is so, in particular, in countries in which international law is deemed to be part of municipal law. See § 19.

There is probably no substance in the argument that the review of – or refusal of recognition to – foreign legislation which is clearly contrary to international law constitutes a denial of the sovereignty of the foreign state in question. For it may be argued, with no less force, that the sovereignty of the state of the *lex fori* is put under strain if its courts are compelled to give effect to foreign legislation which is contrary to international law – especially if such legislation inflicts injury upon its nationals.

[21] See *Sociedad Minera el Teniente SA v Norddeutsche Affinerie AG* (1973), ILR, 73, p 230.

[22] Thus the rule noted at § 20, that, if possible, no intention to violate international law will be imputed to a statute, applies also to foreign legislation.

[1] The ILC has regarded non-discrimination as a 'general rule which follows from the equality of States' (YBILC (1958), ii, p 105), and as a 'general rule inherent in the sovereign equality of States' (YBILC (1961), ii, p 128). In the particular context of most-favoured-nation clauses the ILC has also referred to it as 'the general principle of non-discrimination', which 'may be considered as a general rule that can always be invoked by any State'; it has also referred to states being 'bound by the duty arising from the principle of non-discrimination' (YBILC (1978), ii, pt 2, pp 11, 12) and being under a 'general duty not to discriminate between States' (*ibid*, p 24). But at the same time the ILC has observed that notwithstanding any such duty, 'States are free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature', and that, because of 'the principle of the sovereignty of States and their liberty of action', other states cannot, apart from an international obligation specifically undertaken by the grantor state, claim to be entitled to the same special favours: this 'liberty includes the right of States to grant special favours to some States and not to be bound by customary law to extend the same favours to others' (*ibid*, pp 12, 24). But the ILC would appear to have regarded states as entitled, on the basis of the principle of non-discrimination, to enjoy the general non-discriminatory treatment accorded by the state in question to other states on a par with them (*ibid*, p 12).

Questions of equality of treatment and discrimination arise particularly in various aspects of international trade and economic relations. In this context see Hasan, *Equality of Treatment and Trade Discrimination in International Law* (1968); Schwarzenberger, YB of World Affairs, 25 (1971), pp 163–81; Kaplan, and Ramcharan, *ibid*, 26 (1972), pp 267–85, and 286–313; Goldsmith and Sonderkötter, *ibid*, 28 (1974), pp 262–77; Sutton, and Stoiber, *ibid*, 31 (1977), pp 190–216, 217–35; Ramcharan, *ibid*, 32 (1978), pp 268–85; Partsch, ZöV, 45 (1985), pp 1–24. As to discriminatory exchange control measures, including the relevant provisions of the International Monetary Fund Agreement, see Fawcett, BY, 20 (1964), pp 32, 55–8; Mann, *The Legal Aspect of Money* (4th ed, 1982), pp 476–82, 496–9, 515–17, and 523–7. As to the GATT, see n 6; as to most-favoured-nation clauses, see § 669.

[2] As to economic pressure on other states, see generally § 129, nn 13–16.

[3] § 124.

[4] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (4th Principle), GA Res 2625 (XXV) (1970). To the extent that non-discrimination is inherent in the sovereign equality of states, acceptance of that principle (see § 107) would imply acceptance of a principle of non-discrimination.

[5] Article 47. See also Vienna Convention on Consular Relations 1963, Art 72; Convention on Special Missions 1969, Art 49; Vienna Convention on the Representation of States in their Relations with International Organisations 1975, Art 83. These various provisions are not uniform.

[6] See eg Arts XIII and XIV. A key element of the GATT is Art I, which provides for general most-favoured-nation treatment as between the contracting parties, which accordingly establishes (subject to numerous detailed rules) a regime of non-discrimination between them. See generally on the GATT, Jackson, *World Trade and the Law of GATT* (1969); Dam, *The GATT* (1970); Hilf, Jacobs and Petersmann (eds), *The European Community and GATT* (1986); McGovern, *International Trade Regulation: GATT, the United States and the European Community* (2nd ed, 1986).

disadvantageous arrangements on others, has long been a valued instrument of policy in the conduct of international relations.[2]

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.[3] 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'.[4]

Furthermore, a state may by treaty 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, since the Vienna Convention on Diplomatic Relations 1961.[5] Several provisions of the General Agreement on Tariffs and Trade (GATT) are based on non-discrimination.[6] 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]

[7] See generally § 669.

[8] As to those preferences which are permitted under the GATT, particularly Art I.2–4, see Jackson, *World Trade and the Law of GATT* (1969), pp 264–72. See also as to Commonwealth preferences, § 669, n 39.

[9] See § 106, nn 6 and 9. See also Art 204 of the Law of the Sea Convention 1982; Art 5(1) of the Montreal Protocol on Substances that Deplete the Ozone Layer 1987 (ILM, 26 (1987), p 1541). It may also be noted that many treaty obligations which are qualified by phrases such as 'as soon as possible' or 'as soon as practicable' may be intended to impose a less onerous obligation on those states whose economic capacities are limited than on other states: see ILA, *Report of the 63rd Conference* (1988), pp 254–8.

[10] See *Italy v Commission* [1963] ECR 165, 178; and Goldsmith and Sonderkötter, YB of World Affairs, 28 (1974), pp 262, 264–9.

[11] Vienna Convention of Diplomatic Relations 1961, Art 47.2; Vienna Convention on Consular Relations 1963, Art 72.2; Convention on Special Missions 1969, Art 49. See Briggs, AJ, 56 (1962), pp 475–82. But cf Vienna Convention on the Representation of States in their Relations with International Organisations 1975, Art 83, which provides for non-discrimination in the application of the Convention, but without the further provision included in the other three Conventions.

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]

DIGNITY

Dickinson, AJ, 22 (1928), pp 840–4 Quadri, *Rivista*, 34 (1942), pp 161–89 Satow, pp 9–11, 20–37.

§ 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]

[12] See §§ 439–41.

[13] See § 409.

[1] See Hackworth, ii, § 127. See also Watts, BY, 33 (1957), at p 71, as regards respect due to the national flag flown by merchant ships. Often individuals or mobs express their disagreement with, or disapproval of, the policies or actions of a foreign state by burning its flag (sometimes in conjunction with attacks on that state's diplomatic, consular or other property): for action taken as a result of such incidents see eg Whiteman, *Digest*, 5, pp 174, 178–81. As to the status of the UN flag, see UN Juridical YB (1971), p 186, and (1973), pp 136–7.

[2] As to English law see *R v Peltier*, 28 St Tr 529 (1803); *R v Vint*, 27 St Tr 627 (1799); *R v Gordon*, 22 St Tr 177, 213 (1787); *R v Most* (1881) 7 QBD 244; *R v D'Eon*, 1 WB1 510 (1764). But some

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 neither be suppressed nor punished.[3] The position is different when the persons in question are in governmental service or otherwise associated with the government of the country.[4] 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*.[5]

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.[6] 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), i, pp 10–14; and see also Parry, BDIL, 6, pp 69–70, and 7, pp 84–90.

As to the US, see Hackworth, ii, § 129; Whiteman, *Digest*, 5, § 9; *Zaimi 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 TJ*, 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 (1938–40), No 3; *Re Rivera Calmet*, ILR, 18 (1951), No 10; *JAM v Public Prosecutor* (1969), ILR, 73, p 387; *Kolingba 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 Tábacos Piccardo v Amministrazione Autonoma dei Monopoli di Stato*, AD, 10 (1941–42), No 3; *Piccardo y Cia, Ltda, SA v Tabacchi Italiani SA*, AD, 12 (1943–45), No 1.

3 See Lauterpacht, AJ, 22 (1928), pp 114, 115, and *Grotius Society*, 13 (1928), pp 143–63, and *R v Antonelli and Barberi* (1905) 70 JP 4; Fleischmann, Liszt, § 13 (n 19); and Wright, AJ, 48 (1954), pp 616–26. See also *Fiscal v Zamora*, AD, 9 (1938–40), No 5; and, for a distinction between criticism and intentional insult, *JAM v Public Prosecutor* (1969), ILR, 73, p 387.

4 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.

5 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 *Rahintoola v Nizam of Hyderabad* [1958] AC 379, 418. See generally § 110.

6 GA Res 277 (III).

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.[7] 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.[8]

§ 116 Maritime ceremonials Connected with the dignity of states are the maritime ceremonials[1] 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]

7 See Whitton, AJ, 44 (1950), pp 141–5.

8 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.

See generally § 122, n 61ff, 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.

1 See Satow, pp 36–7; Colombos, *International Law of the Sea* (6th ed, 1967), pp 53–5, 166–7; and below, § 285.

2 That warships can on the open 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.

3 See § 200.

INDEPENDENCE AND TERRITORIAL AND PERSONAL AUTHORITY

Garner, *American Political Science Review* (February 1925), pp 1–24 Pella, Hag R, 33 (1930), iii, pp 677–830 Delbez, RG, 37 (1930), pp 461–75 Preuss, *ibid*, 40 (1933), pp 606–45 DeLupis, *International Law and the Independent State* (2nd ed, 1987), pp 3–138.

§ 117 Independence and territorial and personal authority, as aspects of sovereignty Sovereignty has different aspects.[1] 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*).[2] As comprising the power of a state to exercise supreme authority over its citizens at home and abroad, it involves *personal* authority (*imperium*, *political sovereignty*).

Independence, and 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,[1] 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 quality 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 she 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

1 For a judicial discussion of these aspects see *R v Jacobus Christian*, BY (1925), pp 211–19, and in JCL, 3rd series, 6 (1924), pp 245–254. See also § 34.

In 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, i, pp 86–7.

1 See § 120.

customs union would not be compatible with Austria's obligations to maintain its independence.[2] 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.[3]

In consequence of its internal independence and territorial authority, a state can adopt any constitution it likes,[4] arrange its administration in any way it

2 *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 of those eight 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), § 25*ag*. As to Austria's present status, see § 98. In the context of the impact of 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' (at p. 723), and that 'sovereignty in this context is the unfettered right to decide: to say yes or no' (at p. 713): *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 in 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).

3 See following note.

4 '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 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 in Res 39/2 of 28 September 1984: see UNYB (1984), pp 157–63), 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 restraints 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, n 4, and § 131, n 4. See BPIL (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 the Government 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).

thinks fit, enact such laws as it pleases, organise its forces on land and sea, build and pull down military installations, adopt any commercial policy it likes, and so on – subject always, of course, to restrictions imposed by rules of customary international law or by treaties binding upon it. According to the maxim, *quidquid est in territorio est etiam de territorio*, all individuals and all property within the territory of a state are under its dominion and sway, and foreign 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.[5] But aliens may be expelled, or not received at all. On the other hand, hospitality – or 'territorial asylum'[6] – 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 that other 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).

5 See § 404, n 12.

6 See § 402.

7 See § 122.

8 See §§ 386–7.

9 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; Lagoni, AJ, 73 (1979), pp 215–43; Utton 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 Fox), 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)) (on which see Manin, AFDI, 24 (1978), pp 792–809), the Murchison Field Reservoir 1979 (TS No 39 (1981)) and the Statfjord 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)).

10 See generally § 407; and also § 106, on the 'New International Economic Order'.

11 Including in particular treaties for the protection of minorities, the general obligations of the 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.

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 violation[1] 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 or personal authority. But it is useful to give some illustrative examples.[5] Thus, in the absence

12 But see § 123, n 2.

13 See § 138. 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,[6] its warships,[7] or its police forces into or through foreign territory, or its aircraft over it,[8] or to carry out official investigations on foreign territory[9] or to let its agents conduct clandestine operations there,[10] or to exercise an act of administration or jurisdiction on foreign territory, without permission.[11] 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 British troops, see BPIL (1963), p 103. For an incident involving a protest by Austria against the shooting by Czechoslovakia border guards of a refugee who had already escaped on to Austrian territory, 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. As to unauthorised incursions by Soviet submarines into Swedish waters in 1981 and 1982, see RG 86 (1982), pp 398–405; 87 (1983), pp 218–19, 451–2, and 900–901.

[8] See § 218ff. On the incident in 1960 concerning the shooting down of an American military aircraft flying over the Soviet Union, and the trial of its pilot, see Wright, AJ, 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); UNYB (1973), pp 249–52; and, for action in ICAO, *ibid*, pp 947, 948.

[9] See eg RG, 84 (1980), pp 1129–31 and 89 (1985), pp 791–2, as to the arrest in Switzerland of two French customs officials engaged in investigative work on Swiss territory. See also RG, 88 (1984), pp 711–12 (protest against activities of French customs officials in Switzerland), and p 725 (protest against various activities of Italian officials in Switzerland). As to the illegal abduction of a person from the territory of one state by the authorities of another, see n 13.

[10] See eg as to the unauthorised operations in France of Spanish counter-terrorist officials, RG, 88 (1984), p 454, and 90 (1986), 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 Glennon, Harv ILJ, 25 (1984), pp 1–42; and § 569, as to spies. It sometimes happens that such activities are carried out by people with diplomatic or consular status: such activities are incompatible with that status: see § 487.

[11] 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 Station at Basle Case*, decided by a German Court in June 1928: AD (1927–28), No 90; and see Vali, *Servitudes of International Law* (2nd ed, 1958), pp 125–34; as to the functions of South African railway police in respect of the railway in Bechuanaland, see *Parliamentary Debates (Commons)*, vol 686, col 43 (written answers, 9 December 1963); as to Canadian and US drugs 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 missiles being held at bases in third states, the consent of those third states was necessary to allow for inspections on their territories: see ILM, 27 (1988), pp 58, 67. See also Hackworth, ii, §§ 150, 151 and 153; and Mann, Hag R, 111 (1964), i, p 127ff.

As to the exercise in a foreign state 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,[12] 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 fulfil 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.[13] It is also a breach of international law for a state

Biria v Kiardo (1967), ILR, 45, p 53; *Sorge v City of New York*, AJ, 63 (1969), p 146; *Re Caneba* (1969), ILR, 71, p 222; *Re Westinghouse Uranium Contract* [1978] 2 WLR 81, 90; *Case against Buscetta*, AJ, 77 (1983), p 164. In the course of US proceedings which were the subject of litigation in the UK a US judge sat in the US Embassy in London to hear witnesses whose attendance had been required by an order of a UK court: in the House of Lords Viscount Dilhorne made the point that the witnesses had not thereby become subject to the US court's jurisdiction (*Rio Tinto Zinc Corpn v Westinghouse Electric Corpn* [1978] AC 547, 628; and see 'X', ICLQ, 27 (1978), pp 446, 450).

In January 1986 an Australian Royal Commission sat and took evidence in the UK, with permission of the British Government. Visits to the UK by an official of a foreign state, acting in that capacity, to check the books of UK companies require the prior permission of the UK Government: *Parliamentary Debates (Commons)*, vol 111, col 204 (written answers, 24 February 1987). For guidelines issued by the Foreign and Commonwealth Office for the activities in the UK of foreign law enforcement agents representing foreign governments, see UKMIL, BY, 58 (1987), p 591. States commonly allow foreign consuls to perform acts of administration and jurisdiction in their territories: see §§ 544–8.

The consent of one state to officials of another crossing its territory, and the extent to which this created rights for the state to which the officials belonged, was considered by the ICJ in the *Case Concerning Right of Passage over Indian Territory*, ICJ Rep (1960), p 6: see § 238.

As to the exercise of governmental authority in another state by a government-in-exile there, with the consent of the host state, see § 42, n 4; as to the situation which arises in cases of belligerent occupation, see vol II of this work (7th ed), §§ 166–726, and as to the particular situation which arose in respect of Germany after the Second World War, see § 40, n 19ff. As to foreign armed forces visiting a state with its consent, see §§ 556–8.

[12] See § 294.

[13] See Bowett, *Self-Defence in International Law* (1958), pp 38–41; Brownlie, ICLQ, 7 (1958), pp 733–4. Although when states have pursued fugitives across a frontier they may try to defend their action by claiming to have been acting in 'hot pursuit', there has been no disposition on the part of other states to accept that any right of 'hot pursuit' exists. For examples of 'hot pursuit' see RG, 82 (1978), p 855, for pursuit by Moroccan forces into Algeria; Brownlie, ICLQ, 7 (1958), p 712, and Fraleigh in *International Law of Civil War* (ed Falk, 1971), p 206, for pursuit by French forces in Algeria into Tunisia; Corbett in *ibid*, pp 399–401 as to pursuit of (rebel) Vietcong raiders from South Vietnam into Cambodia; UNYB (1971), pp 113–16, as to pursuit of armed guerrilla bands into Zambia by South African forces; RG, 83 (1979), p 475, as to pursuit by South African forces into Zambia; RG, 85 (1981), p 893, as to pursuit of offenders by Swiss police into France; RG, 90 (1986), p 178, as to pursuit of guerrillas by South African forces into Angola. In some of the above instances the incursion into the foreign state's territory may have had less the character of 'hot pursuit' than of retaliatory or pre-emptive action against persons habitually using that state's territory as a base from which to launch operations against the pursuing state: for consideration of the extent to which action on those grounds may be justified, see § 127.

If officials improperly enter another state's territory they risk prosecution there: see RG, 93 (1989), pp 660–61, as to the trial of French policemen in Belgium. Note also the incident in July

without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime.[14] 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.[15] But states do not

1989 when four Spanish customs officials in pursuit of suspected smugglers entered Gibraltar; although warrants 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 (1985), pp 455–6). See also the 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.

[14] The abduction of a person from a foreign state's territory may involve the responsibility of the abducting 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 *Celiberti 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.

[15] 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. The case was submitted to arbitration, but soon after the commencement of the written proceedings Germany admitted 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 and a survey of other cases of kidnapping of fugitives from justice on foreign territory, see Preuss, AJ, 29 (1935), pp 502–7, and *ibid*, 30 (1936), p 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 Mbale 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 brought to Florida, see AJ, 78 (1984), pp 207–9.

Monetary compensation for a wrongful seizure was awarded by a US–Panama Arbitral Tribunal in the *Colunje* case, who was seized in 1917 (see O'Higgins, BY, 36 (1960), at p 297, n 1). Appropriate reparation for the wrong done would also include punishment of the abductors. In *Vaccaro v Collier, the United States Marshal*, an officer of the US who forcibly arrested 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: 51 F (2*d*) 17: AD (1929–30), No 180. And see *Villareal v Hammond* (1934), 74 F (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

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.[16]

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.) See generally on the Eichmann case, Silving, AJ, 55 (1961), pp 307–58; Green, MLR, 23 (1960), pp 507–15; Fawcett, BY, 38 (1962), pp 181–215; Lasok, ICLQ, 11 (1962), pp 355–74; Green, BY, 38 (1962), pp 457–71; Papadatos, *The Eichmann Trial* (1964); Schwarzenberger, *International Law and Order* (1971), pp 237–51; Lador-Lederer, Israel YB on Human Rights, 14 (1984), pp 54–79; and the bibliography in ILR, 36, at pp 342–4. For other aspects of the Eichmann case, see § 139, n 21. In August 1973 an Israeli court sentenced to a term of imprisonment a Turkish national seized during an Israeli raid in Lebanon: see RG, 78 (1974), pp 842–3.

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 371.

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 laws. It is this latter question which seems to be primarily addressed by a new US policy made public in 1989. In testimony before a sub-committee of the House of Representatives Committee on the Judiciary 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*, ILM, 29 (1990), p 441 (and Lowe, CLJ, 50 (1991), pp 16–19).

[16] 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* (1886) 119 US 407; *Us ex rel Donelly 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 Reisenfeld, AJ, 74 (1980), pp 892–904). The improper seizure of a person from the territory of a foreign 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 customary 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; *Frisbie v Collins* (1952) 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 as 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 refused a writ of *habeas corpus* for which the accused applied on the ground that he had 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 Untersagt*, AD, 11 (1919–42), No 53; *US v Sobell*, 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 Cadena*, AJ, 73 (1979), p 302; *US v Peltier*, AJ, 73 (1979), p 299; *US v Cordero*, AJ, 76 (1982), p 618. Although the

Having regard to the personal authority of other states, a state is not allowed to naturalise aliens residing on its territory without their consent,[17] 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[1] 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 Garrett* (1917) 86 LJKB 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 *Afouneh v A-G*, AD, 10 (1941–42), No 97; *A–G of Israel v Eichmann* (1962), ILR, 36, p 5; the *Kim Dae Jung* affair, RG, 78 (1974), pp 1112–16, and 85 (1981), p 371; *R v Hartley* (1977), ILR, 77, p 330; and *Fédération Nationale des Déportés et Internés Résistants et Patriots 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: *Ndhlovu 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 Jolis*, AD, 7 (1933–34), 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. And see Cocatre-Zilgien, *L'Affaire Argoud: considérations sur les arrestations internationalement irrégulières* (1965); de Schutter, *Rev Belge*, 1 (1965), pp 8–124, and ZöV, 25 (1965), p 295ff, and 27 (1967), pp 188–9.

See generally on the question of jurisdiction with regard to persons apprehended in violation of international law, *Harv Research* (1935), pp 623–32, Dickinson, AJ, 28 (1934), pp 234–45; Morgenstern, BY, 29 (1952), pp 265–82; O'Higgins, *ibid*, 36 (1960), pp 278–320; Cardozo, AJ, 55 (1961), pp 127–35; Evans, BY, 40 (1964), pp 77, 89–93; de Schutter, *Rev Belge*, 1 (1965), pp 88–124; Shearer, *Extradition in International Law* (1971), pp 72–6; Whiteman, *Digest*, 6, pp 91, 105–9, 1108–17; Coussirat-Coustère and Eisemann, RG, 76 (1972), pp 346–400; Mann, ZöV, 47 (1987), pp 469–87; *Restatement (Third)*, i, pp 331–9. See also Hackworth, ii, § 152; Parry, BDIL, 6, pp 480–95. See also § 414, as to the deportation of wanted fugitives in circumstances amounting to disguised extradition.

Some countries make it a criminal offence to perform in their territory governmental 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.

Evidence obtained in violation of international law has been held admissible in a municipal court: *US v Whiting*, AJ, 76 (1982), p 624; *US v Hensel*, AJ, 77 (1983), p 878. As to the use of illegally obtained evidence before international tribunals see Reisman and Freedman, AJ, 76 (1982), pp 737–53, and Thirlway, AJ, 78 (1984), pp 622–41. See also § 131, n 29.

17 See, however, § 386.

1 See § 121, n 10.

therefore limitations upon their independence cannot be presumed.[2] Independence is a question of degree, and it is therefore also a question of degree whether the independence of a state is destroyed or not by certain restrictions.[3] Thus it used generally to be held that states under protectorate are so much restricted that they are not fully independent, but part sovereign.[4] On the other hand, the restrictions connected with the neutralisation of states do not destroy their independence, although they are in various ways hampered in their liberty of action.[5]

§ 121 Restrictions upon territorial authority Like independence, territorial supremacy does not give an unlimited liberty of action.[1] Thus, every state has a right to demand that its merchantmen may pass through the territorial sea of other states.[2] Foreign Heads of State and envoys, foreign warships, and foreign armed forces must be granted a certain degree of inviolability and exemption from local jurisdiction. Through the right of protection over citizens abroad, which is held by every state according to customary international law, a state cannot treat foreign citizens passing through or residing on its territory arbitrarily according to discretion as it might treat its own nationals.[3] A state, in spite of its territorial authority, may not alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring state – for instance, to stop or to divert or pollute the flow of a river which runs from its own into neighbouring territory.[4] A state is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighbouring state, eg as the result of working of factories emitting deleterious fumes.[5] With the concern shown nowadays for the protec-

2 See also § 633(3), as to the application of the principle *in dubio mitius* in the interpretation of treaties.

3 See Judge Anzilotti's Opinion, referred to at § 118, n 2. Thus through Art 4 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 a 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.

1 As to state servitudes, see §§ 236–40.

2 See § 198ff.

3 See § 117, and §§ 400–14; 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.

4 See §§ 175–81.

5 See the decision in the *Trail Smelter Arbitration* (16 April 1938), with regard to the damage caused by the smelter situated at Trail, British Columbia, to the inhabitants of the State of Washington: AJ, 33 (1939), pp 182–212; Whiteman, *Digest*, 6, § 15; Read, Can YBIL, 1 (1963), pp 213–29; Rubin, Ore Law Rev, 50 (1971), p 259; Bourne, *ibid*, p 291; Hoffman, ICLQ, 25 (1976), pp 509–42. See also § 124, n 14. As to the *Lake Lanoux Arbitration*, ILR, 24 (1957), p 101, see § 124, n 12.

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.[6] 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[7] 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',[8] 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.[9]

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[10] –

6 See generally §§ 124, 125 and 353–61.

7 See § 124.

8 ICJ Rep (1949), p 22. Moreover, while the exclusive control exercised by a state within its territory does not, in the absence of fault, involve its responsibility for injuries suffered by a foreign state (see § 149, n 7), such exclusive control was held – in the same case (*ibid* (1949), p 19) – to have a bearing upon the nature of the proof of the responsibility of the territorial state. The fact of exclusive control makes it often impossible for the foreign state, which is the victim of a violation of international law, to furnish direct proof of the responsibility of the territorial state. In such cases, it was held, the foreign state 'should be allowed a more liberal recourse to inferences of fact and circumstantial evidence' (*ibid*). See also *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 82–6.

See also, for responsibility imposed as a result of activities taking place within a state's territory (or under its jurisdiction or control), draft Art 3 of the 1988 draft Articles on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, YBILC (1988), ii, pt 2, para 22, and discussion of that draft article (and its precursor) by the ILC: YBILC (1987), ii, pt 2, pp 41, 45–6, and *Report of the ILC* (40th session, 1988), paras 68–76.

9 See the incidents, in 1956 and 1960, concerning the launching by organs of the USA of balloons from the territory of the Federal Republic of Germany, and the statements made in Austria by Mr Krushchev, the Chairman of the Council of Ministers of the USSR: YBILC (1975), ii, pp 84–5, paras (6) and (7); and § 159, n 1.

10 The PCIJ several times took occasion to point out that, so far from treaty obligations being restrictions upon sovereignty, 'the right of entering into international engagements is an attribute of State sovereignty': *The Wimbledon Case*, PCIJ, Series A, No 1, at p 25; see also PCIJ, Series B, No 10, at p 21, and PCIJ, Series A, No 23, at p 26. And the ICJ has noted that a state which is free to decide upon its domestic electoral arrangements 'is sovereign for the purpose of accepting a limitation of its sovereignty in this field': *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 131. See McNair, *Law of Treaties* (1961), Appendix A. Note also the ICJ's rejection of the argument that a state entitled to become a party to a treaty may, by virtue of its sovereignty, do so while making any reservation it chooses: *Reservations to the Genocide Convention*, ICJ Rep (1951), p 24. See also § 120, as to restrictions upon a state's sovereignty to such a degree as to prejudice its independence.

even including restrictions on the size of its armed forces.[11] 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.[1]

The situation is different where the conduct of private persons[2] 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.[3] Accordingly a state must take special care when it allows political refugees[4] from another state to take up residence in its territory, particularly in the case of a political figure who has

11 Thus after the First World War Germany assumed an obligation not to keep more than 100,000 men under arms, nor a navy larger than necessary for coast defence and purposes of police, nor any military or naval air forces; and in the Treaty of Peace with Italy after the Second World War the total strength of the Italian Army was limited to 250,000: Art 61. As to limitations upon the armed forces of the Federal Republic of Germany pursuant to Art 1 of Protocol II to the Brussels Treaty, as varied from time to time by decisions taken under Art III of the Protocol (TS No 39 (1955)), see Bathurst and Simpson, *Germany and the North Atlantic Treaty* (1956), pp 165–6. See now Art 3 of the Treaty on the Final Settlement with respect to Germany 1990: Cm 1230; ILM, 29 (1990), p 1186. Note the observation of the ICJ in the *Military and Paramilitary Activities Case*, ICJ Rep (1986), that 'in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception' (at p 135).

1 See eg the rejection by the USA of protests from Czechoslovakia and Hungary in 1954 against the release over their territories of balloons carrying leaflets, organised by the Crusade for Freedom Committee, which was an organisation of private citizens: Whiteman, *Digest*, 13, pp 975–8. See also *ibid*, pp 1025–7 for a communication by the USA to the Dominican Republic about allegedly libellous publications by some Dominican exiles in the USA; the US Government explained the constitutional restraints imposed on attempts to limit freedom of speech of private persons.

2 There may be a question whether persons who take action affecting another state are acting as private individuals and of their own free choice, or whether their actions are in substance organised by the state from which they come. The matter clearly affects the degree of responsibility of that state for their conduct. The question has arisen in the context of 'peaceful marches' of very large numbers of people across a frontier, as with the march of Libyan people into Egypt in July 1973, and of Moroccans into the Sahara in October 1975 (as to which see UNYB (1975), pp 178–84), and in the context of 'volunteers' from one state who assist a party to a conflict in another: as to the use of volunteers in the Spanish Civil War, see Thomas and Thomas in *International Law of Civil War* (ed Falk, 1971), pp 154–6, 164–5, 167–8 and 175.

3 See n 16ff.

4 See § 402.

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.[5]

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.[6] 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.[7] These matters assumed some prominence

[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 presence in France of the Ayatolla Khomeini, a political and religious leader in exile from Iran, who while in France in 1978–79 openly organised and encouraged a successful campaign in Iran to oust from power the Shah of Iran and the Government appointed by him: see RG, 83 (1979), pp 805–7 and AFDI, 25 (1979), pp 968–9. When in 1981 the former President of Iran requested asylum in France, this was granted on the express condition that he would not engage in any political activity on French territory, a condition enforced almost immediately by the cancellation of a press conference which he had planned to hold: RG, 86 (1982), pp 153–4.

For representations by Algeria to France concerning intemperate remarks by the former President of Algeria, Ben Bella, while residing in France, see RG, 86 (1982), pp 720–21. See generally § 402.

[6] See generally on armed bands, Brownlie, ICLQ, 7 (1958), pp 712–35; Laughier, 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 3 and 5); and it is also an offence to prepare or fit out any naval or military expedition to proceed against a friendly foreign state (s 11). 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 (Cmnd 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 5–32.

Apart from action under such legislation it may be open to a state to prevent the departure of

in the 1960s and 1970s as a result of the recruitment by contending 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,[8] 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[9] 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'.[10] By Article 47 of the 1977 Additional Protocol I to the

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 *Florsheim v Delgado*, Sirey (1934), 2, p 75 (with a note by Niboyet); AD, 6 (1931–32), No 9; and see ZöV, 4 (1934), p 937, for references to similar cases.

[8] It may be noted that in Angola the mercenaries were being used primarily by the forces on one side of an internal conflict, in response to the overt assistance being given to the other side 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, 289–90. 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).

[9] In 1976 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 905, cols 236–44 (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.

[10] See also GA Res 2465 (XXIII) (1968), para 8, repeated in eg Res 2548 (XXIV) (1969) and 2708 (XXV) (1970).

Note also that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States states it to be 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).

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.[11]

In 1989 the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries,[12] based on the work of an *ad hoc* committee established in 1980.[13] Articles 2, 3 and 4 lay down that any person who recruits, uses, finances or trains mercenaries, or who, being a mercenary,[14] 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,[15] 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 assert 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

For consideration by the ILC, in the course of its renewed consideration of the draft Code of Crimes against the Peace and Security of Mankind, of the possibility of establishing 'mercenarism' as a crime against peace, see *Report of the ILC* (40th Session, 1988), paras 268–74.

[11] See Van Deventer, AJ, 70 (1976), pp 811–16. See generally on legal aspects of the use of mercenaries, David, *Rev Belge*, 13 (1977), pp 197–237; Tercinet, AFDI, 23 (1977), pp 269–93; Burmester, AJ, 72 (1978), pp 37–56; Green, Israel YBHR, 8 (1978), pp 9–62.

[12] GA Res 44/34; ILM, 29 (1990), p 90.

[13] GA Res 35/48.

[14] The term is defined in Art 1, as follows:

'For the purposes of the present Convention,

1. A mercenary is any person who:

(*a*) Is specially recruited locally or abroad in order to fight in an armed conflict;

(*b*) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(*c*) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(*d*) Is not a member of the armed forces of a party to the conflict; and

(*e*) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

(*a*) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(*b*) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(*c*) Is neither a national nor a resident of the State against which such an act is directed;

(*d*) Has not been sent by a State on official duty; and

(*e*) Is not a member of the armed forces of the State on whose territory the act is undertaken.'

[15] A specific provision is included to prohibit states recruiting, using, financing or training mercenaries for the purpose of opposing the exercise of the right to self-determination: Art 5(2).

constitution,[16] from engaging in or actively supporting subversive activities against another state have often been stated.[17] Article 2 of the International Law Commission's draft Code of Offences against the Peace and Security of Mankind[18] 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[19] 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

[16] As illustrating the difficulty of distinguishing in some cases between the acts of governments and of political parties closely associated therewith, see Bünger's study on the relations of party and state in China in ZöV, 6 (1936), pp 286–302; see also Friedmann, AJ, 50 (1956), pp 492–5.

As to the responsibility of Soviet Russia for the activities of the Communist Party and the Third International, see Verdross, ZöR, 9 (1930), pp 577–82. For details as to various protests against propaganda conducted by the Communist International see Tabouillot, ZöV, 5 (1935), pp 851–60. On the Chinese–Russian incident of May 1929, arising out of alleged Communist activities of the Russian authorities of the Chinese Eastern Railway, see Toynbee, *Survey* (1929), pp 344–69. For the Statutes of the Communist International, see *Documents* (1928), pp 57–63. When in November 1933 the US recognised the Soviet Government, the latter undertook 'to respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States', and to prevent such interference on the part of persons in governmental service or organisations under its control or in receipt of its financial assistance. See AJ, 29 (1935), p 657; and see *ibid*, pp 656–62, for a note by Hyde on the protest of the US, in August 1935, against a 'flagrant violation' of this pledge, and Garner, BY, 17 (1936), pp 184–86. See also the Notes exchanged in December 1929 on the occasion of the resumption of diplomatic relations between Great Britain and Soviet Russia: TS No 2 (1930), Cmd 3467.

[17] See Rapoport, *Répertoire*, ii, pp 237–39; H Lauterpacht, AJ, 22 (1928), pp 105–30, and *Grotius Society*, 13 (1928), pp 143–63; Bourquin, Hag R, 14 (1927), i, pp 121–78; Pella, *ibid*, 33 (1930), iii, 677–830 (on offences against foreign states generally); Delbez, RG, 37 (1930), pp 461–75; Preuss, *ibid*, 40 (1933), pp 606–45, and AJ, 28 (1934), pp 649–68; Van Dyke, *ibid*, 34 (1940), pp 58–73; Smith in Geo LJ, 29 (1941), pp 809–828; Fenwick, AJ, 35 (1941), pp 626–31; Cowles, *ibid*, 36 (1942), pp 242–51; Whitton, Hag R, 72 (1948), i, pp 545–88.

A state which allows armed bands, or more organised forces, to use its territory as a base for operations against another state may lay itself open to action in self-defence by that other state against those bases: see § 127.

[18] YBILC (1954), ii, p 149; and see n 24. Note also Art 1 of the Pan-American Convention of February 1928 on Duties and Rights of States in the event of Civil Strife (see § 27, n 11) obliges the contracting parties to use all means at their disposal to prevent the inhabitants of their territories, nationals or aliens, from participating in, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil war. The same Article obliges the parties to forbid, so long as the belligerency of the rebels has not been recognised, the traffic in arms and war material, except when intended for the Government.

For the Declaration on Subversion adopted in 1965 by the OAU see ILM, 5 (1966), p 138.

[19] GA Res 2625 (XXV) (1970); see § 105. See also, much earlier, para 3 of GA Res 290 (IV) (1949), on 'Essentials of peace'.

Declaration on 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 Mankind[21] 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 one of them 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 Amer-

[20] YBILC (1949), p 286.

[21] YBILC (1954), ii, p 149.

[22] GA Res 2625 (XXV) (1970). See also para 3 of GA Res 290 (IV) (1949), para 1 of GA Res 380 (V) (1950), and GA Res 2734 (XXV) (1970). See also GA Res 2131 (XX) (1965), and Res 78 adopted in 1972 by the General Assembly of the OAS, and cited in the *Military and Paramilitary Activities Case*, ICJ Rep (1986), at p 102, and paragraph 6 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations: GA Res 42/22 (1987). See § 128ff., as to intervention generally.

[23] GA Res 3314 (XXIX) (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 through its territory of arms destined for rebel groups 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.

[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 intervention by fomenting or aiding subversive or terrorist activities in another state so as to undermine the free exercise by it of its sovereign rights was treated by the ILC as a crime against peace: draft Articles on the draft Code of Crimes against the Peace and Security of Mankind, Art 14 (as provisionally adopted, with commentary), ILC Report, 41st session, 1989), para 217.

[25] ICJ Rep (1986), pp 118–19, 124–5, and 136.

[26] See eg South Africa–Swaziland Agreement concerning Security 1982, Art 3 (ILM, 23 (1984), p 286); Israel–Lebanon Agreement 1983, Arts 4 and 6 (ILM, 22 (1983), p 708); South Africa–Mozambique Agreement on non-Aggression and Good Neighbourliness 1984, Art 3 (ILM, 23 (1984), p 282; Cadoux, AFDI, 30 (1984), pp 65–92) – but see RG, 90 (1986), pp 179–80 for violations of this Agreement by South Africa; Afghanistan–Pakistan Agreement 1988, Art II(4)–(8), (11)–(12) (ILM, 27 (1988), p 581).

[27] For a detailed survey of the early practice of the US with regard to hostile expeditions see Curtis, AJ, 8 (1914), pp 1–37, 224–55, and Hackworth, ii, § 156. See generally, Brownlie, ICLQ, 7 (1958), pp 712–35; Fawcett, Hag R, 103 (1961), ii, pp 353–9; Higgins, *Development of International Law through the Political Organs of the United Nations* (1963), pp 189–95; Fitzmaurice, *Annuaire: Livre du Centenaire 1873–1973* (1973), pp 220–221.

As to armed expeditions sent by one state into another's territory at the latter's invitation, see § 130.

[28] 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.

[29] See eg as to Israel'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 79ff. Insofar as a state of war may be regarded as having existed at these times, different considerations apply.

[30] 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/360/Rev 1).

[31] GA Res 707 (VII) (1952): the matter was regarded as involving 'a violation of the territory and sovereignty' of Burma. See also GA Res 815 (IX) (1954).

[32] See Fawcett, Hag R, 103 (1961), ii, pp 372–83; UNYB (1954), pp 96–9.

[33] See Fenwick, AJ, 49 (1955), pp 235–8.

[34] See references cited at § 130, n 4.

ica organised an armed expedition which landed at the Bay of Pigs in Cuba;[35] some years later United States agencies engaged in covert operations in Chile against the regime of President Allende;[36] during the Vietnam conflict United States bases in Laos were used as a starting point for bombing and reconnaissance missions against North Vietnam,[37] while Cambodian and Laotian territory was used by North Vietnamese forces as bases for attacks on the Republic of Vietnam;[38] 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;[39] 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;[40] and for several years from 1981 onwards the United States gave assistance in various forms to rebel forces in Nicaragua.[41]

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;[42] *a fortiori* a state must not itself engage in or

[35] UNYB (1961), pp 120–23; and see Whiteman, *Digest*, 5, pp 275–6.

[36] See Falk, AJ, 69 (1975), pp 354–8.

[37] See § 127, n 31. 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 guerrillas operating 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).

See § 131(4), as to the argument that assistance to those engaged in 'wars of liberation' is lawful.

[40] See Chatterjee, ICLQ, 30 (1981), pp 755–68.

[41] See *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 14.

[42] See generally on international terrorism Moore, *AS Proceedings* (1973), pp 88–94; Dugard, *ibid*, pp 94–100; Abu-Lughod, *ibid*, pp 100–104; Franck and Lockwood, AJ, 68 (1974), pp 69–90; Schwarzenberger, *Current Legal Problems*, 24 (1971), pp 257–82; Tran-Tam in *International Criminal Law*, vol 1 (eds Bassiouni and Nanda, 1973), pp 490–503; Prevost, AFDI, 19 (1973), pp 579–600; Green, Israel YBHR, 4 (1974), pp 134–67; *Réflexions sur la définition et la répression du terrorisme* (University of Brussels Colloquium 1973) (1974); Alexander (ed), *International Terrorism: National, Regional and Global Perspectives* (1976); Nawaz and Gurdip Singh, Indian JIL, 17 (1977), pp 66–82; *AS Proceedings* (1977), pp 17–31, and (1978), pp 343–51; Alexander and Finger (eds), *Terrorism: Interdisciplinary Perspectives* (1977); Crelinsten, Laberge-Altmejd and Szabo (eds), *Terrorism and Criminal Justice* (1978); Evans and Murphy, *Legal Aspects of International Terrorism* (1978); Friedlander, *Terrorism: Documents of International and Local Control* (2 vols, 1979); Alexander, Carlton and Wilkinson (eds), *Terrorism: Theory and Practice* (1979); the UN Secretariat's *Analytical Study*, UN Doc A/AC 160/4, 28 February 1979; Warbrick, ICLQ, 32 (1983), pp 82–119; Murphy, *Punishing International Terrorists* (1985); Sofaer, *Foreign Affairs* (Summer, 1986), pp 901–22; Labayle, AFDI, 32 (1986), pp 105–38; Tyagi, Rama Rao and Saxena, Indian JIL, 27 (1987), at, respectively, pp 160–82, 183–93, and 194–202; Falk, *Revolutionaries and Functionaries: The Dual Face of Terrorism* (1988); Levitt, *Democracies against Terror: the Western Response to State-Supported Terrorism* (1988); Bassiouni (ed), *Legal Responses to International Terrorism* (1988), Konstantinov, Germ YBIL, 31 (1988), pp 289–306; Guillaume, Hag R, 215 (1989), iii, pp 287–416; Cassese, ICLQ, 38 (1989), pp 589–608. See also ILA, *Report of the 56th Conference* (1974), pp 155–77; *Report of the 57th Conference* (1976), pp 119–52; *Report of the 59th Conference* (1980), pp 495–519; *Report of the 60th Conference* (1982), pp 349–75; *Report of the 61st Conference* (1984), pp 313–24.

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.

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.[43] In the Declaration on the Strengthening of International Security[44] and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States[45] the General Assembly reaffirmed the duty of states to refrain from organising, assisting, instigating or participating in terrorist acts in another state. Progress towards general and more binding international anti-terrorist 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,[46] 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

[43] 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 and of the Convention for the Creation of an International Criminal Court, see the Report of the Committee of Jurists of 26 April 1937; Doc C 222, M 162 1937 V; Hudson, *Legislation*, vii, 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, Off J. 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.

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).

[44] GA Res 2734 (XXV) (1970). See also GA Res 2131 (XX) (1965).

[45] GA Res 2625 (XXV) (1970), Principles 1 and 3. See also operative para 6 of GA Res 40/61 (1985). Support for terrorist armed activities within another state constitutes an indirect form of coercion which, apart from constituting an unlawful use of force, amounts to unlawful intervention: see *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 108.

[46] See § 141.

1963,[47] followed by the Convention for the Suppression of Unlawful Seizure of Aircraft signed at the Hague in 1970,[48] and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal in 1971.[49] Also in that year the Organisation of American States concluded a Convention to Prevent and Punish Acts of Terrorism,[50] 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.[51] A European Convention on the Suppression of Terrorism was opened for signature in 1977;[52] it provides principally for certain terrorist acts to be extraditable as between contracting parties without being regarded as political offences,[53] 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.[54] 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.[55] In 1979 the Assembly adopted a Convention against the Taking of Hostages.[56] Two further multilateral agreements were

[47] See § 141, n 7.

[48] See § 141, n 12.
At a meeting in July 1978 in Bonn the Heads of State and Government of Canada, the Federal Republic of Germany, France, Italy, Japan, the UK and the USA made a formal statement to the effect that where a country refuses to extradite or prosecute those who hijack an aircraft and/or do not return such aircraft, their governments would take immediate action to cease all flights to that country, and would initiate action to halt incoming flights from that country or from any country by airlines of that country: ILM, 17 (1978), p 1285; AJ, 73 (1979), pp 130, 133–4; Kraiem, Harv ILJ, 19 (1978), pp 1037–45; Busuttil, ICLQ, 31 (1982), pp 474–87. A number of other governments later subscribed to that commitment. The Bonn Declaration was reaffirmed at subsequent meetings of the seven Heads of State and Government, eg at Ottawa in 1981 (ILM, 20 (1981), pp 955, 956), and at Tokyo in 1986 (ILM, 25 (1986), pp 1004, 1005). See also Chamberlain, ICLQ, 32 (1983), pp 616–32, as to the suspension of air services as a collective sanction against states which assist those who commit terrorist acts against civil aircraft; and § 645, n 3.

[49] See § 141, n 14.

[50] ILM, 10 (1971), p 255; AJ, 65 (1971), p 898. See Evans and Murphy (eds), *Legal Aspects of International Terrorism* (1978), pp 299–303.

[51] See § 492, n 8.

[52] ILM, 15 (1976), p 1272; TS No 93 (1978); European TS No 90. See Vallée, AFDI, 22 (1976), pp 756–86; Stein, ZöV, 37 (1977), pp 668–84; Fraysee–Druesne, RG, 82 (1978), pp 969–1023; Lowe and Young, Neth IL Rev, 25 (1978), pp 305–33. The Convention entered into force on 4 August 1978. In the UK the Suppression of Terrorism Act 1978 enabled the UK to ratify the Convention (and note that by s 5(1) the application of the Act can be extended to states not parties to the European Convention). See also the Agreement concerning the Application of the European Convention on the Suppression of Terrorism among the Member States of the European Communities 1979 (ILM, 19 (1980), p 325), on which see Stein, ZöV, 40 (1980), pp 312–21. See also § 424, nn 12–15.

[53] Articles 1 and 2; but see Art 13. See generally as to extradition in respect of political offences, §§ 421–4.

[54] Articles 6 and 7.

[55] GA Res 3034 (XXVII). See also the Secretariat's Study of Measures to Prevent International Terrorism (UN Doc A/C 6/418, 2 November 1972); and GA Res 40/61 (1985) and 42/159 (1987).

[56] GA Res 34/146; TS No 81 (1983). See Platz, ZöV, 40 (1980), pp 276–311; Rosenne, Israel YBHR, 10 (1980), pp 109–56; Verwey, AJ, 75 (1981), pp 69–92; Shubber, BY, 52 (1981), pp 205–39;

concluded in 1988: the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation,[57] 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).[58] 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,[59] and the Act to Combat International Terrorism 1984 enacted in the United States of America.[60]

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,[61] 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.[62] Numerous

Lambert, *Terrorism and Hostages in International Law* (1990). See also SC Res 579 (1985) and 638 (1989), together with the statement by the President of the Security Council immediately before the adoption of the latter resolution. In the *Case Concerning US Diplomatic and Consular Staff in Teheran* the ICJ stated that 'wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights': ICJ Rep (1980), p 42.

[57] TS No 20 (1991); ILM, 27 (1988), p 628. The Protocol supplements the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, and is to be read as one with it. The Protocol followed terrorist incidents at several international airports. See eg the statement by the President of the Security Council on 30 December 1985, referring to the attacks at Rome and Vienna airports, and urging that those responsible be brought to trial in accordance with due process of law and calling on all concerned to refrain from taking actions inconsistent with their obligations under the UN Charter and other relevant rules of international law: UNYB (1985), pp 292–3, 1170.
A further Convention was concluded at Montreal in March 1991, on the Marking of Plastic Explosives for detection.

[58] ILM, 27 (1988), pp 672, 685. See Halberstam, AJ, 82 (1988), pp 269–310; Momtaz, AFDI, 34 (1988), pp 589–600; Joyner, Germ YBIL, 31 (1988), 230–62; Francioni, *ibid*, pp 263–88; Fried, Harv ILJ, 30 (1989), pp 26–36; Plant, ICLQ, 39 (1990), pp 27–56. The Convention was concluded in the aftermath of the seizure by terrorists of the Italian vessel *Achille Lauro*, in 1985, as to which see § 305, n 3.

[59] See generally Walker, *The Prevention of Terrorism in British Law* (1986).

[60] ILM, 24 (1985), p 1015; see also AJ, 78 (1984), pp 915–28. See more generally Alexander and Nanes, *Legislative Responses to Terrorism* (1986).

[61] See § 115, n 4; and § 447, n 4.

[62] As to hostile propaganda in general see Preuss, AJ, 28 (1934), pp 649–68; Fenwick, AJ, 32 (1938), pp 339–43 and AJ, 35 (1941), pp 626–31; van Dyke, AJ, 34 (1940), pp 58–73; Whitton, Hag R, 72 (1948), i, pp 545–656, AJ, 41 (1947), pp 899–903, AJ, 45 (1951), pp 151–3, AJ, 52 (1958), pp 739–45, and in *International Criminal Law*, vol 1 (eds Bassiouni and Nanda, 1993), pp 239–72; Wright, *AS Proceedings* (1950), pp 95–106; Friedmann, AJ, 50 (1956), pp 498–500; Whiteman, *Digest*, 13, pp 982–1029; Martin, *International Propaganda, Its Legal and Diplomatic Control* (1958); Stone, *Legal Controls of International Conflict* (rev, 1959), pp 318–23; Larson and Whitton, *Propaganda: Towards Disarmament in the War of Words* (1963); Evensen, Hag R, 115 (1965), ii, pp 556–62; Havinghurst (ed), *International Control of Propaganda* (1968); Murty, *Propaganda and World Public Order* (1968); Stuyt, Neth IL Rev, 24 (1977), pp 274–86.
See also § 115 (as to defamation and libels on foreign states), § 122 (as to responsibility for

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.[63] In the Convention concerning the Use of Broadcasting in the Cause of Peace 1936[64] 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,[65] as a result of which a Convention on the Right of Correction was adopted in 1952.[66] 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-Guetzévitch, *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 Pundeff, *ibid*, pp 537–42.

63 On the National-Socialist propaganda, wireless and otherwise, directed against Austria in 1933, see *Documents* (1933), pp 385–98; Stenuit, *La Radiophonie et le droit international public* (1932), pp 37 *et seq*; Preuss, AJ, 28 (1934), pp 649–68; Raestad, *Dossiers de la cooperation internationale* (1933).

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 overthrow of the Haitian Government, and the dispute was referred to the OAS; while in 1950 the Council of the OAS had to call upon the Governments of Haiti and the Dominican Republic to desist from systematic and hostile propaganda against each other. See Whitton, AJ, 52 (1956), at pp 743–4; and also Fenwick, AJ, 48 (1954), pp 289–92. In 1958 Lebanon and Jordan complained about (*inter alia*) radio propaganda directed by the United Arab Republic against them, and the matter was discussed in the Security Council: see UNYB (1958), p 36ff; Whiteman, *Digest*, 13, pp 1011–14. As to whether the official governmental proclamation of a 'Captive Nations Week' by the USA in 1960, directed in effect against the established governments of communist states, violated the rule of international law prohibiting the official use of subversive propaganda by one state against another, see Wright, AJ, 54 (1960), pp 521–35, and Whitton, AJ, 55 (1961), pp 120–32.

While in many states broadcasting is officially controlled, so that the state may bear direct responsibility for broadcasts of hostile propaganda, in others it is not and in such cases the state's responsibility is less direct. Thus the independence of the British Broadcasting Corporation from control by the British Government has frequently been invoked by that government in replying to representations by foreign governments about BBC broadcasts; and see similarly regarding the Near East Arab Broadcasting Station in Cyprus, *Parliamentary Debates (Lords)*, vol 198, cols 1205–7 (18 July 1956).

For bilateral agreements to refrain from hostile propaganda, see eg the Israel–Lebanon Agreement 1983, Art 5 (ILM, 22 (1983), p 708); South Africa–Mozambique Agreement on Non-Aggression and Good Neighbourliness 1984, Art 5 (ILM, 23 (1984), p 282); and the Afghanistan–Pakistan Agreement 1988, Art II(10) (ILM, 27 (1988), p 581).

64 See Off J (1936), p 1437; Cmd 5505, Misc No 6 (1937); AJ, 32 (1938), p 113; Hudson, *Legislation*, vii, p 409; Fenwick, AJ, 32 (1938), pp 339–43; Raestad, RI, 16 (1935), pp 289–98; Tomlinson, *International Control of Radiocommunications* (1938), pp 226–33. See also GA Res 841 (IX) (1954) as to the possible preparation of a protocol to transfer to the UN the functions performed under the Convention by the League of Nations: no such protocol was concluded, and the matter is still regulated by the general provisions of GA Res 24 (I) (1946).

65 See Whitton, AJ, 43 (1949), pp 73–87; Bolla, *Ann Suisse*, 5 (1948), pp 29–62.

66 See § 115, n 8. As to the right of reply and correction, see also Art 14 of the American Convention on Human Rights 1969 (§ 443), and *Enforceability of the Right to Reply or Correction* (1986), ILR, 79, p 336.

early days the General Assembly of the United Nations has passed resolutions condemning hostile propaganda[67] as well as, more generally, propaganda against peace or for wars of aggression.[68]

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.[69] A draft Convention on Freedom of Information was prepared at the 1948 United Nations Conference[70] 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,[71] but it too has not yet been adopted by the General Assembly.[72] Freer access to and dissemination of in-

67 Thus in 1947 the General Assembly passed Res 110 (II) in which it condemned 'all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression'. For comment see Quincy Wright, AJ, 42 (1948), pp 128–36. See also Whitton, Hag R, 72 (1948), i, pp 626–56; and GA Res 381 (V) (1950).

68 Eg GA Res 290 (IV) (1949). In the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States the Assembly declared that 'States have the duty to refrain from propaganda for wars of aggression' (Res 2625 (XXV) (1970)). See also paragraph 9 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations: GA Res 42/22 (1987). See also Art 20 of the International Covenant on Civil and Political Rights 1966 (§ 440). As to condemnation of racial propaganda, see GA Res 1904 (XVIII) (1963), and Art 4 of the Convention on the Elimination of all Forms of Racial Discrimination (see § 439).

69 See GA Res 59 (II) (1946); Art 19 of the Universal Declaration of Human Rights (§ 437); and Art 19 of the International Covenant on Civil and Political Rights (§ 440); Art 10 of the European Convention on Human Rights (§ 442). See also GA Res 2448 (XXIII) (1968). See generally on freedom of information, Schwelb, ICLQ, 9 (1960), pp 662–7; Whiteman, *Digest*, 13, pp 903–82, 1040–68; *La Circulation des informations et le droit international* (proceedings of a colloquium held in Strasbourg, 1977); Vines, *AS Proceedings* (1979), pp 183–92; *United Nations Action in the Field of Human Rights* (UN Secretariat, 1988; UN Doc ST/HR/2/Rev 3), pp 222–31.

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 301–11, 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 Boisson de Chazournes, AFDI, 34 (1988), pp 795–805. The European Court of Human Rights, in *Autronic AG v 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.

70 See § 115, n 8.

71 Resolution 756 (XXIX).

72 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 Racialism, Apartheid and Incitement to War was adopted at the 20th 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 seen as

formation was also provided for in the Final Act of the Helsinki Conference on Security and Cooperation in Europe 1975.[73] 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.[74]

§ 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.[1] Thus, for instance, a state may not use force upon its nationals abroad to compel them to fulfil their military service obligations in their home state (even though it is within its rights in imposing such obligations upon them);[2] 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.[3]

But a state may also by treaty obligation be in some respects restricted in its liberty of action with regard to its citizens.[4] 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.

73 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).

74 See eg *Parliamentary Debates (Commons)*, vol 32, col 31 (written answers, 15 November 1982), *ibid*, vol 60, col 115 (written answers, 15 May 1984), and *ibid*, vol 79, col 463 (written answers, 22 May 1985). Such jamming of radio broadcasts is likely to be inconsistent with the relevant provisions, particularly Art 35, of the International Telecommunication Convention 1982, Art 19.2 of the International Covenant on Civil and Political Rights 1966, and the Final Act of the Helsinki Conference on Security and Cooperation in Europe 1975 (Art 2 of Basket 3).

1 See § 118.

2 See Oppenheimer, AJ, 36 (1942), at pp 589–90.

3 For example, in time of war a belligerent is not entitled to prohibit one of its nationals, resident in a neutral state under the laws of which debts must be paid, from paying a debt due to a national of the other belligerent. For a survey of the law of the US as to the jurisdiction of courts of equity over persons to compel the doing of acts outside the territorial limits of the state, see Messner, Minn Law Rev, 14 (1929–30), pp 494–529. As to enforcement of foreign public law, see § 144. See also § 139, as to certain problems which have arisen in connection with anti-trust cases and boycotts.

4 Note also the Treaty of Berlin of 1878 which restricted the personal supremacy of Bulgaria, Montenegro, Serbia, and Romania in so far as these states were thereby obliged not to impose any religious disabilities on any of their subjects (see also § 40, n 4 and § 131, n 41, as to the position of Cyprus); and the policy of protecting racial, religious, and linguistic minorities by means of treaty obligations was carried further in the treaties concluded at the end of the First World War (see §§ 426–7).

humanitarian intervention[5] is tending to become a rule of international law and specific legal obligations in the field of human rights and fundamental freedoms are becoming established,[6] states are bound to respect the fundamental human rights of their own citizens.

§ 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.[1] 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.[2] 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.[3] Individual judges of the International Court of Justice have some-

5 See § 131(2).

6 See §§ 429–44.

1 See H Lauterpacht, *The Function of Law*, pp 286–306, *Development of International Law by the International Court* (1958), pp 162–5; Scerni, *L'abuso del diritto nei rapporti internazionali* (1930); Gutteridge, CLJ, 5 (1932), pp 22–45; Seles, *La Notion de l'abus du droit dans le droit international* (1939); Kiss, *L'abus de droit en droit international* (1953); Cheng, *General Principles of Law as Applied by International Tribunals* (1953), pp 121–36; Politis, Hag R, 6 (1925), i, pp 1–109; Leibholz, ZöV, I (1929), pp 77–125; Schlochauer, ZöV, 17 (1933), pp 373–94; Salvioli, Hag R, 46 (1933), iv, pp 66–9; Guggenheim, *ibid*, 74 (1949), i, pp 249–54; Roulet, *Le Caractère artificiel de la théorie de l'abus de droit en droit international* (1958); Garcia-Amador, Hag R, 94 (1958), ii, pp 376–82; Schwarzenberger, *International Law and Order* (1971), pp 84–109; Taylor, BY, 46 (1972–73), pp 323–52; Goodwin-Gill, *International Law and the Movement of Persons between States* (1978), pp 209–18, and BY, 47 (1974–75), pp 79–86; Thirlway, BY, 60 (1989), pp 25–9. See also the work done by the ILC from 1974 onwards and referred to at nn 15, 16 and 18.

To some extent, the matter may be one of formulation. If a right is formulated in absolute terms ('a State may expel aliens'), arbitrary and precipitate action may involve an abuse of that right; if the right is formulated in qualified terms ('a State may take reasonable measures to expel aliens'), such action would be wrongful not so much as an abuse of right but as being outside the scope of the right claimed. And see YBILC (1973), p 182, para (10). The inclusion in a rule of a qualification requiring reasonableness, or something similar, in its application, serves much of the purpose of the doctrine of 'abuse of rights'. That doctrine is a useful safeguard in relatively undeveloped or over-inflexible parts of a legal system pending the development of precise and detailed rules.

2 See §§ 413–14.

3 *Free Zones of Upper Savoy and the District of Gex*: Series A, No 24, p 12, and Series A/B, No 46, p 167. See also the case of *Certain German Interests in Polish Upper Silesia*: Series A, No 7, p 30. In the *Anglo-Norwegian Fisheries* case the Court regarded the situation before it as in part involving a 'case of manifest abuse' of the right to measure the territorial sea: ICJ Rep (1951), p 142. See Fitzmaurice, BY, 27 (1950), pp 12–14; *ibid*, 30 (1953), pp 53–4; and *ibid*, 35 (1959), pp 210–16.

When the ILC adopted in 1953 a draft Article on Fisheries which provided, *de lege ferenda*, that states shall be under a duty to accept regulations prescribed by an international authority as essential for the purpose of protecting fishing resources against waste or extermination, it stated

times referred to it;[4] possibly it is implied in the frequent judicial affirmation of the obligation of states to act in good faith.[5] 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.[6] 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.[7] 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 tort in several systems of law;[8] 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.[9] However, the extent of the application of the still controversial[10] 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)).

4 See eg Judge Azevedo in the *Admission Case*, ICJ Rep (1948), pp 79, 80; Judge Alvarez in the *Admission (General Assembly) Case*, ICJ Rep (1950), p 15. See also Judge Anzilotti in the *Electricity Company of Sofia Case*, Series A/B, No 77, p 88.

5 See the Joint Dissenting Opinion in the *Admission Case*, ICJ Rep (1948), 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 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.

6 See the *Minutes* of the First Committee of the Hague Conference on Codification of International Law (1930), pp 20 and 197. And see Rundstein, ZöV, 16 (1931), pp 41–5, and § 378. See also the Dissenting Opinion of Judge Read in the *Nottebohm Case*, ICJ Rep (1955), at pp 37–8.

7 See §§ 175–81 and also §§ 173, 225.

8 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 discharge which was causing the pollution was acting in breach of a legal duty.

9 See § 12. In *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1972] CMLR 177, 186, a court in the Federal Republic of Germany regarded the principle of proportionality as existing in public international law as part of the general principle of law prohibiting the abuse of rights.

10 See eg Balladore Pallieri, p 287; Cavaglieri, *Nuovi Studi sull' intervento* (1928), pp 42–52. 'Abuse of rights' may have some affinities with, although it is distinct from, the doctrine of *détournement 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.

State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction';[11] and in the *Corfu Channel* case, which by contrast raised questions of direct state responsibility, the International Court of Justice referred to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[12] Such limited international judicial consideration of the issues involved, while affording sound guidance as to the underlying principles, is insufficient to regulate increasingly complex situations. In relation in particular to pollution of the environment[13] of one state from sources in another state, international agreements have been concluded as a means of regulating the extent of state responsibility.[14] The topic of 'international liability for injurious consequences arising out of acts not prohibited by international law' was placed in the work programme of the International Law Commission in 1974 at the request of the General Assembly of the United Nations.[15] This has been seen as 'an affirmation of a broad principle that States, even when undertaking acts that international law did not prohibit, had a duty to consider the interests of other States that might be affected'.[16] This notion is broader than that of 'abuse of rights' since it omits the suggestion of excess inherent in the term 'abuse'.

Early consideration of this topic by the Commission, as reflected in draft articles considered by it in 1988–90, covers activities within a state which create an appreciable risk of causing physical transboundary injury, and of which the state knew or had the means of knowing:[17] while states are free to carry out or

11 RIAA, iii, p 1963, quoting Eagleton, *Responsibility of States in International Law* (1928), p 80. See also n 14.

12 ICJ Rep (1949), p 22; and see § 121, n 8.
See also the *Lake Lanoux Arbitration* – in which France's entitlement to exercise its rights (in relation to the utilisation of the waters of Lake Lanoux) had to be set against the entitlement of Spain (which was downstream of Lake Lanoux) to have its rights respected and Spanish interests taken into consideration – but this Arbitration turned on the provisions of a treaty between the two parties rather than on customary international law (ILR, 24 (1957), at p 140). It must be noted that where actions of private individuals and companies in one state cause harm in the territory of another, the matter is often settled by municipal courts applying municipal law. For references to several such cases, see Lachs, ICLQ, 39 (1990), pp 663–9. See also n 8 of this section. As to the damage caused to downstream states by the escape of chemical wastes into the Rhine from the Sandoz Chemical Corporation's factory at Basle, Switzerland, see Rest, Germ YBIL, 30 (1987), pp 160–76.

13 See generally, § 125. On liability for ultra-hazardous activities, see also § 149.

14 For an instance of conventional regulation of a nuisance committed by private persons and affecting injuriously the territory of a neighbouring state, see the Convention of 15 April 1935, between Canada and the USA for the settlement of difficulties arising out of the complaint of the US that fumes discharged from the smelter of the Consolidated Mining and Smelting Company in British Columbia were causing damage to the State of Washington: US TS No 983; AJ, 30 (1936), Suppl, p 163. In the *Trail Smelter Arbitration* arising out of this Agreement it was held, in 1941, that under international law no state has a right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another; RIAA, iii, p 1963; AD, 9 (1938–40), No 104. See the Report in the same matter of the International Joint Commission between Canada and the US of 28 February 1931: AJ, 25 (1931), p 540. See also § 121, n 5.

15 Res 3071 (XXVIII) (1973).

16 YBILC (1980), ii, pt 2, p 159. See generally, UN Secretariat, *Study of State Practice Relevant to International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law* (1984, UN Doc A/CN 4/384).

17 Note also the Decision of the OECD Council of 8 July 1988 on the exchange of information

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.[18]

§ 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.[1]

concerning accidents capable of causing transfrontier damage: ILM, 28 (1989), p 247. And see § 125, n 15, for other OECD decisions.

[18] 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 municipal law) were also discussed: *Report of the ILC* (42nd Session, 1990), paras 492–525. See generally on the ILC's work on this topic, Caubet, AFDI, 29 (1983), pp 99–120; Magraw, AJ, 80 (1986), pp 305–30; Barboza, AFDI, 34 (1988), pp 513–22; Boyle, ICLQ 39 (1990), pp 1–26.

[1] See generally Andrassy, Hag R, 79 (1951), ii, pp 77–178; Thalmann, *Grundprinzipien des modernen zwischenstaatlichen Nachbarrechts* (1951); Hag R (1973), Special Vol (ed Kiss) (Proceedings of Colloquium on the Protection of the Environment and International Law); Dickstein, ICLQ, 23 (1974), pp 426–46; Barros and Johnston, *The International Law of Pollution* (1974), pp 69–82; Handl, AJ, 69 (1975), pp 50–76; Teclaff and Utton (eds), *International Environmental Law* (1975); Kiss, *Survey of Current Developments in International Environmental Law* (1976), in *The Structure and Process of International Law* (eds Macdonald and Johnston, 1983), pp 1069–94, *Droit international de l'environment* (1989), and Germ YBIL, 32 (1989), pp 241–63; Hoffman, ICLQ, 25 (1976), pp 509–42; Johnson, *International Environmental Law* (1976); Dupuy, AFDI, 20 (1974), pp 815–29, and *La Responsabilité internationale des états pour les dommages d'origine technologique et industrielle* (1977); Springer, ICLQ, 26 (1977), pp 531–57; Handl, *Rev Belge*, 14 (1978–79), pp 40–64, AJ, 74 (1980), pp 525–65, and *AS Proceedings* (1980), pp 223–34; Schneider, *World Public Order and the Environment* (1979); Bothe (ed), *Trends in Environmental Policy and Law* (1980); Cripps, ICLQ, 29 (1980), pp 1, 2–6; Caldwell, *International Environmental Policy* (1984); Hag R (1984), Special Vol (ed Dupuy) (Proceedings of Colloquium on the Future of the International Law of the Environment); Gündling, ZöV, 45 (1985), pp 265–91; Lang, ZöV, 46 (1986), pp 261–83; Flinterman, Kwiatkowska and Lammers (eds), *Transboundary Air Pollution* (1986); Malvia, Indian JIL, 27 (1987), pp 30–49; *Annuaire*, 1 (1987), pp 159–294 (an exhaustive study); *Environmental Protection and Sustainable Development* (1987), a Report of UN Experts Group on Environmental Law (Munro, Chairman; Lammers, Rapporteur), appointed by the UN World Commission on Environment and Development; Anand, *International Law and the Developing Countries* (1987), pp 150–73; *Restatement (Third)*, ii, pp 99–143; Sumitra, Indian JIL, 27 (1987), pp 385–410; Boyle, BY, 60 (1989), pp 257–313; Gaines, Harv ILJ, 30 (1989), p 311–49; Hahn and Richards, *ibid*, pp 421–46; Lachs, ICLQ, 39 (1990), pp 663–9; Sachariew, Neth IL Rev, 37 (1990), pp 193–206; Wolfrum, Germ YBIL, 33 (1990), 308–30.

See also discussion of the legal aspects of long-distance air pollution by the ILA: *Report of the 58th Conference* (1978), pp 383, 390–422; *Report of the 59th Conference* (1980), pp 531–79; *Report of the 60th Conference* (1982), pp 157–82 (approving the 'Montreal' Rules of International Law Applicable to Transfrontier Pollution); *Report of the 61st Conference* (1984), pp

This wider environmental concern sprang from growing awareness of the damage done to neighbouring states by various forms of pollution, particularly that brought about by increasingly intensive industrial activity and its associated phenomenon of 'acid rain'.[2] The development of nuclear power, with the attendant risks of radioactive pollution should the nuclear reactors be damaged, added an extra dimension to the problem; and special urgency and importance was added after the Chernobyl disaster of 1986,[3] which caused serious and damaging

377–413; *Report of the 62nd Conference* (1986), pp 198–230; *Report of the 63rd Conference* (1988), pp 218–81. See also § 179, as to pollution of river waters resulting from the conduct of upper riparian states; and § 124, n 18, as to the work of the ILC on state responsibility for injurious consequences arising out of acts not prohibited by international law.

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 Organisation 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), p 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 1009; 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 Case (1)* and *(2)* (1987), ILR, 80, pp 367, 377; the court noted, *inter alia*, 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 Case 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 for accession to 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 Adede, *The IAEA Notification and Assistance Conventions* (1987). Note also similar 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 cooperation and assistance arrangements, 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.

There was also the disaster of a gas leak from a pesticide plant at Bhopal in India, on 3 December 1984; but this did not apparently involve cross-frontier air pollution, and the question of responsibility fell to be determined by municipal law and, ultimately, by the Indian municipal courts. For the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, see ILM, 25 (1986), p 884. Litigation was also instituted in the USA: see *Re Union Carbide Corpn Gas Plant Disaster at Bhopal, India in December 1984*, ILM, 25 (1986), p 771, AJ, 80 (1986), p 771, AJ, 80 (1986), p 964, affirmed on appeal, AJ, 81 (1987), p 415. See also Magraw, AJ, 80 (1986), pp 305, 325–6; Abraham and Abraham, ICLQ, 40 (1991), pp 334–65.

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 radioactive fall-out on their territories thus violating their territorial sovereignty: the Court 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), pp 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 the dumping at sea of noxious substances);[6] pollution of maritime areas originating 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

test explosions if they cause radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted. As to liability for ultra-hazardous activities, see § 149.

4 See § 353ff, as to marine pollution generally. It should be noted that Arts 192–6 of the Law of the Sea Convention 1982 consist of 'General Provisions' which are a statement in treaty language of the general principles of the Stockholm Conference, and may therefore be relevant also to the protection of the environment of land areas.

5 See § 353ff.

6 See eg Convention on the Dumping of Waste and Other Matters at Sea 1972 (ILM 11 (1972), p 1308; TS No 43 (1976)); Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft 1972 (ILM, 11 (1972), p 263).

7 See eg Convention for the Prevention of Marine Pollution from Land-Based Sources 1974 (TS No 64 (1978); ILM, 13 (1974), p 352); Convention on Protection of the Marine Environment in the Baltic 1974 (ILM, 13 (1974), p 546), on which see Boczek, AJ, 72 (1978), pp 782–814. A Protocol to the former Convention was concluded in 1986 extending it to cover the emission of pollutants into the atmosphere: Cm 87, Misc No 3 (1987).

8 See § 179; and the Report by Salmon, *Annuaire*, 58 (1979), i, pp 193–380, at p 318, for a list of relevant conventions from 1868–1977.

9 See eg the Geneva Convention on Long-Range Transboundary Air Pollution 1979; ILM, 18 (1979), p 1442; TS No 57 (1983). Participation in this convention was limited to member states of the Economic Commission for Europe, and also states having a consultative status with the Commission, and certain regional economic integration organisations. This convention, however, is limited to matters of cooperation and exchange of information, and undertakings to adopt policies without undue delay for combating air pollution; it does not touch on the difficult matter of liability. On this convention, see Heywood, Harv ILJ, 21 (1980), pp 536–40; Rosencranz, AJ, 75 (1981), pp 975–82; Tollan, *Journal of World Trade Law*, 19 (1985), pp 615–19; UN Legislative Series, *Review of the Multilateral Treaty-Making Process* (1985) (ST/LEG/SER B/21), pp 264–6; Fraenkel, Harv ILJ, 30 (1989), pp 447–76. Three protocols to the convention were concluded in 1984 (ILM, 24 (1985), p 484; TS No 24 (1985)), 1985 (ILM, 27 (1988), p 698) and 1988 (ILM, 28 (1989), p 212). The 1984 Protocol makes provision for mandatory contributions from party governments (to replace contributions from the UN Environment Programme (UNEP)); the 1985 Protocol 'on the Reduction of Sulphur Emissions or their transboundary fluxes by at least 30%' containing undertakings to achieve this as soon as possible and at the latest by 1993; the 1988 Protocol concerns the 'control of emissions of nitrogen oxides or their transboundary fluxes'. See also the Declaration on Acid Rain, 21 March 1984, by Canada and nine west European parties to the convention, undertaking to reduce emissions of sulphur and nitrogen oxides: ILM, 23 (1984), p 662.

See also the Convention on the Protection of the Environment, concluded by the Nordic States in 1974: ICLQ, 23 (1974), pp 886–7; Kiss, AFDI, 20 (1974), pp 808–14.

10 See the two conventions concluded in 1986 in the aftermath of the Chernobyl disaster, and cited at n 3 of this section.

11 See eg US–Mexico Agreement on Cooperation for the Protection and Improvement of the Environment 1983 (ILM, 22 (1983), p 1025); and four Annexes concluded in 1985–86 (ILM, 26 (1987), p 16); and see Hoffmann, Harv ILJ, 25 (1984), pp 239–44.

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,[12] treaties have sometimes totally excluded the dumping of certain wastes in areas covered by them,[13] or, like the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989,[14] 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,[15] and an Action Plan,[16] 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

See also the Memorandum concerning Transboundary Air Pollution concluded between the USA and Canada in 1980 (ILM, 20 (1981), p 690). The State of New York and the Province of Quebec concluded an agreement on acid precipitation in 1982: ILM, 21 (1982), p 721. See generally on problems of acid rain and other transboundary pollution problems as between Canada and the USA, Bourns, Neth IL Rev (1981), pp 188–94; Wetstone and Rosencranz, *Acid Rain in Europe and North America* (1983); Van Lier, *Acid Rain and International Law* (1984); Schmandt and Roderick (eds), *Acid Rain and Friendly Neighbours* (1985); ILA, *Report of the 63rd Conference* (1988), pp 237–8; Brunnée, *Acid Rain and Ozone Layer Depletion* (1988); and works cited at n 1 and n 9 of this section, dealing with transfrontier air pollution generally.

12 See n 6 of this section.

13 Eg Art V of the Antarctic Treaty 1959 (see § 257).

14 ILM, 28 (1989), p 657. See Bothe, Germ YBIL, 33 (1990), pp 422–31. As to particular problems associated with the dumping of waste products in Third World States, see Pambou Tchivounda, AFDI, 34 (1988), pp 709–25.

15 ILM, 11 (1972), p 1416. See Kiss and Sicault, AFDI, 18 (1972), pp 603–28. The Stockholm Conference was convened on the recommendation of the UN 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 environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction; and according to Principle 22 states shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction. Note also the Nairobi Declaration adopted in 1982 on the tenth anniversary of the Stockholm Declaration: ILM, 21 (1982), p 676, and Kiss, AFDI, 28 (1982), pp 784–93.

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 I, para 15(d)).

See also recommendations relating to transfrontier pollution adopted by the OECD Council in 1974, 1976, 1977 and 1978 (respectively, ILM, 14 (1975), p 242; *ibid*, 15 (1976), p 1218; *ibid*, 16 (1977), p 977; and *ibid*, 17 (1978), p 1530); ICLQ, 25 (1976), p 917; Shoesmith, Harv ILJ, 19 (1978), p 407. See also the Council's decision of 8 July 1988 on the exchange of information concerning accidents capable of causing transfrontier damage: ILM, 28 (1989), p 247; RG, 94 (1990), pp 140–6.

As to pollution of water and air, see § 124, and as to pollution at sea, see § 353ff.

16 ILM, 11 (1972), p 1421.

Nations Environment Programme (UNEP), with a Governing Council and a Secretariat.[17]

The focus for earlier measures of pollution prevention and control was the risk or occurrence of specific damage to the property or interests of another state. A much broader concern, however, was evoked by damage to the environment in a general sense, not directly related to the specific economic interests of particular states. The need to protect from damage areas beyond national jurisdiction was, for example, recognised by Principle 21 of the Stockholm Declaration,[18] and, more particularly, by Part XII of the Law of the Sea Convention 1982 in relation to the marine environment,[19] and treaties regulating or prohibiting the disposal of toxic wastes on the high seas. Article 30 of the Charter of Economic Rights and Duties of States 1974[20] provided, in general terms, that all states have a responsibility for the protection, preservation and enhancement of the environment. A serious breach of an international obligation of essential importance for safeguarding and preserving the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas, has been proposed by the International Law Commission as an international crime.[21] 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'.[22]

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 atmosphere which shields the earth from harmful rays from the sun. Second was the accumulation of evidence that a build-up of certain gases in the earth's upper atmosphere was apparently leading to a 'greenhouse' effect resulting in a steady increase in the planet's temperature, with a potentially serious threat to many aspects of life on earth. Major contributors to the damage to the ozone layer and the build-up of gases producing the 'greenhouse' effect (so-called 'greenhouse gases') are certain human activities, particularly those involving the emission of chlorofluorocarbons (damaging the ozone layer) and an increase in carbon dioxide emissions caused primarily by increases in the use of fossil fuels and by activities interfering with natural processes which would otherwise use up excess carbon dioxide (such as deforestation, which also affects rainfall patterns over

17 Res 2997 (XXVII).

18 See n 15 of this section.

19 See also Art 145 (as to protection of the marine environment from harmful effects of activities on the seabed beyond national jurisdiction); and Arts 1(4) and (5) defining 'pollution of the marine environment' and 'dumping'. See also § 353ff.

20 See § 106, n 6.

21 Draft Articles on State Responsibility, Art 19.3(d); YBILC (1976), ii, pt 2, pp 95, 108–10 (paras 30–33), 121 (para 71); and *Report of the ILC* (1989), paras 199–204.

22 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques 1976. GA Res 31/72; ILM, 16 (1977), p 88. See Fischer, AFDI, 23 (1977), pp 820–36. See also Arts 35(3) and 55 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 (ILM, 16 (1977), p 1391). During its occupation of Kuwait in 1990–91 Iraq caused extensive environmental damage by releasing crude oil into the waters of the Gulf, and setting fire to hundreds of oil wells.

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,[23] and the associated Montreal Protocol on Substances that Deplete the Ozone Layer 1987,[24] 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.[25]

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.[26] 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,[27] it may prove necessary to develop the possibilities inherent in obligations to protect the environment being owed *erga omnes*,[28] or in the right of a party to a multilateral treaty to take action against another party which is in breach.[29] 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 compensatable 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.

See also on various legal aspects of atmospheric protection and global climate change Kiss, AFDI, 21 (1975), pp 792–800, and 34 (1988), pp 701–8; Nanda (ed), *World Climate Change: the Role of International Law and Institutions* (1983); papers by Handl, Hajost, Gündling and Williams, in *AS Proceedings*, 1989, pp 62–80; Kirgis, AJ, 84 (1990), pp 525–30 (with particular reference to GA Res 43/53 (1988); Nanda, Harv ILJ, 30 (1989), pp 375–420; Churchill and Freestone (eds), *International Law and Global Climate Change* (1991).

26 On the need to develop international law so as adequately to ensure such protection see Brunée, ZöV, 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').

27 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.

28 See § 1, n 6; and note also § 1, n 9, as to the possibility of instituting an *actio popularis*.

29 See § 649.

SELF-PRESERVATION AND SELF-DEFENCE

Cavaglieri, *Lo stato di necessità nel diritto internazionale* (1918) Strupp, *Das völkerrechtliche Delikt* (1920), pp 122–29 Strisower, *Der Krieg und die Völkerrechtscordnung* (1919), pp 85–108 Rodick, *The Doctrine of Necessity in International Law* (1928) Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp 29–102 Visscher, RG, 24 (1917), pp 74–108 Hindmarsh, AJ, 26 (1932), pp 315–26 Giraud, Hag R, 49 (1934), iii, pp 692–860 Hertz, *Friedenswarte*, 35 (1935), pp 137–42 Wright, AJ, 29 (1935), pp 373–95, and 30 (1936), pp 45–6 Weiden, *Grotius Society*, 24 (1938), pp 105–32 Sperduti, *Rivista*, 35 (1943), pp 19–113 Ding, RG, 52 (1948), pp 223–54 Waldock, Hag R, 81 (1952), ii, pp 495–505, and *ibid*, 106 (1962), ii, pp 230–46 Stone, *Legal Controls of International Conflicts* (1954), pp 243–51, 259–65 Green, *Archiv des Völkerrechts*, 6 (1957), pp 387–438 Bowett, *Self-Defence in International Law* (1958) Brownlie, BY, 37 (1961), pp 183–268, and *International Law and the Use of Force by States* (1963), pp 41–4, 46–9, and 231–308 McDougal and Feliciano, *Law and Minimum World Public Order* (1961), pp 207–58 Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 197–210, and in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 440–46 Delivanis, *La Légitime défense en droit international public moderne* (1971) Pierluigi, *La legittima difesa nel dirito internazionale* (1972) Schwebel, Hag R, 136 (1972), ii, pp 413, 478–83 Tucker, AJ, 66 (1972), pp 586–95 Dinstein in *International Criminal Law*, vol 1 (ed Bassiouni and Nanda, 1973), pp 272–86, and *War, Aggression and Self-Defence* (1988), pp 165–253 Zourek, *Annuaire*, 56 (1975), pp 1–69 Friedlander, Israel YBHR, 8 (1978), pp 63–77 ILC Draft Articles on State Responsibility, Arts 33 and 34 and Commentary, YBILC (1980), ii, pt 2, pp 34–61 Singh, *Use of Force under International Law* (1984) Cot and Pellet, *La Charte des Nations Unies* (1985), pp 769–90 Sauvignon, AFDI, 31 (1985), pp 237–53 Combacau in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 9–38 Schachter, AJ, 83 (1989), pp 259–77 Greig, ICLQ, 40 (1991), pp 366–402 Simma (ed), *Charta der Vereinten Nationen* (1991), pp 617–35 See also vol II of this work (7th ed), §§ 52*aa* and 52*g*, in connection with the concept of 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.[1] 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

[1] See §§ 128–33.

territory, the necessity of safeguarding the integrity and inviolability of the territory of the state may in strictly limited circumstances justify acts which would otherwise be internationally wrongful.[2]

§ 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;[1] counter-measures involving the use of force are now normally unlawful, because of Article 2(4) of the United Nations Charter.[2]

Nevertheless, if a state is attacked it is entitled, in circumstances of necessity, to use armed force in order to defend itself[3] against an attack, to repel the

[2] See Draft Articles on State Responsibility, Art 33 and Commentary, YBILC (1980), ii, pt 2, 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 which, in the view of the ILC, would enable necessity to preclude 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 not in conformity does not arise out of a rule of *ius cogens*.

Some older precedents may still be instructive concerning 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 Venezuela Railroads Case*, *ibid*, x, pp 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 Chinn Case* (1934), PCIJ, Series A/B, No 63, pp 112–14. As to the *Torrey Canyon* incident (1967) (bombing of an oil tanker to minimise dangers of serious oil pollution), see Cmnd 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.

On the separate question of the defence of 'military necessity' see vol II of this work (7th ed), pp 232–3, 415–16; Dunbar, BY, 29 (1952), pp 442–52; Downey, AJ, 47 (1953), pp 251–62.

[1] See Art 30 of the ILC's draft Articles on State Responsibility, YBILC (1979), ii, pt 2, pp 115–22; Leben, AFDI, 28 (1982), pp 9 –77; Zoller, *Peacetime Unilateral Remedies: An Analysis of Counter-Measures* (1984); Simon and Sicilianos, AFDI, 32 (1986), pp 53–78; de Guttry, Ital YBIL, 7 (1986–87), pp 169–89; Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (1988); Thirlway, BY, 60 (1989), pp 107–113. In the *Case Concerning the Air Services Agreement of 27 March 1946* (*USA v France*) (1978), 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 affirm its rights through "counter-measures"' (at p 337); and see § 625, n 22. See also §§ 129, nn 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.

[2] See § 128. It may be noted that Art 2 (4) does not prevent a state from using force on its own territory, if eg it has been invaded by another state: in such a case the use of force would be justified as self-defence.

[3] Note also the somewhat wider sense of self-defence as meaning the warding off of a disaster caused or threatened by the work of nature. For instance, if a river flowing successively through

attackers, and expel them from its territory. Article 51 of the Charter, moreover, expressly preserves the right of individual or collective[3a] 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.[4] The requirement that there be an armed attack is clear, but not without difficulty.[5] It includes direct attacks across an international frontier by a state's regular armed forces (if amounting to more than a mere frontier incident),[6] 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;[7] but does not include such acts as assistance to opposition groups taking the form of the provision of weapons or logistic,[8] financial or other support (although such acts may amount to an unlawful use or threat of force or to intervention in the internal or external affairs of a state).[9]

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.

3a As to alliances, see §§ 664–6; and as to collective action in the general interest, see § 132. It may in particular 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.

4 *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 94, 102–3. The requirement under Art 51 to report to the Security Council measures taken in self-defence is not part of customary international law: see § 127, n 22.

5 As to the meaning of 'armed attack' see Brownlie, *International Law and the Use of Force by States* (1963), pp 278–9, 365–8; *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 103–4, 119–20. See also nn 15, 18 and 19, and § 128, n 3.

If 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 n 35) and 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 solely 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.

6 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.

7 Cf para 3 (g) of the Definition of Aggression, GA Res 3314 (XXIX) (1974).

8 But see the observations of Judge Jennings in his Dissenting Opinion in the *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 3, 543.

9 This has the consequence that the illegal use of such forms of force cannot be met by countermeasures 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.[10] 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;[11] 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[12] even though it may involve violation of the other state's territory and the use of armed force.

10 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; Fraleigh 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 in their actions against, and resistance to, such forcible action peoples are entitled to seek and receive support 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 in which the peoples live. Sovereignty, with its attendant rights and duties, rests with that state. It is, accordingly, both the right and the duty of the state to maintain law and order in the territory, and it may use armed force for the purpose. International law does not prohibit inhabitants of a state from rebelling or starting a civil war; and if they do so the existing government of the state is entitled to use force within its own territory to suppress the rebellion, and is not deprived of that right by action in 'self-defence' taken by the rebels. See also § 130, at nn 21, 22. Associated aspects of this issue include (1) the right of a liberation movement within a state to seek assistance from third states (see § 85, n 27 and § 131 (4)), and (2) their right to respond positively to such a request (*ibid*); (3) the right of the parent state to seek assistance from third states (see § 130, nn 20–22), 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).

11 See § 119, n 13, as to 'hot pursuit' on land.

12 Although in practice the dividing line is not always clear, it is necessary to distinguish self-defence from reprisals. The former is defensive action to repel or prevent 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 219–23; Kalshoven, *Belligerent Reprisals* (1971); Bowett, AJ, 66 (1972), pp 1–36; Barsotti in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 79–110; Zemanek, ZöV, 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 countermeasures, 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,[13] 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'[14] 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'.[15]

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*[16] 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

[13] See vol II of this work (7th ed), §§ 52*aa*, 52*g*. See also works cited in the bibliography preceding § 126.

As to the notion of self-defence in the major legal systems, see Jenks, *Common Law of Mankind* (1956), pp 139–43.

[14] 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.

[15] See Wharton, i, § 50*c*; 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 § 558, n 12. As to both cases, see Jennings, AJ, 32 (1938), pp 82–99. In addition to the *Caroline* incident, cases of self-preservation discussed in the 8th ed of this vol, §§ 131–133 concerned the shelling of Copenhagen and the destruction of the Danish Fleet (1807), Amelia Islands (1817), 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 *Virginius* (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 895–903). That a vessel sailing under another state's flag can nevertheless be seized on the high seas in case she is sailing to a port of the capturing state for the purpose of an invasion or bringing material help to 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.

[16] ICJ Rep (1986), p 14. See generally for comment on this aspect of the judgment, Moore, AJ, 80 (1986), pp 43–127; Rowles, *ibid*, pp 568–83; Bernstein, Harv ILJ, 28 (1987), pp 146–56; Verhoeven, RG, 91 (1987), pp 1159–1239; Hohmann and de Waart, Neth ILR, 34 (1987), pp 162–91; Akehurst, Indian JIL, 27 (1987), pp 357, 374–8; Hargrove, AJ, 81 (1987), pp 135–43. See also § 129, as to the findings of the Court in respect of intervention by the USA in the affairs of Nicaragua.

In response to Iran's seizure of the US Embassy in Teheran in 1979 and the holding of its staff as hostages, the US, in April 1980, landed military forces in Iran in an attempt (which was unsuccessful) to rescue the hostages. The US notified this operation to the Security Council, asserting that it had been carried out 'in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy'. Although the legality of this operation was not before the ICJ in the *Diplomatic and Consular Staff Case*, the Court expressed 'its concern in respect to the United States' incursion into Iran': ICJ Rep (1980), pp 18–19, 43–4. See generally Jeffery, ICLQ, 30 (1981), pp 717–29; Stein, AJ, 76 (1982), pp 499–531.

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.[17]

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.[18] 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

[17] ICJ Rep (1986), pp 103–4, 105, 120–21. But note the caution expressed by Judge Jennings in his Dissenting Opinion (at pp 544–5) as regards any requirement of undue formality in the 'declaration' or 'request'. As to collective self-defence see Bowett, BY, 32 (1955–6), pp 130–61; and as to alliances see §§ 664–6.

[18] See eg Kelsen, *Law of the United Nations* (1964), p 914, Brownlie, *International Law and the Use of Force by States* (1963), pp 257–61, 275–6, and Henkin, *How Nations Behave* (1979), pp 141–4, for the view that anticipatory self-defence is not permitted, which was also the view expressed in vol II of this work (7th ed), p 156; for the contrary view see Waldock, Hag R, 81 (1952), ii, pp 496–8; Fitzmaurice, Hag R, 92 (1957), ii, at p 171; Bowett, *Self-Defence in International Law* (1958), pp 187–92; McDougal and Feliciano, *Law and Minimum World Public Order* (1961), pp 232–41; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 199–203. See also Farer in *The Future of the International Legal Order*, vol 3 (eds Black and Falk, 1971), pp 36–42; Schwebel, Hag R, 136 (1972), ii, pp 413, 478–83; Mallison and Mallison, *The Palestine Problem* (1986), pp 297–302; Cassese, *International Law in a Divided World* (1986), pp 230–33. Note the distinction drawn by Dinstein in *War, Aggression and Self-Defence* (1988) between 'anticipatory' and 'interceptive' self-defence, the latter being a lawful response where the opposing state 'has committed itself to an armed attack in an ostensibly irrevocable way' (p 180). In the *Military and Paramilitary Activities Case*, the possible lawfulness of a response to the imminent threat of an armed attack which had not yet taken place was not raised and the Court expressed no view on that aspect: ICJ Rep (1986), pp 27–8, 103. See also as to the significance of threats of force in international law, Sadurska, AJ, 82 (1988), pp 239–68.

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 atack 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, can be justified[20] as self-defence under international law where (a) an armed attack is launched, or is immediately threatened, against a state's territory or forces (and probably its nationals); (b) there is an urgent necessity for defensive action against that attack; (c) there is no practicable alternative to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect; (d) the action taken by way of self-defence is limited to what is necessary 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.[21] 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*

[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/PV 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).

The Indian 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.

[20] If there exists a justification for action in self-defence, the existence of additional motives for the action taken does not deprive that action of its character of self-defence: *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 70–71.

[21] 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 subject to 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

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 until 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 and the restoration of peace.[22] 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.[23]

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 examples[24] 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.[25] Israel asserted that it needed to destroy fedayeen bases in Sinai from which repeated recent raids against Israel had been launched, with the consent and approval of Egypt.[26] Israel also claimed

Egyptian claim to have acted in self-defence in restricting passage through the Suez Canal of ships with Israeli destinations or origins.

[22] Article 51. The reporting requirement is not a condition of the lawfulness of the use of force in self-defence in customary international law, although the absence of a report may be one of the factors indicating whether the state in question was itself convinced that it was acting in self-defence: *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 105, 121–2.

It may be noted that the terms of Art 51 allow action in self-defence only until the Security Council has 'taken measures necessary to maintain international peace and security'. The actions of Kuwait and its allies in 1990 in responding to Iraq's aggression against Kuwait suggests that this does not prevent continued resort to self-defence even after the Council has taken some measures (eg the imposition of economic sanctions), if those measures have not had the necessary effect.

[23] Thus the *Report of the United Nations Special Committee on the Problems of Hungary*, 1957 (UN Doc A/3592) demonstrated the incorrectness of the Soviet Union's allegations that the Hungarian uprising of 1956 was strongly supported by the arrival of armed personnel from abroad. Similarly in 1970 a special mission was appointed by the Security Council to inquire into the facts of an alleged Portuguese attack upon Guinea: see SC Res 289 and 290 of 1970, and UNYB (1970), pp 187–91.

As to the value of the argument that a state, by raising the justification of self-defence, may thereby make an admission of the actions which it took and of their unlawfulness in the event that the plea of self-defence is rejected, see *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 44–5.

[24] As to the reliance by the Soviet Union on self-defence to justify its invasion of Poland in 1939, see Ginsburgs, AJ, 52 (1958), pp 69, 75–6; and as to the request by Lebanon for assistance from the USA in 1958, see § 130, n 4.

[25] See § 131, n 6.

[26] See the statement by the representative of Israel in *Security Council Official Records*, 749th

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 incidents[33] arising during the fighting in Vietnam, the lawfulness 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 Argentina of the Falkland Islands and South Georgia, eventually securing the removal of all Argentine forces from those British territories.[36]

Meeting, pp 8–10; UNYB (1956), p 26. So far as concerned the plea of self-defence it was widely considered that Israel's action had exceeded the limits of proportionality. There have been many other similar incidents during the Arab–Israeli confrontation since 1948, when Israel has attacked *fedayeen* bases and camps of the Palestine Liberation Organisation in neighbouring Arab territories. It is not always easy to distinguish the element of self-defence from that of reprisal (see § 127, n 12); nor is it always right to treat the incidents as self-contained, rather than as part of a continuing conflict. Furthermore, insofar as a state of war may be regarded as having existed at the relevant times, different considerations may apply. See generally Martin, *Le Conflit Israelo–Arabe* (1973); Rostow, AJ, 69 (1975), pp 272–89; Pogany, *The Security Council and the Arab–Israeli Conflict* (1984).

27 See UNYB (1967), pp 174–91; Higgins, *Journal of Contemporary History*, 3 (1968), pp 253–71; Schwebel, AJ, 64 (1970), pp 344–7; Shapira, Israel Law Rev, 6 (1971), pp 65–80; Martin, *Le Conflit Israelo–Arabe* (1973), pp 153–70; Pogany, *The Security Council and the Arab–Israeli Conflict* (1984), ch 5.

28 See UNYB (1982), p 428ff; and Mallison and Mallison, *The Palestine Problem* (1986), pp 276–406.

29 See Proclamation 3504 of 23 October 1962 (AJ, 57 (1963), p 512); Meeker, *ibid*, pp 515–24; Christol and Davis, *ibid*, pp 525–46; Wright, *ibid*, pp 546–65; Fenwick, *ibid*, pp 588–92; MacChesney, *ibid*, pp 592–7; McDougal, *ibid*, pp 597–604; Larson (ed), *The 'Cuban Crisis' of 1962* (1963); Virally, AFDI, 8 (1962), pp 457–75; Henkin, Hag R, 114 (1965), i, pp 251–71; Chayes, *Dept of State Bulletin*, 47 (1962), pp 763–5; Giraud, RG, 67 (1963), pp 501–44; Akehurst, BY, 42 (1967), pp 175, 197–203.

An important element in the incident was the right of anticipatory self-defence, as to which see n 18.

30 See BPIL (1964), pp 109–13; UNYB (1964), pp 182–6.

A somewhat similar incident occurred in 1958 when French forces in Algeria attacked the village of Sakiet in Tunisia, contending *inter alia* that they were doing so in self-defence since the village was being used as a base for rebels operating against the French in Algeria and that Tunisia had failed to act on previous French requests to control the rebels: see RG, 62 (1958), pp 171–80; UNYB (1958), pp 77–8.

It has been a persistent feature of the situation in relation to South Africa that its armed forces have attacked targets in neighbouring states, claiming that it needed to do so in order to defend the territory of South Africa and of South West Africa (Namibia) against guerrilla attacks launched from those states or perpetrated by people who subsequently fled into their territories. Such actions by South African forces have been regularly condemned by other states and by the Security Council. See eg SC Res 393 (1976); UNYB (1981), pp 217–21; SC Res 546 (1984); UNYB (1984), pp 180–84; and other incidents noted in RG, 89 (1985), pp 977–8, and RG, 90 (1986), pp 953–4.

See also § 119, *n* 13, as to the alleged right of 'hot pursuit' on land.

31 For comment, see Falk, Rogers, Moore, Aldrich, Friedmann, Bork and Hargrove, AJ, 65 (1971), pp 1–83; these, and other papers, are collected in Falk (ed), *The Vietnam War and International Law* (vol 3, 1972).

32 See the communications made to the Security Council on behalf of the Republic of Vietnam and the USA on 8 February 1971, UN Docs S/10104 and S/10106.

33 Among these note the incident in the Gulf of Tonkin in 1964, when North Vietnamese torpedo boats attacked US vessels in the Gulf and US aircraft then attacked the torpedo boats and their support facilities in North Vietnam in order to protect US naval units from further attack: the USA asserted to the Security Council that 'the action they [sc US forces] took in self-defence is the right of all nations and is fully within the provisions of the Charter of the United Nations' (the statement of Ambassador Stevenson is set out in Falk (ed), *The Vietnam War and International Law* (vol 1, 1968), pp 574–8). Similarly, the USA justified its action in laying mines at the entrance to certain North Vietnamese ports in 1972 on grounds of self-defence: see AJ, 66 (1972), pp 836–40.

34 See generally the literature cited at § 40, n 48.

35 See the statement made to the Security Council by the representative of Israel in June 1981, reproduced at ILM, 20 (1981), pp 970, 973, 989. The Security Council condemned the Israeli attack, and considered Iraq entitled to appropriate redress for the destruction it had suffered: SC Res 487 (1981). See generally UNYB (1981), pp 275–83; Fischer, AFDI, 27 (1981), pp 147–67; UNYB (1982), pp 425–8; RG, 86 (1982), pp 161–4; D'Amato, AJ, 77 (1983), pp 584–8. As to action taken against Israel within the IAEA as a result of the attack, see ILM, 20 (1981), pp 963–5; Gross, AJ, 77 (1983), pp 569, 574–83.

36 The Security Council demanded 'an immediate cessation of Hostilities' and 'an immediate withdrawal of all Argentine forces from the Falkland Islands (Islas Malvinas)': SC Res 502 (1982); see also SC Res 505 (1982). For the resolutions adopted at the Twentieth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, see ILM, 21 (1982), pp 669, 672. For various statements of the British Government's position, see UKMIL, BY, 53 (1982), pp 503–6, 519–20. See generally UNYB (1982), pp 1320–47; RG, 86 (1982), pp 724–73; Dupuy, AFDI, 28 (1982), pp 337–53; Forlati and Leita (eds), *Crisi Falkland–Malvinas e organizzazione internazionale* (1985); Levitin, Harv ILJ, 27 (1986), pp 621, 635–42. See also § 111, n 10, as to economic measures taken by various states against Argentina. See generally on the dispute over the Falkland Islands Cohen Jonathan, AFDI, 18 (1972), pp 235–62; Ronzitti (ed), *La Questione*

(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 proved 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]

INTERVENTION

Cavaglieri, *Nuovi studi sull' intervento* (1928) Schoenborn, *Die Besetzung von Veracruz* (1914) Hodges, *The Doctrine of Intervention* (1915) Stowell, *Intervention in International Law* (1921) Redslob, *Histoire des grands principes du droit gens* (1923), *passim* Brown, *International Society* (1923), pp 90–100 Redslob, *Les Principes du droit des gens moderne* (1937), pp 113–48 Mosler, *Die Intervention im Völkerrecht* (1937) Zannini, *Dell' intervento* (1950) Dupuis, Hag R (1924), i, pp 369–406 Strisower in Strupp, *Wört*, i, pp 581–91 Winfield, BY (1922–23), pp 130–49, and *ibid* (1924), pp 149–62 Hettlage, ZI, 37 (1927), pp 11–88 Guerrero, RG, 36 (1929), pp 40–51 Potter, Hag R, 32 (1930), pp 611–85 Séfériadès, *ibid*, 34 (1930), iv, pp 386–400 Yepes, *ibid*, 47 (1934), i, pp 51–90 Strupp, *ibid*, pp 513–21 Kaufmann, *ibid*, 55

delle Falkland–Malvinas nel Diritto Internazionale (1984); Ferrer Vieyva, *Las Islas Malvinas y el Derecho International* (1984) and *An Annotated Legal Chronology of the Malvinas (Falklands) Islands Controversy* (1985); Gustafson, *The Sovereignty Dispute over the Falkland (Malvinas) Islands* (1988); Beck, *The Falkland Islands as an International Problem* (1988).

37 ICJ Rep (1986), p 14. See n 16 of this section.

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; AJ, 80 (1986), pp 632–6; AFDI, 32 (1986), pp 1026–7; Greenwood, West Vir Law Rev, 89 (1987), pp 933–60; D'Amato, AJ, 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 UKMIL, BY, 57 (1986), pp 637–42.

In a somewhat similar incident in October 1985 Israeli aircraft attacked the headquarters in Tunisia of the Palestine Liberation Organisation, which had been responsible for a campaign of terrorist actions against Israeli interests. The Security Council condemned the Israeli action, and considered Tunisia entitled to appropriate reparations: SC Res 573 (1985). See RG, 90 (1986), p 457; AJ, 80 (1986), pp 165–7.

On those two incidents, and certain other anti-terrorist actions, see Regourd, AFDI, 32 (1986), pp 79–103.

39 See generally Gray, ICLQ, 37 (1988), pp 420, 425–7; Thorpe, *Ocean Development and International Law*, 18 (1987), pp 255–78; Ronzitti, AFDI, 33 (1987), pp 647–62; Wachenfeld, Germ YBIL, 31 (1988), pp 138, 159–64; Boczek, *Ocean Development and International Law*, 20 (1989), pp 239–71.

40 See § 220, n 1.

41 See RG, 91 (1987), pp 1335–6; *ibid*, 92 (1988), pp 701–2; ILM, 26 (1987), pp 1423–8; Gawley, Harv ILJ, 29 (1988), pp 566–71. For the eventual payment by Iraq of $27,350,374 in full and final settlement of all claims concerning the 37 deaths which had occurred, see ILM, 28 (1989), pp 644–8; AJ, 83 (1989), pp 561–4.

42 See ILM, 28 (1989), pp 896–7; RG, 93 (1989), pp 128–9, 436; SC Res 616 (1988); Report of ICAO Fact-Finding Investigation, November 1988, and ICAO Council Decision of 7 December 1988 and Resolution of 17 March 1989 (ILM, 28 (1989), pp 898–943); Leich, AJ, 83 (1989), pp 319–24; Maier, *ibid*, pp 325–32; Lowenfeld, *ibid*, pp 336–41; AJ, 84 (1990), pp 732–4; Linnan, Yale JIL, 16 (1991), pp 245–389. In 1989 Iran instituted proceedings before the ICJ against the USA for compensation arising out of this incident. The USA had earlier offered, *ex gratia*, compensation to the families of the victims: see AJ, 83 (1989), p 912.

43 See the USA's letter to the President of the Security Council pursuant to Art 51, UN Doc S/20366 of 4 January 1989.

A somewhat similar incident occurred in March 1986, although this time over waters on the Gulf of Sirte, a part of the Mediterranean Sea claimed by Libya as part of its territorial sea (a claim which was not generally recognised by other states). See Francioni, Ital YBIL, 5 (1980–81), pp 85–109. See also § 207 n 1 para 4.

44 See generally *The Kuwait Crisis: Basic Documents* (ed E Lauterpacht and others, 1991) and *The Kuwait Crisis: Sanctions and their Economic Consequences* (ed Bethlehem, 1991); Warbrick, ICLQ, 40 (1991), pp 482–92; various contributors, AJ, 85 (1991), pp 63–109; RG, 95 (1991), pp 149–53, 468–74. Hostilities ended in early March 1991; SC Res 687 (1991), of 3 April 1991, laid down the terms on which action against Iraq ceased. See also § 55, at n 45a, § 132, n 4, § 254, n 4, and § 517, n 1.

(1935), iv, pp 589–607 Ellis, *AS Proceedings* (1933), pp 78–88 Fenwick, AJ, 39 (1945), pp 645–63 Preuss, Hag R, 74 (1949), i, pp 605–19 Fabela, *Intervention* (1961) Fawcett, Hag R, 103 (1961), ii, pp 347–421 Higgins, BY, 39 (1961), pp 269–319; *The Development of International Law through the Political Organs of the United Nations* (1963), pp 167–239; and in *Intervention in World Politics* (ed Bull, 1984), pp 29–44 McDougal and Feliciano, *Law and Minimum World Public Order* (1961), pp 207–58 Brownlie, *International Law and the Use of Force by States* (1963), pp 281–301, 317–27, 333–49 Henkin, *AS Proceedings* (1963), pp 147–62 Stanger (ed), *Essays on Intervention* (1964) Lucchini, *Clunet*, 93 (1966), pp 451–464 Coste, RG, 71 (1967), pp 369–81 Gerlach, *Die Intervention* (1967) Schwebel, Hag R, 136 (1972), ii, pp 413–97, especially pp 452–5 Vincent, *Non-Intervention and International Order* (1974) Ouchakov, Hag R, 141 (1974), i, pp 1–86 Arangio-Ruiz, Hag R, 157 (1977), iv, pp 199, 252–304 Singh, *The Use of Force Under International Law* (1984) Bull (ed), *Intervention in World Politics* (1984) Foreign and Commonwealth Office Paper, *Is Intervention ever Justified?* also in BY, 57 (1986), pp 614–20 Levitin, Harv ILJ, 27 (1986), pp 621–57 Henkin, Hag R, 216 (1989), iv, pp 142–54, 163–81.

§ 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 threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the principles of the United Nations. This prohibition is also, and separately, reflected in customary international law.[4] If the use of armed force is of sufficient gravity, it may also constitute aggression.[5]

While the customary rules of international law relating to intervention have now to a considerable extent to be considered alongside the more general prohibition of the use or threat of force, intervention is still a distinct concept. Its prohibition is embodied in several treaties.[6] Article 3 of the International Law Commission's Draft Declaration on Rights and Duties of States categorically provides that 'every State has the duty to refrain from intervention in the internal or external affairs of any other State'.[7] In 1965 the General Assembly adopted a

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1 *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 106–7.

2 *Ibid*, pp 108, 109–10.

3 See generally vol II of this work (7th ed), § 52a. See also Stone, *Legal Controls of Armed Conflict* (1954); Waldock, Hag R, 81 (1952), ii, pp 455, 487–514; Bowett, *Self-Defence in International Law* (1958), pp 145–55; Brownlie, *International Law and the Use of Force by States* (1963), especially pp 264–70, 361–8, and in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 491–504; Giraud, RG, 67 (1963), pp 501–44; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 167–222, and in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 435–52; Derpa, *Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung Nichtmilitärischer Gewalt* (1970); Franck, AJ, 64 (1970), pp 809–37; Henkin, AJ, 65 (1971), pp 544–8; Zourek, *L'Interdiction de l'emploi de la force en droit international* (1974); Neuhold, *Internationale Konflikte – verbotene und erlaubte Mittel ihrer Austragung* (1977); Röling, Neth IL Rev, 24 (1977), pp 242–59, and in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 3–8; Lachs, Hag R, 169 (1980), iv, pp 153–69; papers by Acevedo, Reisman and Gordon, *AS Proceedings* (1984), pp 69–92; Cot and Pellet, *La Charte des Nations Unies* (1985), pp 113–25; Bokor-Szego in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 453–77; Sahovic, *ibid*, pp 479–88; Asrat, *Prohibition of Force under the UN Charter* (1991); Simma (ed), *Charta der Vereinten Nationen* (1991), pp 67–90. As to the significance of threats of force, see Sadurska, AJ, 82 (1988), pp 239–68.

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 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 BPIL (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 prohibiting the use of force, 'force' was not limited to armed attacks or aggression (ICJ Rep (1986), at p 101); but this could still leave less 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.

See also Stone, *Aggression and the World Order* (1958), pp 58–60, 66–8; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 175–8; Bowett, *Self-Defence in International Law* (1958), pp 106–16; Farer, AJ, 79 (1985), pp 405–13. As to the meaning of that particular form of armed force which constitutes an 'armed attack', see § 127, n 5.

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, nn 13–16, as to economic coercion.

4 *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 *ius cogens*.

5 GA Res 3314 (XXIX), (1974); see also § 30, n 37.

6 Thus the principle of non-intervention is embodied in Art 8 of the Montevideo 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 (Peaselee, *International Governmental Organisations* (3rd ed revised, 1974), p 1165), on which see Akinyemi, 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 (BFSP, 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.

7 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 insofar as it is not qualified by treaty obligations,[1] to decide for itself such matters

intervention in the internal or external affairs of another State'. 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* (40th 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 § 157.

8 Res 2131 (XX), adopted by 109 votes in favour, none against, and one abstention. See also eg Res 380 (V) (1950).

In 1981 the Assembly adopted a further declaration, the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States: GA Res 36/103. This resolution, unlike Res 2131 (XX), met with opposition from a significant body of states, and although 120 states voted in favour, 22 voted against and 6 abstained.

9 GA Res 2625 (XXV) (1970). See generally on the Declaration § 105. On the first principle in particular, see Tanca in *The Current Legal Regulation of the Use of Force* (ed Cassese, 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: GA Res 42/22 (1987).

10 Cmnd 9066; ILM, 14 (1975), pp 1292, 1294. See generally § 105, n 3.

11 See § 132.

1 See § 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:[2] support for an opposition within another state is perhaps one of the clearest examples of unlawful intervention in the affairs of that state[3] (provided that support has the other characteristics necessary to constitute intervention). This was the central issue in the *Military and Paramilitary Activities Case*,[4] 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;[5] 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;[6] and if it involves direct military action by the supporting state (whether on the part of its regular forces or through the despatch 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, acquiesced in by State B by treaty, 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.

2 ICJ Rep (1986), p 133.

3 It matters not that the aims of the state giving support may be less extensive than the aims of those being supported: 'The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching' (ICJ Rep (1986), p 124).

4 ICJ Rep (1986), p 14. See generally on the judgment, Eisemann, AFDI, 32 (1986), pp 153–91; Akehurst, Indian JIL, 27 (1987), pp 357–84; Highet, AJ, 81 (1987), pp 1–56; Briggs, *ibid*, pp 78–86; Boyle, *ibid*, 86–93; Christenson, *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*, 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; Tesón, *ibid*, pp 173–83. See also § 127, n 37, as to the justification of self-defence advanced by the USA (but rejected by the Court). See also § 130, as to civil wars.

For the Order of the Court indicating provisional measures see ICJ Rep (1984), p 169, on which see Rucz, RG, 89 (1985), pp 83–111; 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 debates 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, 80 (1986), pp 43–127; Rowles, *ibid*, pp 568–86.

5 Eg financial support: ICJ Rep (1986), p 124. See generally n 19.

6 ICJ Rep (1986), pp 103–4, 124.

on a significant scale)[7] it is in addition likely to constitute an armed attack (so giving rise to the right of self-defence[8] 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.[10] There are many acts which a state performs which touch the affairs of another state, for example granting or withholding recognition of its government,[11] 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),[12] sever diplomatic relations with another state, discontinue exports[13] to it or a programme of aid, or organise a boycott[14] of

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7 *Ibid*, pp 103–4.

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).

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 Redslob, *op cit.* in bibliography preceding § 128, at p 511, and Hettlage, *op cit.* in bibliography preceding § 128, at p 25. See also Gemma, Hag R (1924), iii, p 365, and Fauchille, § 300 (3). See § 122 as to subversive action in fomenting civil strife in another state.

11 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 General Franco after 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.

12 But note that Art XXI of the GATT permits unilateral trade restraints if a state believes its national security threatened.

13 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.

In the *Military and Paramilitary Activities* case the ICJ held that the various economic measures taken by the USA against Nicaragua (such as cessation of economic aid, reduction in import quotas for Nicaraguan sugar, and a trade embargo) did not violate the principle of non-intervention: ICJ Rep (1986) p 126. For the reference, at Nicaragua's request, of the US measures to an investigatory panel under the GATT, see Whitt, *Law and Policy in International Business*, 19 (1987), pp 603–31.

On the embargo by several Arab states of supplies of oil to certain other states in 1973, see Shihata, AJ, 68 (1974), pp 591–627; Paust and Blaustein, AJ, 68 (1974), pp 410–39, and (as eds), *The Arab Oil Weapon* (1977).

In 1978, the USA imposed a trade embargo on Uganda, in response to Uganda's conduct in gross violation of human rights. See Talkington, Harv ILJ, 20 (1979), pp 206–13, and Grove, *ibid*, pp 704–8.

In 1980 the USA imposed certain trade and other restrictions on transactions with Iran, following Iran's continued detention as hostages of US diplomatic and consular staff in Iran. See SC Res 461 (1979); Reisman, AJ, 74 (1980), pp 904–7; RG, 84 (1980), pp 876–81. See also *Narenji v Civiletti*, AJ, 74 (1980), p 433 (concerning restrictive regulations applied to Iranian nationals in the USA), and *Islamic Republic of Iran v United States*, AJ, 83 (1989), p 103 (holding export controls to have been tantamount to expropriation). See, for action taken by the UK, the Iran (Temporary Powers) Act 1980; and, for action taken by EC States, and some others, RG, 84 (1980), pp 881–9. The trade restrictions had been preceded, near the end of the previous year, by the blocking of Iranian assets in the USA: see ILM, 18 (1979), p 1549; ILM, 19 (1980), p 514; Fearon, Harv ILJ, 21 (1980), pp 523–8; and § 111, n 11, and § 139, n 4. For the USA–Iran Agreement providing for the unblocking of Iranian assets, see ILM, 20 (1981), p 230.

In the course of the USA's attempts to secure the overthrow, and arrest on drugs charges, of General Noriega, the military leader and effective ruler of Panama, the USA initiated various economic measures against Panama: see AJ, 82 (1988), pp 566–9, 571–7, 704. As to the military action eventually taken to secure the General's overthrow and arrest, see § 130, n 14.

On US export controls generally, as a contribution to foreign policy, see the Export Administration Act 1979 (ILM, 18 (1979), p 1508); and Murphy and Downey, ICLQ, 30 (1981), pp 791–834; Carter, *International Economic Sanctions* (1989).

On the embargo on trade with South Africa, pursuant at least in part to action by UN organs, see § 132, n 4.

On the control of exports of products having a potential strategic value, operated by a number of western industrialised states through the Coordinating Committee on Export Controls (COCOM) established in 1949, see the Export Administration Act 1979 enacted in the USA (ILM, 18 (1979), p 1508), as amended by s 2401ff of the omnibus Trade and Competitiveness Act 1988 (ILM, 28 (1989), pp 399, 421), and Davis, Harv ILJ, 29 (1988), pp 547–51.

Developing countries may be particularly susceptible to economic forms of pressure: see GA Res 38/197 (1983) on economic measures as a means of political and economic coercion against developing countries, and successive resolutions in following years (eg GA Res 44/215 (1989)). These resolutions followed reports on the subject by the UN Secretary-General containing much useful material.

See generally on non-forcible, economic coercion and influence, Lillich (ed), *Economic Coercion and the New International Economic Order* (1976); Neff, *Columbia Journal of Transnational Law*, 20 (1981), pp 411–37; Nincic and Wallensteen, *Dilemmas of Economic Coercion* (1983); Dupuy, RG, 87 (1983), pp 505–43; various papers presented at a Colloquium on 'Economic Pressure and International Law', *Rev Belge* (18 (1984–85), pp 5–245; Farer in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 121–31; de Guttry, Ital YBIL, 7 (1986–7), pp 169–89; Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (1988); Damrosch, AJ, 83 (1989), pp 1–50; Carter, *International Economic Sanctions* (1989); and n 14 of this section.

14 On the question of responsibility for the boycotting of goods from a foreign country, see Walz, *Nationalboykott und Völkerrecht* (1939); H Lauterpacht, BY, 14 (1933), pp 125–40; Hyde and Wehle, AJ, 27 (1933), pp 1–10; Preuss, *ibid*, 28 (1934), pp 667, 668; Bouvé, *ibid*, pp 19–42; Friedmann, BY, 19 (1938), pp 142–45, and in AJ, 50 (1956), at pp 495–8; Rousseau, RG, 62 (1958), pp 5–25; papers by Maw, Moore, Reisman and Archer in *AS Proceedings* (1977), pp 170–92; Mersky (ed), *Conference on Transnational Economic Boycotts and Coercion* (1978). See also Remer, *A Study of Chinese Boycotts* (1933), and Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp 604–22.

One of the most important recent boycotts has been that organised by certain Arab states against Israel: see generally Chill, *The Arab Boycott of Israel* (1976); Friedman, Harv ILJ, 19 (1978), pp 443–533. In 1946 the Council of the Arab League established a permanent 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 black-listed by the Central Boycott Office, and their products 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 them 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[15] or regards as unlawful, and may be presented by it as a form of 'sanctions'.[16] 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.[17]

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.[18] 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.[19]

taken steps to prevent the application of the boycott within their own territories. Thus in the USA legislation was enacted in 1977 having the general effect of prohibiting US persons from complying with specified foreign boycott requirements: see Public Law 95–52 (ILM, 16 (1977), p 917), later incorporated into the relevant part of the Export Administration Act 1979 (ILM, 18 (1979), pp 1508, 1517); see also implementing regulations and interpretations at ILM 17 (1978), pp 169, 198, 1136, 1141; ILM, 21 (1982), p 1121; and ILM, 22 (1983), pp 353, 359, 879; and see papers and discussion in *AS Proceedings* (1977), pp 170–96, and *ibid* (1978), pp 80–96; AJ, 72 (1978), pp 898–906; Pfeifer, Harv ILJ, 19 (1978), pp 349–72. See also ILM, 15 (1976), p 662 for similar legislation by the State of Maryland. See also *US v Bechtel Corpn*, ILM, 16 (1977), p 95; *Briggs and Stratton Corpn v Baldridge*, AJ, 77 (1983), p 310.

As to the British Government's policy towards the Arab boycott of Israel (broadly to the effect that it is 'against the introduction into commercial 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.

15 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); UKMIL, 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 672–9; RG, 90 (1986), pp 1005–7. For 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.

16 Eg various 'sanctions' imposed on Southern Rhodesia, South Africa and Iraq: see § 132, n 4.

17 But note that such action may be open to objection for other reasons. Thus in 1976 the Security Council, in Res 402, 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).

18 *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 108. In that case the ICJ 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*, pp 124–5.

19 In the *Military and Paramilitary Activities* case the ICJ held that the supply of funds to

§ 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,[1] which may be given *ad hoc* or in advance by treaty.[2] 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;[3] when British and American forces landed in (respectively) Jordan and Lebanon in 1958 at the request of those states;[4] when British forces assisted Uganda, Kenya and Tanganyika in 1964,[5] and Zambia in 1965,[6] at their request; when, during the Vietnam conflict, American forces assisted the Republic of Vietnam at its request;[7] when, in 1968 and 1969,[8] and again in 1983,[9] French

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: ICJ 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.

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 and rehabilitation of states whose finances had been plunged into chaos as the 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 financial and economic troubles has been carried out through the IBRD and IMF, and other inter-governmental financial institutions established on a regional basis. The grant 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 § *n* 16. The ICJ has accepted that 'intervention ... is already allowable at the request of the government of a State': *Military and Paramilitary Activities* case, ICJ Rep (1986), p 126. See generally Doswald-Beck, BY, 56 (1985), pp 189–252; Ronzitti in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 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; UNYB (1962), p 146.

4 See UNYB (1958), pp 36–49; *UK Contemporary Practice*, VII, pp 148–56 (ICLQ, 8 (1959)); Potter, AJ, 52 (1958), pp 727–30; Wright, AJ, 53 (1959), pp 112–25.

5 See BPIL (1964), pp 22–3.

6 See *ibid* (1965), p 189.

7 See generally the literature cited at § 40, n 48, and § 127, nn 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.

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;[11a] 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;[12] or when in 1988 Indian troops assisted the Maldives to restore order after an attempted coup.[13]

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 can only be determined in the light of the particular circumstances.[14]

[8] See Mitchell, YB of World Affairs (1972), pp 152–86, especially pp 168ff. For a statement of the French Government's principles in this context, see RG, 83 (1979), pp 1036, 1047–8.

[9] See AFDI, 30 (1984), pp 1023–7; Alibert, RG, 90 (1986), pp 345, 374ff. See generally as to the situation in Chad, involving also intervention by Libya, RG, 85 (1981), pp 586–8, 88 (1984), pp 288–92, and 89 (1985), pp 477–82; Alibert, *loc cit*, pp 345–406; Cot in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 167–78).

[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.

[11] See RG, 82 (1978), p 627.

[11a] See Brouillet, AFDI, 28 (1982), pp 293–336; RG, 87 (1983), pp 428, 433–5.

[12] See the India–Sri Lanka Agreement of 29 July 1987, ILM, 26 (1987), p 1175, at p 1181; Lewin, AFDI, 33 (1987), pp 95–105; Arulpragasam, Harv ILJ, 29 (1988), pp 178–84.

[13] See statement by the Indian Prime Minister in the Indian Parliament on 4 November 1988.

[14] Such questions arose for example when the Soviet Union sent its forces into Hungary in 1956 (see Wright, AJ, 51 (1957), pp 257–76; International Commission of Jurists, *The Hungarian Situation and the Rule of Law* (1957); GA Res 1004, 1005 and 1006 (ES-II) (1956), 1131 (XI) (1956), and 1133 (XI) (1957); *Report of the UN Special Committee on the Problem of Hungary* (1957), UN Doc A/3592 – and see also § 127, n 23; Fawcett, Hag R, 103 (1961), ii, pp 383–91; Szikszóy, *The Legal Aspects of the Hungarian Question* (1963); Whiteman, *Digest*, 2, pp 398–400); and when Soviet forces entered Czechoslovakia in 1968 (see § 133, n 10).

Similarly the entry of Soviet forces into Afghanistan in 1979 was allegedly preceded by a request from Afghanistan, in circumstances involving the virtually contemporaneous deposition and execution of the previous President and his replacement by a new President who was at the time not even in Afghanistan. See GA Res ES-6/2 of 14 January 1980; RG, 84 (1980), pp 826–46; AFDI, 26 (1980), pp 870–4; UNYB (1980), pp 296–309; Reisman, AJ, 81 (1987), pp 906–9; Reisman and Silk, AJ, 82 (1988), pp 459–86. Soviet forces finally withdrew from Afghanistan in February 1989, pursuant to agreements concluded the previous year: see ILM, 27 (1988), pp 577–95; RG, 92 (1988), pp 673–6; Ghebali and L'Homme, AFDI, 34 (1988), pp 91–107.

As to the landing of US forces in Grenada in 1983, see Audéoud, AFDI, 29 (1983), pp 217–28; Gilmore, *The Grenada Intervention* (1984); Joyner, AJ, 78 (1984), pp 131–44; Moore, *ibid*, pp 145–68; Vagts, *ibid*, pp 169–72; statements on behalf of the US Government at *ibid*, pp 200–204, 661–5; statements in the British Parliament, UKMIL, BY, 54 (1983), pp 528–9; Doswald-Beck, Neth ILR, 31 (1984), pp 355–77; RG, 88 (1984), pp 484–90; Levitin, Harv ILJ, 27 (1986), pp 621, 642–51; Weiler in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 241–68; Davidson, *Grenada* (1987).

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; Farer, *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.

In any event, while the established and internationally recognised government of a state is entitled to seek assistance from other states in preserving internal law and order[15] or to defend its borders from outside attack, and those other states may lawfully provide assistance, there are limits to the lawfulness of doing so in circumstances of civil war.[16] So long as the government is in overall control of the

[15] 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.

[16] On intervention by invitation in general, see E Lauterpacht, ICLQ, 7 (1958), pp 102–8; Brownlie, *International Law and the Use of Force by States* (1963), pp 321–7. See also Higgins in *The Future of the International Legal Order*, vol 3 (eds Black and Falk, 1971), pp 93–106. See on the principle of non-intervention in civil wars generally, Schindler, *Annuaire*, 55 (1973), pp 416–573, and *ibid*, 56 (1975), pp 119–33, followed in each case by comments by various members of the Institute of International Law; Chimni, Indian JIL, 20 (1980), pp 243–64; Akehurst, *ibid*, 27 (1987), pp 357, 365–74; Art 1(1) of the Inter-American Convention on the Rights and Duties of States in the Event of Civil Strife 1928 (BFSP, 128 (1928), p 514), and Res 78 adopted by the General Assembly of the OAS in 1972 (cited by the ICJ in the *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 102).

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 657–74. See generally on civil war, § 49, n 2.

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 revolution in Brazil.

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*; Dean, *Geneva Special Studies*, vii, No 8 (1936); Jessup, *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; Padelford, 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, cannot be easily brought within 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 promise of other powers to refrain from acting in a manner in which they were entitled – and, according to some, legally bound – to act. See, on intervention in the Spanish Civil War generally, Toynbee, *Survey* (1937), ii; Vedovato, *Il non intervento in Spagna* (1938); Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (1939); Rousseau, RI, 3rd series, 19 (1938), pp 217–93, 473–549, 700–75, and 20 (1939), pp 114–49; Scelle, RG, 45 (1938), pp 265–74, 473–549, and 46 (1939), pp 197–228; Raestad, *ibid*, pp 613–37, 809–26; Thomas and Thomas in *The International Law of Civil War* (ed Falk, 1971), pp 113–20.

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.[17] 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;[18] 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.[19]

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.[20] 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'.[21] 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.[22]

17 Outside states will in particular be under obligations to abstain from interference if the rebels have been granted recognition of insurgency or belligerency, as to which see § 49. See also § 122, as to obligations resting upon states to refrain from action encouraging activities calculated to foment civil strife in another state, which have obvious application to aid to rebels in another state.

18 In any case, a request to intervene made by the opposition within a state is insufficient to make the intervention lawful: *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 126.

See generally Brownlie, *International Law and the Use of Force by States* (1963), pp 321–7; Rosenau (ed), *International Aspects of Civil Strife* (1964); Pinto, Hag R, 114 (1965), i, pp 476–99; Hyde, i, p 253; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 210–13; Leurdijk, Neth ILR, 24 (1977), pp 143–59; and literature cited at § 49, n 2, as to civil war generally.

19 Thus in Angola in 1975–76 two liberation movements, each having by armed force struggled to oust the Portuguese colonial administration, then fought each other for eventual supremacy in the country. Armed forces from Cuba, and military equipment from the Soviet Union, supported one side (the MPLA), while the other (a combination of two previously separate liberation movements, the FNLA and UNITA) was supported by mercenaries from other countries; and there was also occasional involvement by South African forces (on which see SC Res 387 (1976)). See generally on the events in Angola, RG, 80 (1976), pp 554–74; Bothe, ZöV, 37 (1977), pp 572–602; UNYB (1976), pp 171–8. The withdrawal of Cuban forces from Angola was eventually agreed in 1988, to be completed by 1 July 1991 (ILM, 28 (1989), p 944; UN Doc S/20345 of 22 December 1988). On foreign intervention in Africa generally, see Legum, YB of World Affairs, 34 (1980), pp 76–94, and 35 (1981), pp 23–36.

20 See also § 85. 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 § 217, n 10); (2) its right to seek assistance from third states (see § 85, n 27 and § 131 (4)) and (3) their right to respond positively to such a request (*ibid*); (4) the right of the parent state to use force to resist the liberation movement (see § 127, n 10 and § 130, nn 20–22); and (5) the international status of the liberation movement, and the question of recognition (see § 49).

21 GA Res 2625 (XXV) (1970), para 7 of the elaboration of the first principle.

§ 131 Circumstances which may justify intervention Exceptionally, a state may be justified in intervening in the affairs of another state. In such cases the intervening state 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,[1] and its decision in the *Military and Paramilitary Activities case*[2] 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.[3]

Reasons which have been said to give a state justification for intervening in the affairs of another state include the following.[4]

22 See § 85, n 27, as to assistance to Portugal. On aid to France against the Algerian rebel movement, and unsuccessful attempts to argue that other states must not aid states resisting self-determination, see McNemar in *International Law of Civil War* (ed Falk, 1971), pp 215–18.

See also, generally, Ronzitti in *Current Problems of International Law* (ed Cassese, 1975), pp 319–54; Falk in *Intervention in World Politics* (ed Bull, 1984), pp 119–33; Rubino in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 133–45; Higgins in *ibid*, pp 448–50.

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.

2 ICJ Rep (1986), p 14.

3 *Ibid*, pp 26–8. See also the judgment on jurisdiction in this case, ICJ Rep (1984), pp 431–6.

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

(1) A state's right to protect its citizens abroad,[5] 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;[6] the landing of United States forces in Lebanon in 1958 at a time of internal conflict there;[7] 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;[8] the landing of United States and Belgian forces at Stanleyville in the Congo in 1964, to rescue persons being held by rebels as hostages;[9] the landing of United States forces in the Dominican Republic in 1965 at a time of internal upheavals in that country;[10] the

interest of the whole international community, it being the right of states (particularly leading states) to act in support of that interest. Such action, accordingly, had something of the character of 'police' action: that term was in fact used in, for example, the so-called Roosevelt Corollary of 1904 (for text see AJ, 69 (1975), p 383, n 2). Whatever may have been the justification for such intervention in the past, it can no longer be justified, the responsibility for such 'police' action now resting with those organs which, within the framework of the UN, can be authorised 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 (1986), pp 110–11, 127.

5 See § 410.

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, i, pp 646–9; Akehurst, *International Relations* (May 1977), pp 3–23; Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (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.

6 See ICLQ, 6 (1957), pp 325–30; and see generally § 132, n 2.

7 See § 130, n 4.

8 See UNYB (1960), p 52ff; McNemar in *The International Law of Civil War* (ed Falk, 1971), pp 272–3.

9 See UNYB (1964), pp 95–100; BPIL (1964), pp 130–33.

10 See § 133, n 9.

landing of Israeli commandos at Entebbe Airport, Uganda in 1976 to free the passengers (mostly Israeli nationals) of a hijacked aircraft;[11] the landing of Egyptian forces at Lanarka Airport, Cyprus in 1978 to rescue Egyptian and other hostages held by terrorists in a hijacked aircraft;[12] 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;[13] and the landing of United States forces in Grenada in 1983.[14]

Although it was formerly said that intervention was justified in order to ensure the safety of the property of a state's citizens abroad,[15] 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

11 See UNYB (1976), pp 315–20; ILM, 15 (1976), pp 1224–34; Margo, South African LJ, 94 (1978), p 306; Murphy in *Legal Aspects of International Terrorism* (eds Evans and Murphy, 1978), p 554ff; *Digest of US Practice 1976*, pp 149–54; AJ, 73 (1979), pp 122–4; Boyle, Neth ILR, 29 (1982), pp 37–71.

12 See RG, 82 (1978), pp 1096–7. See also RG, 90 (1986), pp 428–9, as to the landing of Egyptian forces in November 1985 in Malta in similar circumstances.

13 See *Parliamentary Debates (Commons)*, vol 951, cols 336–7 (written answers, 12 June 1978); AJ, 72 (1978), pp 917–20; RG, 83 (1979), pp 202–8; Manin, AFDI, 24 (1978), pp 159–88; *ibid*, pp 1087–90. Assistance had been requested by the Government of Zaire.

14 See § 130, n 14, para 3.

15 Occasionally the need to protect property has been advanced in justification of action taken, eg by the UK in landing armed forces in Egypt in 1956 (see n 6), and by South Africa in 1976 when sending forces into Angola to protect the Calueque Dam and construction site which were vital to the economy of part of Namibia (then under South African control) (see Bothe, ZöV, 37 (1977), at pp 578–80; RG, 80 (1976), at p 565; UNYB (1976), pp 172, 175.

As to debts owed by a state to foreign states and their nationals, intervention is no longer permissible to secure the payment of such debts. This was not formerly so. The matter assumed some importance at the beginning of the 20th century in the context of the so-called *Drago Doctrine*, which asserted that intervention was not allowed for the purpose of making a state pay its public debts. The rule did not at the time receive general recognition, although Argentina and some other South American states tried to establish it at the second Hague Peace Conference of 1907. But this Conference adopted, on the initiative of the USA, a 'Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts'. According to Art 1 of this Convention, the contracting powers agreed not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals. This undertaking was, however, not applicable when the debtor state refused or neglected to reply to an order of arbitration or, after accepting the offer, rendered the settlement of the *compromis* impossible, or, after the arbitration, failed to submit to the award. It must be emphasised that the stipulations of this Convention concerned the recovery of all contract debts, whether or not they arose from public loans. Louis M Drago was sometime Foreign Secretary of the Republic of Argentina. See Drago, *Cobro coercitivo de deudas publicas* (1906); Barclay, *Problems of International Practice*, etc (1907), pp 115–22; Moulin, *La Doctrine de Drago* (1908); Vivot, *La Doctrina Drago* (1911); Borchard, §§ 119–26, 371–78, and pp 861–64, and *State Insolvency and Foreign Bondholders*, 2 vols (1951); Higgins, *The Hague Peace Conference*, etc (1909), pp 184–97; Scott, *The Hague Peace Conference* (1909), i, pp 415–22; and AJ, 2 (1908), pp 78–94; Calvo, RI, 2nd series, 5 (1903), pp 597–623; Drago, RG, 14 (1907), pp 251–87; Moulin, RG, 14 (1907), pp 417–72; Hershey, AJ, 1 (1907), pp 26–45; Drago, AJ, 1 (1907), pp 692–726; Spielhagen, ZI, 25 (1915), pp 509–65; Dupuis, *Le Droit des gens et les rapports des grandes puissances* (1921), pp 270–82; Fischer Williams in *Bibliotheca Visseriana*, ii (1924), pp 1–55, and *Chapters*, pp 257–324; Scelle, ii, pp 121–28. With regard to state responsibility for the non-payment of contract debts and damages, see § 408.

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[16] according to discretion. But a substantial body of opinion[17] and of practice has supported the view that there are limits to that discretion and that when a state commits cruelties against and persecution of its nationals 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.[18] However, the fact

[16] See §§ 118, 377.

[17] See generally, Grotius, ii, 20, 38; Vattel, ii, 4, 56; Westlake, i, pp 319, 320. See also Stowell, pp 51–194 and AJ, 30 (1936), pp 102–6; Fauchille, i, pp 510–12; Martens, ii, pp 109, 110; Bluntschli, p 270; Janovsky and Fagen, *International Aspects of German Racial Policies* (1937), pp 1–43; Aroneanu, *Revue international de droit pénal*, 19 (1948), pp 173–244; Whiteman, *Digest*, 12, pp 204–15; Green, *Current Legal Problems*, 8 (1955), pp 162, 167–73; Ganji, *International Protection of Human Rights* (1962); Lillich, Iowa Law Rev, 53 (1967), pp 325–51; *ILA Report* (54th Conference, 1970), pp 633–41, (55th Conference, 1972), pp 608–24, and (56th Conference, 1974), pp 217–21; Lillich (ed), *Humanitarian Intervention and the United Nations* (1973); Sohn and Buergenthal, *International Protection of Human Rights* (1973), ch III; Franck and Rodley, AJ, 67 (1973), pp 275–305; Gerson, Harv ILJ, 18 (1977), pp 525, 550–5; Arangio-Ruiz, Hag R, 157 (1977), iv, pp 199–328 (with particular reference to non-intervention in the context of the human rights provisions of the Helsinki Final Act 1975); Akehurst in *Intervention in World Politics* (ed Bull, 1984), pp 95–118; Donnelly, *Journal of International Affairs*, 37 (1984), pp 311–28; Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985); Verwey, Neth ILR, 32 (1985), pp 357–418, and in *The Current Legal Regulation of the Use of Force* (ed Cassese, 1986), pp 57–78; Tesón, *Humanitarian Intervention* (1988); Rodley, ICLQ, 38 (1989), pp 321–33. See Brownlie, *International Law and the Use of Force by States* (1963), pp 338–42, for the conclusion that it is 'extremely doubtful whether a right of humanitarian intervention still survives'. As to the protection of human rights in general, see §§ 425–44, and see also § 397, n 4.

[18] Thus Great Britain, France, and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey when public opinion reacted with horror to the cruelties committed during the struggle. Intervention was often resorted to in order to put a stop to the persecution of Christians in Turkey. As to the French intervention in Syria in 1860–61, see Pogany, ICLQ, 35 (1986), pp 182–90.

The policy of apartheid exercised by South Africa is widely accepted as raising issues in which other states have, on humanitarian grounds, a lawful interest. But there are wide differences of opinion as regards the action which may lawfully be taken in pursuance of that interest: for the view that the use of force against South Africa in the context of bringing to an end the system of apartheid could be justified as humanitarian intervention, and as such a tacit exception to Art 2(4) of the Charter, see Rao in *New Horizons of International Law and Developing Countries* (eds Agrawala, Rao and Saxena, 1983), p 24. On apartheid generally, see § 439.

India in part justified its military intervention in Bangladesh in 1971–72 on humanitarian grounds: see *Review of the International Commission of Jurists*, June 1972, pp 57–62; Franck and Rodley, AJ, 67 (1973), pp 275–305. Tanzanian support for the overthrow of President Amin of Uganda in 1978–79 may also be seen as an example of humanitarian intervention justified by

that, when resorted to by individual states, it may be – and has been – abused for selfish purposes tended to weaken its standing as a lawful practice.[19] That objection does not apply to collective intervention,[20] 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

the cruelties of President Amin's regime: see Chatterjee, ICLQ, 30 (1981), pp 755–68. 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. As 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.

Elements of humanitarian intervention can be seen in the action, beginnning 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 in safety. Iraq was at 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, were temporary, 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 other 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 in 1990: see § 127, n 44.

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 the situation or unwilling to do so (or is perhaps itself the cause of it); whether competent organs of 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 to be 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.'

[19] See Jessup, AJ, 32 (1938), pp 116–19.

[20] See § 132.

intervention.[21] 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,[22] 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[23] and nothing in the Charter itself authorises intervention in matters which are essentially within the domestic jurisdiction of the state.[24] 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 is at least available) without discrimination between the parties to the conflict.[25]

(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.[26] Thus, the International Court of Justice accepted, in the *Military and Paramilitary Activities* case,[27] 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.[28] However, the Court rejected the contention of the United Kingdom that its action was justified as necessary both in the

[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, partaking of 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, n13.

[27] ICJ Rep (1986), p 14.

[28] See § 119, n 8. For comment on the judgment, see Waldock, Hag R, 81 (1952), ii, pp 499–503; Wilhelm, *Ann Suisse*, 15 (1958), pp 116–30.

interests of safety of navigation and in order to secure evidence which otherwise might be lost or destroyed,[29] 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.[30] 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.[31]

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.[32]

Nevertheless, the lawfulness of such intervention is open to considerable doubt. While the principle of self-determination of peoples is generally accepted,[33] until independence has been attained the parent state retains

[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, since international 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 § 85, n 27); (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).

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.

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.

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 Isoart, 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.

[31] See examples cited, § 85, nn 25–8. See also Gerson, Harv ILJ, 18 (1977), pp 525, 548–50.

[32] 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).

[33] 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.[34] 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[35] and perhaps also if it is of an economic character not directly associated with the military effort of the rebels.[36]

(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,[37] 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,[38] 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[39] 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;[40] 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[41] 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).

34 See § 127, n 10, and § 130, nn 20–2.

35 See § 129, n 18.

36 But see § 129, n 5.

37 Thus Art 7 of the US–Panama Treaty 1903, provided that 'the same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon, and the territories and harbours adjacent thereto, in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order': see Martens, NRG, 2nd series, 31 (1905), p 599, and Jones, *The Caribbean Since 1900* (1936), pp 339–52.

As to intervention pursuant to treaty by the USA in Cuba in 1906 and in Panama in 1904, see the 8th ed of this vol, pp 307–8, where certain other treaty provisions of this kind are also referred to. See also Art 6 of the Treaty between the Soviet Union and Persia concluded in 1921 (LNTS, 9, p 400): this Article was denounced by Iran in 1979 (see RG, 84 (1980), p 653; Reisman, AJ, 74 (1980), pp 144–54). As to the 'primary responsibility' of the USA for the defence of the Panama Canal see Art IV of the Panama Canal Treaty 1977 (ILM, 16 (1977), p 1022), and § 186. See generally Brownlie, *International Law and the Use of Force by States* (1963), pp 318–21.

38 See §§ 81–3.

39 But this has not been generally recognised; see, for instance, Hall, § 93, who denied the existence of such a right. It is difficult to see why a state should not be able to undertake the obligation to retain a certain form of government or dynasty. That historical events can justify such state in considering itself no longer bound by such treaty according to the principle *rebus sic stantibus* (see §§ 651) is another matter. See § 667–8, on treaties of guarantee in general.

40 That Treaty provided that 'Greece, under the sovereignty of Prince William of Denmark and the guarantee of the three Courts, forms a monarchical, independent, and constitutional State'. See Martens, NRG, 17, pt ii, p 79; and Ion, AJ, 11 (1917), pp 46–73, 327–57, and AJ, 12 (1918), pp 312–37.

41 TS No 5 (1961). Note, however, GA Res 2077 (XX) (1965), and comment by Schwelb, AJ, 61 (1967), at pp 952–3. As to the action of the three guarantor states in December 1963 in providing joint armed forces, under British command, to assist the Government of Cyprus, at its invitation, in restoring order in Cyprus after an outbreak of inter-communal disturbances, see BPIL (1963), pp 3–11.

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.

§ 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.[1] 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.[2] Thus, even if trading

1 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.

2 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 Beira patrol pursuant to SC 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 UNYB (1956), pp 25–45; Wright, AJ, 51 (1957), pp 257–76; 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,[3] restrictions imposed pursuant to a mandatory United Nations resolution would not do so.[4]

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.[5]

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,[6] that provision does not exclude action, short of

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 Suppl 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, but for its collective character, would be tantamount to intervention. See also the suggestive observations by Fenwick in AJ, 39 (1945), pp 645–63, 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 existing treaties, 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, nn 13–19.

4 As to the embargo on sales of arms to South Africa, see SC Res 418 (1977); see also SC Res 558 (1984), and 591 (1986). A Committee to oversee the implementation of the arms embargo was established by SC Res 421 (1977). A more extensive embargo on trade with South Africa has often been recommended by GA resolutions, eg (from many such resolutions) GA Res 1761 (XVII) (1962), 2671 F (XXV) (1970) and 40/64 (1985); see also, for extensive 'sanctions' imposed by the USA in the Comprehensive Anti-Apartheid Act 1986, AJ, 81 (1987), pp 201–5; ILM, 26 (1987), p 77; and Walker, Harv ILJ, 28 (1987), pp 117–222. Apart from any sanctions against South Africa which they might have introduced unilaterally, most Commonwealth governments applied certain sanctions pursuant to the Commonwealth Accord agreed at the Nassau meeting of Commonwealth Heads of Government in 1985: Commonwealth YB (1986), p 47. See also Barrie, AJ, 82 (1988), pp 311–14; Szasz, *ibid*, pp 314–18; RG, 90 (1986), pp 945–51, and 91 (1987), pp 916–17 and 1306; UKMIL, BY, 58 (1987), pp 631–3; Roeser, Germ YBIL, 31 (1988), pp 574–94.

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, § 168*f*, and vol II (7th ed), § 25*gc*; and Goodrich, Hambro and Simons, *Charte of the United Nations* (3rd ed, 1969), pp 60–72; Cot and Pellet, *La Charte des Nations Unies* (1985), pp 141–60; Trinidade, ICLQ, 25 (1976), pp 715–65; Simma (ed), *Charta der Vereinten Nationen* (1991), pp 100–14.

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.[7] 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;[8] and the action taken primarily by military forces of the United States in Grenada in 1983,[9] 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[1] 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'.[2] In a declara-

7 See § 433. See also Wright, AJ, 50 (1956), pp 102–10, to the effect that discussion of events in the UN does not constitute intervention. See also § 433, at n 12, and n 21, as to discussion in the UN of questions of human rights arising in member states.

8 See § 130, n 9.

9 See § 130, n 14, para 3.

1 For a fuller treatment of the Monroe Doctrine, and an extensive bibliography, see 8th ed of this vol, § 138. In more recent years the US has invoked the Monroe Doctrine in its relations with Cuba: see RG, 66 (1962), pp 769, 772.

2 See Fenwick, AJ, 33 (1939), pp 257–68; Wilcox, *American Political Science Review*, 36 (1942), pp 434–53. In the Declaration of Lima the American states proclaimed their common concern and their determination to make effective, by consultation and otherwise, their solidarity in case the peace, security or territorial integrity of any American republic should be threatened by foreign

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.[3] 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'.[4] 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.[5]

The prohibition of intervention in the American continent by extra-continental 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 extra-continental 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'.[6] 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[7] 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,[8] and the action taken in 1965 to forestall the establishment in the Dominican Republic of a Communist regime.[9]

intervention or activity. This step in the direction of what may be regarded as an extension of the Monroe Doctrine was tempered by the qualification that the 'Governments of the American Republics will act independently in their individual capacity, recognising fully their juridical equality as sovereign States': AJ, 34 (1940), Suppl, p 200.

3 *International Conference of American States, First Suppl, 1933–40* (1940), p 360.

4 *Ibid*, p 373.

5 AJ, 39 (1945), Suppl, p 108.
The Act, in anticipation of the forthcoming Charter of the United Nations, described the declaration in question as a regional arrangement not inconsistent with the purposes and the principles of the general organisation. The Act of Chapultepec was reaffirmed and its provisions rendered more effective in the Treaty of Rio de Janeiro of 2 September 1947 (as to which see § 665).

6 AJ, 48 (1954), Suppl, p 123; see also Fenwick, *ibid*, pp 451–3.

7 For a study of attempts by the USA to intervene in order to secure free elections abroad, see Wright, *American Support of Free Elections Abroad* (1964).

8 See § 224, n 4. Note also the action taken by the OAS in 1964 against Cuba, including the imposition of certain sanctions, as a result of Cuban intervention in Venezuela: see ILM, 3 (1964), p 977.

9 See the Resolution of 6 May 1965 adopted by the Tenth Meeting of Consultation of Ministers of Foreign Affairs of the OAS (AJ, 59 (1965), pp 987–8); UNYB (1965), pp 140–55; BPIL (1965), pp 11–18, 120–21; Fenwick, AJ, 60 (1966), pp 64–7; Bohan, *ibid*, pp 809–12; Dupuy, *Ann Français*, 11 (1965), pp 71–110; RG, 69 (1965), pp 1117–35; McLaren, Can YBIL, 4 (1966), pp 178–93; Akehurst, BY, 42 (1967), pp 175, 203–13; Slater, *Intervention and Negotiation* (1970).
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 § 122, n 32).

10 See ILM, 7 (1968), pp 1265–1340; Bergmann, *Self-Determination: The Case of Czechoslovakia 1968–69* (1972); Valenta, *Soviet Intervention in Czechoslovakia 1968* (1979). In December 1989 leaders of the Soviet Union and other East European states issued a statement condemning the invasion of Czechoslovakia, acknowledging it to be an 'interference in the internal affairs of sovereign Czechoslovakia': *The Times*, 5 December 1989.

11 On the 'Brezhnev Doctrine', see Schwebel, AJ, 66 (1972), pp 816–19; Remington, *AS Proceedings* (1973), at pp 63–4; Russell, AJ, 70 (1976), pp 253–7; Reisman, Yale JIL, 13 (1988), pp 171–98. For the British Government's view of the unlawfulness of the interventionist aspects of the Brezhnev Doctrine, see *Parliamentary Debates (Commons)*, vol 996, col 13 (written answers, 15 December 1980). The fundamental political changes in eastern Europe in 1989 effectively brought about the demise of the Brezhnev Doctrine.

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.[10] 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.[11]

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 Lachs, Hag R, 169 (1980), iv, pp 85–103.

§ 134 Intercourse between states Although it is no longer appropriate to speak of a vague general right of so-called intercourse,[1] mutual dealings are essential for the members of the international community, and the promotion

1 For the views of the scholastic 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 *ius communicationis* 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 diplomatic[2] and consular[3] relations, the freedom of the high seas[4] and the right of innocent passage through the territorial sea.[5]

§ 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 transit[2] 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 purposes[4] 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

2 See §§ 461–533.
3 See §§ 534–55.
4 See §§ 284–6.
5 See §§ 198–201.

1 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; Hostic, RI, 3rd series, 2 (1921), pp 83–124; Holländer, 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, ZöR, 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.
2 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.
3 For bibliography, see 8th ed of this vol, p 322, n 2.
4 Article 1.

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*:[7]

5 GA Res 2625 (XXV), fourth principle. See § 105. 'It seems to us on the whole not too much to regard the idea of an obligation of co-operation as being now in a fair way to acceptance as a general principle of international law': Fitzmaurice, *Annuaire: Livre du Centenaire 1873–1973* (1973), pp 319–20. See more generally, Pop, *Voisinage et bon-voisinage en droit international* (1980). Since 1979 the General Assembly has considered the development and strengthening of good neighbourliness between states (GA Res 34/99), but by the end of its 45th session in 1990 had not concluded its work.
6 The intercourse being regulated and facilitated is, of course, not just that of the states in question but also involves – and often involves primarily – dealings across international frontiers by individuals and corporations (increasingly multinational in character).
7 Note also that a great number of agreements have been made for the purpose of facilitating travel by removing or modifying passport restrictions. See § 381, n 7, and § 401, nn 4–8.

(a) road traffic;[8] (b) river transport;[9] (c) rail traffic;[10] (d) civil aviation;[11] (e) traffic by sea;[12] (f) postal communications;[13] and (g) radio communications.[14] In

[8] 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 80 (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) Declaration 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 (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 Crews 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 on Main International 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) the 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, p 321, n 2 (at p 322), and p 1022, n 1 (at p 1023). And see Whiteman, *Digest*, 9, pp 1121–32, 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 1975 (§ 105, n 3), and in furtherance of those provisions, the UK–USSR Agreement concerning International Road Transport 1988 (TS No 4 (1989)).

[9] See §§ 175–81.

[10] The principal treaties concluded after the Second World War include: (1) the two International Conventions of 10 January 1952, signed at Geneva, to Facilitate the Crossing of Frontiers for Passengers and Baggage by Rail and to Facilitate the Crossing of Frontiers for Goods carried by Rail (UNTS, 163, pp 3, 27); (2) International Convention, and Additional Protocol, concerning Carriage of Goods by Rail (CIM) 1970 (TS No 40 (1975)); (3) International Convention, and Additional Protocol, concerning Carriage of Passengers and Luggage by Rail (CIV) 1970 (TS No 41 (1975)) – these two last-mentioned conventions replacing earlier similarly entitled conventions concluded in 1961 (TS Nos 66 and 67 (1965)) and 1952 (TS Nos 46 and 47 (1958)); (4) Convention relating to the Liability of the Railway for Death of and Personal Injury to Passengers 1966 (TS No 20 (1973)); (5) Protocol concerning Contributions towards the Expenses of the Central Office of the States Parties to CIM and CIV 1970; (6) Convention concerning International Carriage by Rail (COTIF) 1980 (TS No 1 (1987)), which abrogates the treaties at (2), (3) and (5) above. For treaties concluded before the Second World War, see 8th ed of this vol, p 1022, n 1. See also Whiteman, *Digest*, 9, pp 1110–21.

Note also the UN Convention on International Multimodal Transport of Goods 1980 (ILM, 19 (1980), p 938), concerning the international carriage of goods by at least two different forms of transport. See Mankabady, ICLQ, 32 (1983), pp 120–40.

[11] See §§ 218–24.

[12] See §§ 285, 296–7, 353–9.

matters of *trade and finance* the needs of the international community have similarly been met by commercial treaties[15] between states, loan agreements,[16] aid arrangements, investment promotion and protection agreements,[17] 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[18] 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.[19] 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.[20] 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.

[13] See the Universal Postal Convention, and Postal Regulations, periodically revised.

[14] See § 122, nn 63–4, and § 225, and § 313.

[15] See § 669 (most favoured nation treaties), § 106 (economic rights and duties of states), and § 114, n 6 (GATT).

[16] On international cooperation in currency matters, particularly through standardising and stabilising agreements and international regulation of exchange control as well as through the International Monetary Fund, see Nussbaum, *Money in the Law* (1950), pp 502–46, Mann, *The Legal Aspect of Money* (4th ed, 1982), pp 355–559; Shuster, *The Public International Law of Money* (1973). See also *International Law Association Report*, 45 (1952), pp 233–96. See also Hulm, *International Monetary Cooperation* (1945); Rasminsky, *Foreign Affairs* 22 (1944), pp 589–604; J H Williams, *ibid*, 23 (1944), pp 38–54; Morgenthau, *ibid*, 23 (1945), pp 182–95; Mann, BY, 22 (1945), pp 251–58; Pehle, Yale LJ, 55 (1946), pp 1127–39. See also Lemkin, *La Réglementation des paiements internationaux* (1939); Hug, Hag R, 79 (1951), ii, pp 515–712; and Nussbaum, AJ, 38 (1944), pp 242–57.

[17] See § 407, nn 50–51.

[18] As to non-governmental organisations, see generally, § 7, n 28.

[19] See 8th ed of this vol, pp 977–1029. Peaselee, *International Inter-governmental Organisations* (6 vols, 3rd ed, revised 1974–79), sets out the constitutions of many international organisations. It is hoped to prepare a separate volume of this work to cover international organisations.

[20] The annual volumes of the UNYB summarise developments in each of the specialised agencies for the year in question.

JURISDICTION

Fischer Williams, *Chapters*, pp 209–31 Beale, HLR, 36 (1923), pp 241–62, and *Cambridge Legal Essays* (1926), pp 41–56 Wegner, *Über den Geltungbereich staatlichen Strafrechts* (1930) Mennacker, *Das Schutzprinzip*, etc (1931); *Actes de la Conférence Internationale du droit pénal de 1928* (Rome, 1931) Beckett, BY (1925), pp 44–60, and *ibid* (1927), pp 108–28 Cybichowski, Hag R (1926), ii, pp 264–382 Rousseau, RG, 37 (1930), pp 420–60 Mercier, RI, 3rd series, 12 (1931), pp 439–90 Monaco, *Rivista*, 24 (1932), pp 36–52, 161–83 Morelli, *ibid*, 25 (1933), pp 382–411 Overbeck, *Schweizerische Zeitschrift für Strafrecht*, 47 (1933), pp 310 *et seq* Travers, *Répertoire*, iv, pp 361–447 *Harv Research* (1935), pp 466–632 (a valuable exposition of the subject) McNair, *Opinions* (vol 2, 1956), pp 141–54 Jennings, BY, 33 (1957), pp 146–75 F A Mann, Hag R, 111 (1964), i, pp 9–162, and 186 (1984), iii, pp 9–116 Whiteman, *Digest*, 6, pp 88–183 Akehurst, BY, 46 (1972–73), pp 145–257 Bassiouni and Nanda, *International Criminal Law* (vol 2, 1973) Bowett, BY, 53 (1982), pp 1–26, and in Macdonald and Johnston (eds), *The Structure and Process of International Law* (1983), pp 555–80 *Restatement (Third)*, i, pp 230–366, 525–56, 591–641 Neale and Stephens, *International Business and National Jurisdiction* (1988) Henkin, Hag R, 216 (1989), iv, pp 277–330 See also, with particular reference to the extra-territorial application of anti-trust and other laws, works cited at § 139, n 43.

§ 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 jurisdiction[2] in the various forms it may take, while the latter prescribes the extent to which, and

[1] See also Basdevant and others, *Dictionnaire de la terminologie du 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 to 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 that discretion was 'limited in certain cases by prohibitive rules' and that it was 'required of a State ... that it should not over-step the limits which international law places upon its jurisdiction': PCIJ, Series A, No 10, at p 19.

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 upon 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 powers[8] 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

[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.

[6] PCIJ, Series A, No 10, at p 19. See also Lord Macmillan in *The Cristina* [1938] AC 485, 496–7.

[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 territory[1] of a state fall under its territorial authority,[2] 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 it is limited if to do so would 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:[3] 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.[5]

[9] See Mann, Hag R, 111 (1964), i, pp 43–51, 82ff; Brownlie, *Principles of International Law* (4th ed, 1990), pp 298, 306–7. The adoption by the ICJ in the *Nottebohm Case*, ICJ Rep (1955), p 4 of the principle of a 'genuine link' has been of some influence in the present context. See also § 139, n 46, for the need to consider the 'balance of interest' between states with competing claims to regulate a particular matter.

[1] As to the position of ships and aircraft, see §§ 141, 287. A state's territorial jurisdiction extends, at least for certain purposes, to various adjacent maritime areas even if they are not strictly speaking part of the state's sovereign territorial area: see generally § 314ff, § 327ff. See also, as to the special position of foreign ships in transit through a state's territorial waters, or in its ports, §§ 198–203. As to the status of embassy premises as part of the territory of the sending state, see § 494.

As to the territorial quality of islands composed of floating sea-ice, and jurisdiction over events taking place on them, see *US v Escamilla* (1972) and comment by Auburn, ICLQ, 22 (1973), pp 552–7.

[2] See §§ 117–18. The presumption that a state's territorial sovereignty carries with it the right to regulate matters arising in the state's territory imposes on a party alleging otherwise the onus of establishing its contention: *North Atlantic Coast Fisheries Case* (1910), RIAA, 11, pp 167, 180.

[3] As to a state's jurisdiction to try a person brought within its territory by improper means involving a violation of international law (as where a state has abducted a wanted person from the territory of another state without its consent) see § 119.

Although the territorial limitation upon the exercise of a state's authority affects its ability to enforce its laws, this is to some extent overcome by extensive cooperation between states in the application of their laws. See § 143.

[4] PCIJ, Series A, No 10, at pp 18–19.

[5] The US Supreme Court first enunciated a 'minimum contacts' test for the exercise of jurisdiction in relation to *in personam* jurisdiction in *International Shoe Co v Washington* (1945) 326 US 310. In *Shaffer v Heitner* (1977) 433 US 186 the Court held that *all* assertions of jurisdiction had to meet that test.

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 there[7] (again, at least if that business has given rise to or is directly related to the proceedings), by having made visits either in person[8] or by agents[9] 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.

[6] The US Supreme Court has indicated that that would almost invariably be a sufficient basis for *quasi in rem* jurisdiction: *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, Hay, ICLQ, 35 (1986), pp 32–62; *Restatement (Third)*, i, pp 305–13. As to the position in English law see generally Dicey and Morris, p 288ff.

[7] See eg *Hellicopteros 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 comment by Friedrich, Harv ILJ, 26 (1985), pp 630–36. Cf *Marc Rich & Co AG v US* (1983) 707 F 2d 663, with comment by Manes, Harv ILJ, 25 (1984), pp 250–57; *Asahi Metal Industry Co v Superior Court of California* (1987) 107 S Ct 1026, with comment by Ulene, Harv ILJ, 29 (1988), pp 207–14.

[8] See eg *Derby & Co Ltd v Larsson* [1976] 1 All ER 401.

[9] See eg the decision of a US Court of Appeals in *Republic International Corpn v Amco 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: *ICI Ltd v Commission of the European Communities* [1972] ECR 619, 666–7. For comment see Steindorf, CML Rev (1972), pp 502–10; Acevedo, MLR, 36 (1973), pp 317–20; Mann, ICLQ, 22 (1973), pp 35–50. See also *Europemballage Corpn 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 (1978), p 153; and *US v First National City Bank* (1965), ILR, 38, p 112 (as to a branch office abroad); *Volkswagenwerk AG v Schlunk*, ILM, 26 (1987), 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), iii, pp 53–66; *Restatement (Third)*, i, pp 269–82. See also § 138, n 11. On multinational corporations generally see § 380, n 15.

[11] See generally on criminal jurisdiction in English law over cross-frontier offences, Hirst, 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]

[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 Newman* (1967), ILR, 48, p 88; *Adams v Staatsanwaltschaft Des Kantons Basel-Stadt* [1978] 3 CMLR 480; *Re Chapman* (1970), ILR, 55, p 101.

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), *R v Treacy* [1971] AC 537 (blackmail of a person abroad), *R v El-Hakkaoui* [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).

[13] The leading example of the objective 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 effects, have taken place there' (at p 23).

See also eg *Mobarik Ali Ahmed v State of Bombay*, ILR, 24 (1957), p 156; *Attorney-General (No 1) v Tjoeng Khin-Tsjin* (1965), ILR, 59, p 325; *Re Kote, Mazeli and Noujaim* (1966), ILR, 47, p 267; *Musisi v Republic* (1969), ILR, 48, p 90; *Charron v US* (1969), ILR, 54, p 230; *R v Baxter* [1972] 1 QB 1; *Public Prosecutor v Janos V* (1972), ILR, 71, p 229; *Public Prosecutor v Loh Ah Hoo* (1974), ILR, 56, p 61; *US v Fernandez* (1974), ILR, 61, p 186; *R v Markus* [1976] AC 35. For jurisdiction over an attempt to commit a crime in a state, all elements of the attempt taking 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 55, 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 v Doot* [1973] AC 807; *Marin v US* (1965), ILR, 42, p 143; *Rivard v US*, AJ, 61 (1967), p 1065; *Somchai Liangsiriprasert v Government of the United States of America* [1990] 3 WLR 606; *R v Sansom* [1991] 2 WLR 366; cf *R v Cox* [1968] 1 All ER 410.

[14] 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.

[15] See § 109.

[16] For details, see § 451ff.

[17] See § 488ff. See also § 549ff (as to consuls) and §§ 531–3 (as to special missions).

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.

its warships[18] and its armed forces[19] 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] that state is not wholly free to subject them in every respect to its laws: thus it may probably not enforce upon them military service in its armed forces,[23] or levy taxes on them if they (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]

[18] For details, see §§ 560–4 – an immunity which is extended by the law of some states to cover public ships engaged in trade (see § 565). As regards the very limited 'extra-territoriality' of merchantmen which are by distress compelled to enter a foreign port, see §§ 203–4.

[19] For details, see §§ 556–8.

[20] 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.

[21] *Dickinson v Del Solar* [1930] 1 KB 376.

[22] But as 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] *Weil* case (1875), Moore, *International Arbitrations*, p 3424; *Imperial Tobacco Co of India v Commissioners of Income Tax* (1958), ILR, 27, p 103; Hyde, i, p 665; Albrecht, BY, 29 (1952), pp 145–85; Mann, Hag R, 111 (1964), i, at pp 109–19; Akehurst, BY, 46 (1972–73), at pp 179–80.

[25] See § 138, n 11ff, as to the limits upon a state's rights to require persons subject to its jurisdiction to take action in another state. See also Lord Diplock's acknowledgement in *Treacy v DPP* [1971] AC 537, 561, that 'it would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories' if the UK were to punish persons in the UK for their acts done abroad which had no harmful consequences in the UK. In civil matters, however, English courts will assume jurisdiction over a non-resident alien defendant if a writ is served on him during a brief visit to the UK, and even though the cause of action arose abroad: see *Colt Industries Inc v Sarlie* [1966] 1 All ER 673.

[26] For details see 8th ed of this vol, § 144, and below, § 557, n 4. See also Oppenheimer, AJ, 36 (1942), pp 566–95; Flory, *Le Statut international des gouvernements refugiés et le cas de la France libre* 1939–1945 (1952); Mattern, *Die Exilregierung* (1953); Barton, BY, 27 (1950), pp 207–17; McNair and Watts, *Legal Effects of War* (4th ed, 1966), ch 18. See also § 42, n 4, on governments in exile generally.

[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.[1] Accordingly, it may legislate with regard to their conduct when abroad, levy taxes in respect of their assets or earnings abroad,[2] or legislate in respect of their foreign property.[3] 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[4] to their conduct and consequently the jurisdiction of their courts to try such nationals for their

1 See *Blackmer v The United States of America* (1932), 284 US 421; AJ, 26 (1932), pp 611–18; *Skiriotes v Florida* (1941) 313 US 669; AJ, 35 (1941), p 569; *R v Holm*, decided in 1947 by the Appellate Division of the Union of South Africa: [1948] ASLR 925; AD, 14 (1947), No 33; Hackworth, ii, §§ 133–8; *Re Amand* [1941] 2 KB 239, and *Re Amand (No 2)* [1942] 1 All ER 236; *Kaiser and Attenhofer v Basle*, ILR, 17 (1950), No 46; *Steele v Bulova Watch Co*, ILR, 23 (1956), p 270; *X v Public Prosecutor*, ILR, 19 (1952), No 48; *Public Prosecutor v Y*, ILR, 24 (1957), p 264; *Re Gutierrez, ibid*, p 265; *Re Roquain*, ILR, 26 (1958–II), p 209; *Weiss v Inspector-General of Police, ibid*, p 210; *Public Prosecutor v Antoni* (1960), ILR, 32, p 140; *Cox v Army Council* [1963] AC 48; *Public Prosecutor v Li Te-hua* (1967), ILR, 40, p 87; *Pacific Seafarers Inc v Pacific Far East Line Inc*, AJ, 63 (1969), p 825; *Stegeman v US*, AJ, 65 (1971), p 211; *Scotch Whisky Association v Barton Distillery Co* (1973), ILR, 61, p 227; *US v Cotten* (1973), *ibid*, p 216; *US v Lansky* (1974), *ibid*, p 231; *Case Against Buscetta, Rivista*, 64 (1981), p 174. A state's nationals abroad would appear to be within the state's jurisdiction for the purpose of its obligations to ensure human rights to all persons 'within its jurisdiction': see § 440, n 30, and § 442, n 5.

In somewhat special cases a state may by agreement be able to treat nationals of other states as its own nationals: see § 385, n 1, para 3.

Although in 1949 the ILC included jurisdiction with regard to crimes committed outside national territory in its provisional list of topics for codification, it has not yet begun work on this topic. See § 30, item (4).

2 *US v Rexach* (1960), ILR, 31, p 273. But see F A Mann, Hag R, 111 (1964), i, at p 116. See generally Palmer, Harv ILJ, 30 (1989), pp 1–64; Martha, *The Jurisdiction to Tax in International Law* (1989). See also § 139, n 17.

3 *Amsterdam v Minister of Finance*, ILR, 19 (1952), No 50; *Shareholders of the ZAG v A Bank* (1965), ILR, 45, p 436. Several of the cases referred to in § 144 involve attempts by states to affect by legislation the property abroad of their nationals; while the state of the *situs* usually refused to enforce such laws, this is for reasons other than doubts as to the legislating state's jurisdictional rights in relation to such property.

4 In this context criminal law may be taken to include provisions of the law which impose penalties for conduct contrary to the law, even if the penalty is technically a civil rather than a criminal sanction: see § 139, n 3.

As to the application of a state's civil law, and the jurisdiction of its courts in civil matters, there has been little state practice relating to the compatibility with international law of the wide variety of kinds of jurisdiction asserted. Nevertheless, it is difficult to accept that a state may, without thereby being in breach of international law, assert and exercise jurisdiction in civil matters on whatever grounds it may choose, however little real connection there may be between the state and the matter in issue. The recognition and enforcement of a civil judgment given by a court in another state is usually subject to conditions which ensure that judgments given on the basis of unacceptably wide claims to jurisdiction are not recognised or enforced (see § 143). For discussion of problems of international law which arise in relation to jurisdiction in civil or private law matters, see Mann, Hag R, 111 (1964), i, at pp 73–81, and Akehurst, BY, 46 (1972–73), at pp 170–77, 182–7. See also Bleckman, CML Rev, 17 (1980), pp 467–85, and Collins, *ibid*, pp 487–91, as to the personal jurisdiction of the European Community over nationals and companies of member states when in third states.

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,[5] very few acts committed by nationals abroad constitute criminal offences under their laws; for such states the application of the criminal law is largely governed by territorial principles, sometimes because (as with the United Kingdom) the essentially oral procedures of criminal trials involving 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,[6] sometimes subject to other conditions being met, such as that the offence is also punishable under the law of the place where it occurred[7] or that the victim was also a national.[8] 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[9] 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[10] 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 by states of considerations of good sense and reasonableness. Thus states regularly conclude treaties to avoid or mitigate the 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

5 See generally Lew, ICLQ, 27 (1978), pp 168–214; Report of the Law Commission (England and Wales) on *Territorial and Extra-territorial Extent of the Criminal Law* (1978), and comment by Hirst, Crim Law Rev (1979), pp 355–63; Archbold, *Criminal Pleading, Evidence and Practice* (43rd ed, 1988), pp 125–44. One of the statutes which applies to conduct abroad is the Official Secrets Act: for an instance of authorisation to give evidence abroad notwithstanding the Act, see *Parliamentary Debates (Commons)*, vol 65, cols 854–5 (written answers, 29 October 1984). As to jurisdiction over 'British Subjects' see § 385, n 6.

6 See eg as to Israel's Penal Law Amendment (Offences Committed Abroad) Law 1978, Shachor-Landau, ICLQ, 29 (1980), pp 274–95; Art 9 of the Italian Penal Code; Art 5 of the Turkish Penal Code (provided that the offence carries a certain minimum level of punishment).

7 See eg as to the law of the Netherlands, *X v Public Prosecutor*, ILR, 19 (1952), No 48; *Public Prosecutor v Y*, ILR, 24 (1957), p 264; as to the Republic of China, *Public Prosecutor v Li Te-hua* (1967), ILR, 40, p 87; and as to Switzerland, *Kaiser and Attenhofer v Basle*, ILR, 17 (1950), No 46.

8 See eg as to the law of Belgium, *Re Roquain*, ILR, 26 (1958–II), p 209. Article 1 of the Swedish Penal Code allows Swedish citizens to be punished for crimes committed abroad against Sweden, against another Swede, or in other cases if the King in Council consents to the prosecution: see *Public Prosecutor v Antoni* (1960), ILR, 32, p 140.

9 Some states allow a person to be tried *in absentia*, including absence abroad: but that exercise of jurisdiction will not be effective against the accused, nor be enforced against him, until he returns. Similarly a state may enforce its jurisdiction over its nationals who are abroad by taking action affecting their assets within the state or their political or civic status.

10 See § 404.

even where their laws do have extra-territorial effect for their nationals states often refrain from applying them unless some substantial interest of the state is affected by the illegal conduct. A particular problem arises where under the laws of a state its nationals abroad are required to perform (or refrain from performing) acts abroad which, according to the law of the state where those nationals are, it would be an offence for them to perform there (or refrain from performing); a similar result may flow from an order of a court requiring a particular course of conduct from a party to the proceedings. In such cases the state of nationality must not require compliance with its laws at the expense of its duty to respect the territorial sovereignty of the state of residence.[11]

These issues have arisen notably in the context of the application of United States anti-trust legislation, where defendants have been required to produce to United States authorities or courts documents held abroad: these requirements have sometimes been far-reaching, involving the production of extensive documentation and relating to the defendant's commercial activities generally.[12]

[11] See § 123. In *Skiriotes v Florida* (1941) 313 US 69, 73 the US Supreme Court held that the US was entitled to regulate the conduct of its nationals abroad 'when the rights of other nations or their nationals are not infringed'. See also cases cited in n 12 of this section and § 139, n 41. In 1969 the British Government, in making representations to the Commission of the European Communities concerning jurisdiction in anti-trust matters, stated that 'The nationality principle justifies proceedings against nationals of the State claiming jurisdiction in respect of their activities abroad only provided that this does not involve interference with the legitimate affairs of other States or cause such nationals to act in a manner which is contrary to the laws of the State in which the activities in question are conducted': BPIL (1967), pp 58, 60.

An order to a national company that it should in turn require its foreign subsidiary company to pursue certain conduct amounts to an attempt by a state to control the conduct of an alien abroad and may be regarded as an infringement of the sovereignty of the foreign state concerned: see Akehurst, BY, 46 (1972–73), p 169, citing a Canadian protest in that sense. See also *Parliamentary Debates (Lords)*, vol 260, cols 825–7 (23 July 1964); and *Compagnie Européenne des Petroles SA v Sensor Nederland BV*, ILM, 22 (1983), p 66. The position may be different if the parent company chooses to instruct its foreign subsidiary to act in a certain way even if it does so in order to comply with the laws of the state of which the parent company is a national (see BPIL (1962), pp 31–2), or if the business abroad is merely a branch office of the national company (see *US v First National City Bank* (1965), ILR, 38, p 112). US regulations made in the aftermath of Iran's seizure of US diplomatic and consular staff as hostages in Teheran had the effect of prohibiting US banks, their branches and subsidiaries (even if overseas) from allowing Iran to withdraw dollar-denominated accounts held by them: see § 139, n 41.

[12] The cases have involved not only US nationals but also foreign nationals (usually companies) who by residence or conducting business in the US were subject *in personam* to US jurisdiction. See eg *Re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co* (1947) 72 F Supp 1013; *Re Investigation of World Arrangements*, ILR, 19 (1952), p 197; *Société Internationale pour Participations Industrielles et Commerciales SA v Rogers*, ILR, 26 (1958–II), p 123; *First National City Bank of New York v Internal Revenue Service* (1959), ILR, 28, p 138; *Re Grand Jury Investigation of the Shipping Industry* (1960) 186 F Supp 298; *Ings v Ferguson* (1960), ILR, 31, p 219; *Montship Lines v Federal Maritime Board* (1961), ILR, 32, p 100; *Application of Chase Manhattan Bank* (1962), ILR, 34, p 43; *Re Mitsui Steamship Co Ltd* (1962), ILR, 32, p 158; *Fontaine and IOS Ltd v Securities and Exchange Commission*, ILM, 5 (1966), p 1003; *Grand Jury Subpoenas for Bank Records*, ILM, 22 (1983), p 742 (resisted by the Landgericht, Kiel, *ibid*, p 740).

See generally on extra-territorial discovery Wallace, ICLQ, 32 (1983), pp 141–74; F A Mann, Hag R, 186 (1984), iii, pp 49–53; *Restatement (Third)*, i, pp 348–66; Gerber, AJ, 82 (1988), pp 521–55; and much of the literature cited at § 139, n 43, touches on this matter amongst others.

For responses by UK courts to excessive requests for discovery of documents made in the course of proceedings in the USA, see eg *Radio Corpn of America v Rauland Corpn* [1956] 1 QB 618; *Rio Tinto Zinc Corpn v Westinghouse Electric Corpn* [1978] AC 547; *Re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331.

Apart from any relevant laws adopted by the state in which the documents are situated prohibiting their production,[13] service of a subpoena on a foreign defendant in a foreign state to produce documents held there concerning business conducted there infringes the sovereignty of that state.[14] In practice potential conflicts are often resolved by acknowledging that in order to avoid an impasse the law of the state where the conduct is to take place or the documents are held should be obeyed, and the authorities of the other state accordingly do not insist upon strict compliance with the law, or vary the order or the court, particularly where the conduct required would involve breach of the criminal law in the state where the conduct would take place.[15] As a minimum, it would be appropriate for the court to weigh the importance of domestic public policy of

[13] See § 139, nn 48–50.

[14] See *Federal Trade Commission v Cie de Saint-Gobain-Pont-à-Mousson*, ILM, 20 (1981), pp 597, 603–6; *Mackinnon v Donaldson, Lufkin and Jenrette Corpn* [1986] 2 WLR 453.

[15] See *Interamerican Refining Corpn v Texaco Macaraibo 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 *Mannington Mills Inc v Congoleum Corpn* (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 of 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 comply with an order 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 on Mutual Assistance in Criminal Matters 1973 (see § 143, n 8), but the treaty did not apply to 'investigations or proceedings ... for the purpose of enforcing cartel or anti-trust laws': Art 2.1(a)(4). See generally the same n, 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), pp 722–8).

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 been 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, Whiteman, *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 civil[2] 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 cases[3] where the involvement of the public authority of the

[16] See § 139, n 46.

[1] See Hall, § 62; Westlake, i, pp 261–63; Lawrence, § 104; Moore, ii, §§ 200 and 201; Phillimore, i, § 334; Beckett, BY, 6 (1925), pp 44–60, and 8 (1927), pp 108–28; *Harv Research* (1935), pp 484–508; Preuss, *Grotius Society*, 30 (1944), pp 184–208. The question was studied by the League Codification Committee in 1926, upon a report by Brierly and Charles de Visscher, when the Committee came to the conclusion that, in view of the diversity of practice among states, 'international regulation of these questions by way of a general convention, although desirable, would encounter grave political and other obstacles': see AJ, 20 (1926), Special Suppl, pp 252–9, and comment by Woolsey, AJ, 20 (1926), pp 757–9. Although in 1949 the International Law Commission included jurisdiction with regard to crimes committed outside national territory in its provisional list of topics for codification, it has not yet begun work on this subject. See § 30, item (4). See also Donnedieu de Vabres, *Les Principes modernes du droit pénal international* (1928); Brewster, *Anti-Trust and Business Abroad* (1958); Sørensen (ed), *Manual of Public International Law* (1968), pp 355–74; Maier, AJ, 76 (1982), pp 280–320; Robinson, cited in *ibid*, pp 839–46; Demaret, *Revue trimestrielle de droit Européen*, 21 (1985), pp 1–39; Stern, AFDI, 32 (1986), pp 7–52; and works cited at n 43.

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.

[2] 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 Ltd v Larsson* [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 statutes: see § 20.

As to the grant of an injunction prohibiting a party to proceedings before the English courts from prosecuting proceedings abroad, see *South Carolina Assurance Co v Assurantie Maatschappij 'De Zeven Provincien' NV* [1987] AC 24. See also *Castanho v Brown and Root (UK) Ltd* [1981] AC 557; *Metall und Robstaff AG v ACLI Metals (London) Ltd* [1984] 1 Lloyd's Rep 598; *Laker Airways Ltd v Sabena*, ILM, 23 (1984), p 519; *British Airways Board v Laker Airways* [1985] AC 58; *Laker Airways Ltd v Pan American World Airways*, AJ, 79 (1985), p 1069; *Midland Bank Plc v Laker Airways Ltd* [1986] 1 QB 689.

[3] 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 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.

prosecuting state is readily perceived as leading to the exercise of such authority by one state within the territory of another. Similar problems arise where a state, in pursuit of its public purposes, attempts to block foreign-owned assets held abroad by domestic corporations, or, more to the point, by foreign subsidiaries of domestic corporations; this situation arose, for example, in 1979 when the United States acted in that manner in relation to Iranian assets.[4]

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 arson, libel and the like. These states cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory.[5] 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.[6] The question is, therefore, whether states have a right[7] to exercise jurisdiction over acts of foreigners committed in foreign countries, and whether under customary international law[8] 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

As to the applicability of the US Constitution to criminal proceedings outside the USA, see *US v Tiede and Ruske*, ILM, 19 (1980), pp 179, 194ff; *Williamson v Alldridge* (1970), ILR, 56, p 229; *Williams v Blount*, *ibid*, p 234. See also *Seery v US*, ILR, 22 (1955), p 398, as to the application of US constitutional guarantees in respect of a US citizen's property in Austria.

[4] ILM, 18 (1979), p 1549; Edwards, AJ, 75 (1981), pp 870–902. See generally § 129, n 13, para 5. In *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 3 WLR 314, an English court declined to accept as effective a US order purporting to block Iranian assets held with a London branch of a US bank; the US Government subsequently issued the US bank a licence to pay the sums in question to the Libyan bank (AJ, 82 (1988), at p 136). For comment see Joyce, Harv ILJ, 29 (1988), pp 451–74. See also *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co (No 2)* [1989] 1 Lloyd's Rep 608.

As to orders of an English court freezing the assets abroad of a defendant subject to the court's *in personam* jurisdiction, and the need in such cases to take account of the jurisdictional interests of the state where the assets are situated, see *Babanaft International Co SA v Bassatne* [1988] 2 WLR 232; *Derby & Co v Weldon (No 1)* [1988] 2 WLR 276; *Republic of Haiti v Duvalier* [1989] 2 WLR 261; *Derby & Co v Weldon (Nos 3 and 4)* [1989] 2 WLR 412; *Rosseel NV v Oriental Commercial Shipping (UK) Ltd* [1990] 1 WLR 1387.

[5] See the statements by the PCIJ in the *Lotus* case, quoted at p 458; and on the case generally, see § 140.

[6] This is reflected, for example, in Art 13 of the European Convention on Offences Relating To Cultural Property 1985 (ILM, 25 (1986), p 44) which obliges each party to establish its competence to prosecute offences against cultural property *inter alia* committed outside its territory either by a person having his or her habitual residence on its territory, or directed against cultural property originally found within its territory, but in both cases only if the suspected person is on its territory (the other four grounds of jurisdiction reflect the territorial or nationality bases of jurisdiction, including passive personality).

[7] That is, a right in international law: even if a state has such a right, a particular statute may as a matter of the state's internal law not permit of extra-territorial application against foreign nationals. In many states there is a presumption that its laws are not intended to have any such effect: see § 20.

[8] The state of which the alien is a national may be under an obligation by treaty to acquiesce in the exercise of jurisdiction; see eg the various treaties referred to in the following pages.

[9] This was the view expressed by the author. It was approved by Lord Finlay in his dissenting judgment in the *Lotus* case before the PCIJ in 1927, PCIJ, Series A, No 10: see § 140. There are now very few writers who deny absolutely the right of a state to punish aliens for crimes committed abroad.

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[10] 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]

10 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.

11 PCIJ, Series A, No 10, at pp 19–20.

12 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).

13 In cases of universal jurisdiction (n 19ff) the state's interest is as a member of the international community.

14 Different considerations apply where the conduct takes place in areas outside the territory of another state, eg on the high seas: see § 287ff.

15 See § 137, nn 12, 13.

Furthermore, 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.[16] In the United Kingdom certain exchange control offences can be committed abroad by persons who are residents in the United Kingdom;[17] 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 so 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

16 Akehurst, BY, 46 (1972–73), at p 156, cites Denmark, Iceland, Liberia, Norway and Sweden in this context; and see *Harv 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(GE) (An Infant)*, cited in n 17; and Art 4 of the Tokyo Convention on Offences and certain other Acts Committed on Board Aircraft 1963 (§ 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 ILJ, 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(GE) (An Infant)* [1965] Ch 568.

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.

18 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 *Theophile 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] 1 All ER 192, as to 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.

19 For a list of offences which are sometimes suggested as being subject to universal jurisdiction, see *Harv 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)*, i, pp 254–8. See also § 148 as to the work of the ILC on those internationally serious offences 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,[21] possibly terrorism[22] and the most serious violations of human rights such as torture,[23] and, as a result of treaties, grave breaches of the Geneva Conventions of 1949,[24] the hijacking[25] and sabotage[26] of aircraft, and apartheid.[27]

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,[28] including not only such offences as

[21] See vol II of this work (7th ed), §§ 251–7*c*; 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 Bassiouni, 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, 13 (1946), No 109; *Re Klein and Others (Hadamar 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, 544–6.

See also § 435, as to crimes against humanity.

[22] See generally § 122, n 42ff; and Cassese, ICLQ, 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 7ff).

[23] See *Filartiga v Pena-Arala* (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 § 19, n 93.

[24] UNTS, 75, pp 31, 85, 135 and 287. See also Art 85 of Protocol I to the Geneva Conventions 1977 (ILM, 16 (1977), p 1391). The Genocide Convention 1948 (UNTS, 78, p 277) does not, however, provide for universal jurisdiction in respect of acts of genocide, although the matter is not free from doubt: see Fawcett, BY, 38 (1962), pp 181, 205–8; Carnegie, BY, 39 (1963), pp 402, 408–9.

[25] See § 141, n 12.

[26] See § 141, n 14.

[27] Articles III and IV of the Convention on the Suppression and Punishment of the Crime of *Apartheid* 1973 (GA Res 3068 (XXVIII) (1973)): see § 439.

[28] In 1883 the Institute of International Law (see *Annuaire*, vii, p 156), among a body of fifteen articles concerning the conflict of the criminal laws of different states, 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, few states make it a punishable offence to commit high treason against foreign states (although see *Re van den Plas*, ILR, 22 (1955), p 205). It would be unreasonable to deny to a foreign state the right to punish high treason provided, of course, that the act in question constitutes high treason according to generally recognised legal notions. See also the Israeli law of 1971 which permits the trial in Israel of aliens committing crimes abroad against the security of the state, and under which a Turkish national was convicted in 1973: see *The Times*, 9 August 1973.

For a more modern exposition of the 'protective' principle of jurisdiction, see Bowett, *Self-Defence in International Law* (1958), pp 61–5.

threaten the political or military security of the state but also such offences as counterfeiting its currency,[29] or those which undermine its control over its population by violating its immigration policies[30] or prejudicing public health (especially through the supply of narcotics).[31] In all such cases the offence involves serious prejudice to matters within the competence of the state of the forum which justifies the exercise of jurisdiction by that state to protect itself, notwithstanding that the offender has at all times during the commission of the offence been outside its territory. This exception to the territorial principle does not, however, extend to conduct which offends against mere policies of the state. Thus the measures adopted by the United States of America, acting particularly under the Export Administration Act, to counter the Arab trade boycott of Israel, which purport to apply to foreign incorporated subsidiaries of United States companies doing business abroad have been regarded as to that extent 'quite unjustified and contrary to international law'.[32]

It is sometimes claimed that a state has jurisdiction over crimes committed abroad by aliens if the victim is a national of the state claiming jurisdiction: this is

As to treason committed abroad see *Joyce v DPP* [1946] AC 347; *Chandler v US* (1948) 171 F 2d 921; *Kawakita v US* (1952) 343 US 717; *Re van den Plas*, above; Whiteman, *Digest*, 6, pp 110–16.

[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*, iv, p 2692. See also the Counterfeit Currency (Convention) Act 1935, amending in certain respects the Forgery 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 312–25, 328–44; Fitzmaurice, AJ, 26 (1932), pp 533–51; Mettgenberg, ZöV, 3 (1932), pp 76–94. See also Pella, RG, 24 (1927), pp 673–768; Hackworth, ii, § 159; Whiteman, *Digest*, 6, pp 268–70.

See also *Public Prosecutor v L*, ILR, 18 (1951), No 48; *Georghios Petrides v Republic* (1964), ILR, 48, p 69; *Re Paris*, ILR, 24 (1957), p 48. Note also the reference in *R v Thompson* [1978] ECR, at p 2275 to 'the need to protect the right to mint coinage which is traditionally regarded as involving fundamental interests of the State'.

[30] See *Naim Molvan v Attorney-General for Palestine* [1948] AC 351, 370–71; *Rocha et al v US* (1960), ILR, 32, p 112; *US v Pizzarusso*, AJ, 62 (1968), p 975; cf *US v Baker*, ILR, 22 (1955), p 203. See also Whiteman, *Digest*, 6, pp 95–8.

[31] *Universal Jurisdiction over Drug Offences Case* (1976), ILR, 74, p 166; *United States v Gonzalez*, AJ, 80 (1986), pp 653, 655. See also § 143, n 13ff. As to the extra-territorial application of labour law, see Morgenstern and Knapp, ICLQ, 27 (1978), pp 769–93.

[32] *Parliamentary Debates (Commons)*, vol 37, col 548 (written answers, 25 February 1983). See also the Notes from the British Embassy Washington in 1981, UKMIL, BY, 53 (1982), pp 442–6, and the statement by the Attorney-General at UKMIL, BY, 56 (1985), pp 418–19. See generally on this and other boycotts, § 129, n 14. And see also 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 1985 (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 509, 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,[33] although it has been accepted in certain contexts such as war crimes,[34] and in treaties dealing with such matters as offences committed on board aircraft[35] and offences relating to cultural property.[36]

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.[37] The assertion of jurisdiction over aliens in respect of their conduct abroad on the basis of its effects within the state has in particular given rise to difficulties in connection with the extra-territorial application of anti-trust laws,[38] most notably those of the United States of America (although similar problems have arisen in less acute form in connection with similar laws in other states[39] and the rules of competition of the European Economic Community).[40] Thus the United States legislation relating

33 Note the criticism by Judge Moore in the *Lotus Case*, PCIJ, Series A, No 10. In that case the Turkish law in question reflected 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 578: 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 Laribière* (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 *cause célèbre* in the context of the 'passive personality' principle of jurisdiction arose in 1886 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 finally released, as the plaintiff withdrew his action for libel. 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, RI, 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.

34 See *Re Gerbsch*, AD, 16 (1949), No 143; *Re Rohrig, Brunner and Heinze*, 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, n 15, para 3. The passive personality principle is a more limited basis for jurisdiction over war crimes than the universality principle (n 19ff); 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.

35 See Art 4(b) of the Tokyo Convention on Offences and certain other Acts Committed on Board Aircraft 1963, § 141, n 7.

36 See Art 13.1(e) of the European Convention on Offences Relating to Cultural Property 1985: ILM, 25 (1986), p 44.

37 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, ZöV, 1 (1929), pp 50–56; Drost, ZI, 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 deeming an offence to have been committed not only where it did in fact take place but also where it took effect (eg s 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 DPP* [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 a state has the right to make acts or omissions done abroad criminal offences provided that they bear upon the peace, order and good government of the state: *Re Article 26 of the Constitution and re the Criminal Law (Jurisdiction) Bill 1975* (1976), ILR, 71, p 102.

38 Anti-trust law generally has a mixed civil and criminal character. Most of the controversy has revolved around those of its provisions which, at the instigation of state authorities rather than of private persons, seek to impose a certain course of conduct on pain of fines or other penalties, and may thus be assimilated to criminal law even if not strictly a matter of criminal law under the *lex fori*.

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.

39 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 Lever 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 notwithstanding certain consequences felt within Australia, see *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966), ILR, 52, p 291.

For adoption of an 'effects' principle in certain other fields, see Art 4 of the Tokyo Convention on Offences and certain other Acts Committed on Board Aircraft 1963 (§ 141, n 7), allowing a state to interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board if the offence has effect on the territory of that state; and see § 313, as to 'pirate broadcasting', involving unauthorised radio broadcasts from ships on the high seas, and received in the territory of the state taking action against the broadcaster.

40 Article 85(1) of the EEC Treaty prohibits agreements, decisions and concerted practices which *inter alia* 'have as their object *or effect* the prevention, restriction or distortion of competition within the common market'. In *ICI Ltd v Commission of the European Communities* [1972] ECR 619 the Commission (pp 627–30, 633–5) and the Advocate-General (pp 692–703) main-

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.[41] 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'.[42] 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 one of controversy.[43] 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,[44] 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:[45] 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

tained that jurisdiction on the basis of effects was consistent with international law, but the Court did not find it necessary to decide the point. For the views of the UK Government see the *aide mémoire* submitted to the Commission, BPIL (1967), pp 58–60. See also *Béguelin Import Co v SACL Import Export* [1971] ECR 949. In *Walrave v Union Cycliste Internationale* [1974] ECR 1405 the Court held a Community rule applicable to legal relationships if 'the place where they take effect' can be located within Community territory (at p 1420). See generally Deringer, ICLQ, 12 (1963), pp 582–90; Ellis in *Droit communautaire et droit international* (1965), Cahiers de Bruges, No 14, pp 361–80; and F A Mann, *ibid*, pp 381–7; Rahl (ed), *Common Market and American Anti-Trust* (1970). In *Ahlstrom Osakeyhtio v Commission of the European Communities* (Joined Cases 89, 104, 114, 116, 117, 125–9/1985: known as the 'Woodpulp Case') [1988] ECR 5193, the Court held the Commission to have jurisdiction to impose fines in respect of a pricing agreement concluded outside the EEC by a group of non-EEC companies, but implemented by them (whether directly or through agents, subsidiaries, or branches) within the EEC, and regarded jurisdiction over such conduct as falling within the territorial principle as universally recognised in international law. For comment see Lange and Sandage, CML Rev, 26 (1989), pp 137–65; F A Mann, ICLQ, 38 (1989), pp 375–7; Christoforou and Rockwell, Harv ILJ, 30 (1989), pp 195–206.

41 See eg *Re Grand Jury Investigation of the Shipping Industry* (1960), ILR, 31, p 209; *Montship Lines v Federal Maritime Board* (1961) 295 F 2d 147; *US v Anchor Line* (1964), ILR, 35, p 103; *Armement Deppe SA v US* (1968) 399 F 2d 794; and generally *Restatement (Third)*, i, pp 239, 243, 250–51, 289–90 and 294–5.

See also, as to matters other than shipping (and primarily the Sherman Anti-trust Act), *US v Aluminium Company of America* (1945) 148 F 2d 416; *US v Timken Roller Bearing Co* (1949) 83 F Suppl 284; *US v General Electric Co* (1949) 82 F Suppl 753, (1953) 115 F Suppl 835; *Holophane Co Inc v US*, ILR, 23 (1956), p 130; *Vanity Fair Mills Inc v T Eaton Co*, *ibid*, p 134; *Ramirez & Feraud Chili Co v Las Palmas Food Co Inc*, *ibid*, p 276; *US v Watchmakers of Switzerland Information Centre* (1963) Trade Cases 77, 414.

On the extra-territorial regulation of foreign issuers of securities in the domestic US market, see Stevenson, AJ, 63 (1969), pp 278–84; and *Schoenbaum v Firstbrook* (1968), ILR, 60, p 28 (with comment by Bator, *AS Proceedings* (1970), at pp 141, 143–4) relating to the operation of the Securities and Exchange Commission of the US pursuant to the Securities Exchange Act; *Leasco Data Processing Equipment Corpn v Maxwell* (1972), ILR, 60, p 51; *Schemmer v Property Resources Ltd* [1975] 1 Ch 273 (refusing enforcement of an order by the US Securities and Exchange Commission for possession of assets outside the USA); *Grunenthal GmbH v Hotz*, AJ, 75 (1981), p 960; *MCG Inc v Great Western Energy Corpn*, AJ, 84 (1990), p 755; Lowenfeld, Hag R, 163 (1979), ii, p 311, 344–72; Haseltine, ICLQ, 36 (1987), pp 307–28; *Restatement (Third)*, i, pp 295–303. For a Canadian protest against the operation of the Securities Exchange Act, see Can YBIL, 5 (1967), pp 317–18. See also *Kook v Crang* (1960), ILR, 31, p 206; and the remarks of Judge Jessup in the *Barcelona Traction Case*, ICJ Rep (1970), at p 167. For arrangements concluded by the USA with Japan, Switzerland, the UK and Canada to secure cooperation in the administration and enforcement of securities control legislation, see ILM, 22 (1983), p 1; 25 (1986), pp 1429, 1431; and 27 (1988), p 410.

42 US courts appear to have interpreted this requirement as necessitating some substantive effect within the USA: see Delaume, AJ, 74 (1980), pp 640, 646–9; *Martin v Republic of South Africa*, AJ, 82 (1988), p 583; *Zedan v Kingdom of Saudi Arabia*, AJ, 82 (1988), p 828; *Consolidated Gold Fields Plc v Minorco SA*, AJ, 83 (1989), p 923 (on which see Mann, ICLQ, 39 (1990), pp 410–12). See generally § 110, n 9, paras 2 and 3.

43 See generally on the extra-territorial application of anti-trust laws: Haight, Yale LJ, 63 (1954), pp 639–54; Whitney, *ibid*, pp 655–62; Oliver, AJ, 51 (1957), pp 380–85; Jennings, BY, 33 (1957), pp 146–75; Neale, *The Anti-Trust Laws of the USA* (1960), ch X; Verzijl, Neth ILR, 8 (1961), pp 3–30; Schlochauer, *Die Extraterritoriale Wirkung von Hobeitsakten nach dem öffentlichen Recht und nach Internationalem Recht* (1962); van Hecke, Hag R, 106 (1962), ii, pp 253–356; Barnard in *Comparative Aspects of Anti-Trust Law in the United States, the United Kingdom and the European Community* (1963), ICLQ Suppl Publication No 6, pp 95–116; F A Mann, Hag R, 111 (1964), i, pp 95–108, and 132 (1971), i, pp 162–5; ILA, *Report of 51st Conference* (1964), pp 304–592; ILA, *Report of 52nd Conference* (1966), pp 26–142; ILA, *Report of 53rd Conference* (1968), pp 337–404; ILA, *Report of 54th Conference* (1970), pp 151–246; ILA, *Report of 55th Conference* (1972), pp 107–75; Raymond, AJ, 61 (1967), pp 558–70; Whiteman, *Digest*, 6, pp 118–60; Feltham in *International and Comparative Law in the Commonwealth* (ed Wilson, 1968); Goldman, Hag R, 128 (1969), iii, pp 631–727; Rahl (ed), *Common Market and American Anti-trust* (1970); Falk, *The Status of Law in International Society* (1970), pp 265–325; Akehurst, BY, 46 (1972–73), pp 190–21; Lowenfeld, Hag R, 163 (1979), ii, pp 311, 373–411; Meal and Trachtman, Harv ILJ, 20 (1979), pp 583, 601–27; Jacobs, *The International Lawyer*, 13 (1979), pp 645–65; Gill, *ibid*, pp 607–17; Griffin (ed), *Perspectives on the Extra-Territorial Application of US Anti-Trust and other Laws* (1979); Meng, ZöV, 41 (1981), pp 469–512; Huntley, ICLQ, 30 (1981), pp 213–33; Sornarajah, ICLQ, 31 (1982), pp 127–49; Castel, Hag R, 179 (1983), i, pp 9–144; Lowe, *Extra-Territorial Jurisdiction* (1983), and in *International Economic Law and Developing States* (ed Fox, 1988), pp 47–61; Gerber, AJ, 77 (1983), pp 521–55 (as to the extra-territorial application of German anti-trust laws); Olmstead (ed), *Extra-Territorial Application of Laws and Responses Thereto* (1984); Meesen, AJ, 78 (1984), pp 783–810; Kuyper, ICLQ, 33 (1984), pp 1013–21; Focsaneanu, AFDI, 27 (1981), pp 628–52; *Restatement (Third)*, i, pp 282–95; Barlow, *Aviation Anti-Trust* (1988); Rigaux, Hag R, 213 (1989), i, pp 292–334. As to the views of the British Government see eg UKMIL, BY, 52 (1981), pp 459–60, and BY, 53 (1982), pp 455–7; and statements referred to at nn 48, 49.

44 See § 137, n 13.

45 The UK has generally been opposed to the 'effects' principle (see eg the *aide mémoire* submitted to the Commission of the European Communities in 1969: BPIL (1967), pp 58–60) notwithstanding the occasional suggestion to the contrary, at least if the effects are substantial (eg the statement by the Attorney-General during debates on the Shipping Contracts and Commercial Documents Bill: *Parliamentary Debates (Commons)*, vol 698, col 1280 (15 July 1964). See also UKMIL, BY, 55 (1984), p 539.

nations, to justify the assertion of extra-territorial authority'.[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[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 to 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 prohibit 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).[48] In the face of continuing assertions by

[46] *Timberlane Lumber Co v Bank of America* (1976–77), ILR, 66, p 270 (on which see Roelofs, Harv ILJ, 18 (1977), pp 701–3). See also the later stage in the same litigation, AJ, 79 (1985), p 735; *Mannington Mills Inc v Congoleum Corpn* (1979), ILR, 66, p 487 (and comment by Rauner, Harv ILJ, 20 (1979), pp 667–75); *Dominicus American Bohio v Gulf and Western Industries Inc* (1979), ILR, 66, p 378; *Laker Airways Ltd v Pan American World Airways*, ILM, 23 (1984), pp 748, 751 (on which see comment by Wassermann, Harv ILJ, 26 (1985), pp 201–8); *US v Bank of Nova Scotia* (1984) 740 F 2d 817 (and see Zabel, Harv ILJ, 26 (1985), pp 574–7); *Graco Inc v Kremlin Inc and SKM*, ILM, 23 (1984), p 757; *Remington Products Inc v North American Philips Corpn*, AJ, 80 (1986), p 664. But an interest balancing approach may be rejected where the interests to be balanced are principally political: *Laker Airways Ltd v Sabena*, AJ, 78 (1984), p 666. See generally *Restatement (Third)*, i, pp 248–51.

[47] As to the position in this respect of nationals of the state exercising jurisdiction the position is similar: see § 138.

[48] For comment on the Act, see Mann, ICLQ, 13 (1964), pp 1460–5. See also BPIL (1964), pp 146–55. For parliamentary discussion at an earlier stage of the dispute with the USA, see *UK Contemporary Practice* (1962–I), pp 15–18.

The application of US laws, and in particular the making of orders for the production of documents held outside the US, under s 21 of the US Shipping Act of 1916 (as amended), led to a serious difference of opinion between the US and a number of other states besides the UK. Discussion within the framework of the OECD resulted in a settlement of the matter, on the basis that the 14 states concerned were willing to assist the US to obtain certain of the documents and information it sought and that the US was willing not to proceed with the enforcement of the orders still outstanding: see BPIL (1964), pp 155–7. For protests made by several foreign states to the USA, see ILA, *Report of the 51st Conference* (1964), pp 403–6, 577–84. Many of the cases referred to at n 41 involve orders for the production of documents held abroad. For the requirement of the UK Government that the Anglo-Iranian Oil Co should not accede to any request by the US authorities for the production of documents outside the US and not relating to business in the US, see *Re Investigation of World Arrangements*, ILR, 19 (1952), pp 197, 198, and ILA, *Report of the 51st Conference* (1964), pp 569–73.

As to judicial cooperation over the requests for the production of documentary evidence see § 143, n 6.

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,[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.[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 a summary of the reasons giving rise to the need for this legislation, see *Parliamentary Debates (Commons)*, vol 973, cols 1533–46 (15 November 1979); see also UKMIL, BY, 50 (1979), pp 357–65, and 51 (1980), pp 444–9. For comment on the Act see Mannick, Harv ILJ, 20 (1981), pp 727–35; Huntley, ICLQ, 30 (1981), pp 213–33; Lowe, AJ, 75 (1981), pp 257–82; Lowenfeld, *ibid*, pp 629–38. For US expression of concern at the Act, see ILM, 21 (1982), p 840, and for the UK response see *ibid*, p 847.

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. For a list of occasions when orders or directions have been made under the Act, see UKMIL, BY, 58 (1987), pp 589–90.

[50] See § 138, n 15. The line of decisions there cited has occasioned the protective legislation passed by several states, such as the Shipping Contracts and Commercial Documents Act 1964 enacted in the UK (later replaced by the Protection of Trading Interests Act 1980: see above, in text) and the Business Records Protection Act 1950 enacted in Canada in response to the *Canadian International Paper Case* (1947) 72 F Suppl 1013. See also the later Canadian statute, the Foreign Extra-territorial Measures Act 1984 (ILM, 24 (1985), p 794); the Swedish law of 13 May 1966; the Norwegian law of 16 June 1967; the Finnish law of 4 January 1968; legislation enacted in Australia as the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976, Foreign Anti-trust Judgments (Restriction of Enforcement) Act 1979 (ILM, 18 (1979), p 869, and on which see Nakamura, Harv ILJ, 20 (1979), pp 663–7), and Foreign Proceedings (Excess of Jurisdiction) Act 1984, repealing and replacing the earlier Acts (ILM, 23 (1984), p 1038, with comment by Eure, Harv ILJ, 26 (1985), pp 578–84); the French law of 1980, on which see Herzog, AJ, 75 (1981), pp 382–6, and *Graco Inc v Kremlin Inc and SKM*, ILM, 23 (1984), p 757; and EEC Regulation 2641/84 adopted by the Council of Ministers of the European Communities in 1984 (ILM, 23 (1984), p 1419).

The more excessive assertions of US jurisdiction have been countered by judicial as well as legislative action in other states. In *US v Imperial Chemical Industries* (1952) F Suppl 215 an American court ordered ICI to take certain action in the UK affecting some patents which ICI had assigned to British Nylon Spinners, but the latter sought and obtained from a British court an injunction restraining ICI from carrying out the order of the American court: *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1953] 1 Ch 19. See also *Rio Tinto Zinc Corpn v Westinghouse Electric Corpn* [1978] AC 547, on which see 'X', ICLQ, 27 (1978), pp 496–50; Crawford, BY, 49 (1978), pp 282–5; Kraft, Harv ILJ, 21 (1980), pp 515–23 (on related litigation in the USA); *X AG v A Bank* [1983] 2 All ER 464. See also to similar effect to that of the *Westinghouse* case, *Gulf Oil Corpn v Gulf Canada Ltd*, decided by the Supreme Court of Canada: (1980) 31 NR 451; *Re Grand Jury Subpoenas for Bank Records*, ILM, 22 (1983), p 740, decided by the Landgericht, Kiel.

supplied by United States companies, or their subsidiaries (even if abroad), and material made (even abroad) under licence from United States companies. These measures evoked strong protest from many other countries, as overstepping the limits of jurisdiction permitted by international law.[51] In order to avoid, or at least reduce the impact of, such differences states have concluded agreements or other arrangements intended to facilitate cooperation between their authorities, particularly in relation to anti-trust matters.[52]

§ 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.[1] A collision had occurred on the open sea between the French steamship *Lotus* and the Turkish steamship *Boz-Kourt*, 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,[2] 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-Kourt* 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 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'.[3] 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,[4] in Article 11 of the 1958 Geneva Convention on the High Seas,[5] and in Article 97 of the Convention on the Law of the Sea 1982.[6]

51 For the US measures see ILM, 21 (1982), pp 855, 864, 1098, 1115. For the diplomatic representations by the European Community, see *ibid*, pp 891–904. See also UKMIL, BY, 53 (1982), pp 452–3, 453–5; RG, 87 (1983), pp 397–402; De Souza, Yale JIL, 10 (1984), pp 92–117; Lowe, ICLQ, 33 (1984), pp 515–30. See also *Dresser Industries Inc v Baldridge*, AJ, 77 (1983), p 626; *Compagnie Européenne des Petroles SA v Sensor Nederland BV*, ILM, 22 (1983), p 66. On the extra-territorial reach of US export controls generally, but including the Siberian gas pipeline affair, see Lowe and Warbrick, ICLQ, 36 (1987), pp 398–402; Griffin and Calabrese, *Journal of World Trade Law*, 22 (1988), No 3, pp 5–26. See generally n 32.

52 See eg USA–Australia Agreement Relating to Cooperation on Anti-trust Matters 1982 (ILM, 21 (1982), p 702; Leich, AJ, 76 (1982), pp 866–7); Sutherland, ICLQ, 33 (1984), pp 230–32; the USA–Canada Memorandum of Understanding 1984 (ILM, 23 (1984), p 275; AJ, 78 (1984), pp 659–61), and an earlier arrangement made in 1968 (Whiteman, *Digest*, 6, pp 159–60).

1 PCIJ, Series A, No 10, and (the arguments) Series C, No 13 (ii); Salvioli, *Rivista*, 19 (1927), pp 521–49; Brierly, LQR, 44 (1928), pp 154–63; Berge, Mich Law Rev, 26 (1928), pp 361–82; Noel Henry, RI (Paris), 2 (1928), pp 65–134; Donnedieu de Vabres, *ibid*, pp 135–65; Lapradelle, *Causes célèbres du droit des gens, l'affaire du Lotus* (1928); Verzijl, RI, 3rd series, 9 (1928), pp 1–32 (reprinted in *Jurisprudence of the World Court* (vol 1, 1965), pp 73–98); Ruzé, RI, 3rd series, 9 (1928), pp 124–156; Mercier and Donnedieu do Vabres and others, *Annuaire*, 43(1) (1950), pp 295–365; Hanbury, *Grotius Society*, 37 (1952), pp 171–85. See also the literature cited in vol II of this work (7th ed), p 81, n 2.

2 There was a majority of seven to five judges in favour of the precise ground of the judgment as stated above in the text.

§ 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.[1]

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.[2] 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.[3] 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

3 At p 20.

4 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 PCIJ, 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 (1935), pp 495–9.

5 See § 291, n 3.

6 See § 291.

1 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.

2 See § 218ff.

3 For general consideration of the position before the Tokyo Convention on Offences and certain other Acts Committed on Board Aircraft 1963, see F de Visscher, Hag R, 48 (1934), pp 285–385; Harv Research (1935), pp 508–19; Fenston and De Saussure, McGill LJ, 1 (1952), pp 66–89; Honig, *Legal Status of Aircraft* (1956); Knauth, ILA, *Report of the 48th Conference* (1958), pp 277–305; Meyer, *ibid*, pp 306–19; Mankiewicz, AFDI, 4 (1958), pp 112–43; Cheng, *Current Legal Problems*, 12 (1959), pp 177–207; Wilberforce, *Journal of the Royal Aeronautical Society*, 67 (1963), pp 175–83; Fitzgerald, Can YBIL, 1 (1963), pp 230–57.

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,[4] 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,[5] 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,[8] is in flight or on the surface of the

[4] See § 221.

[5] See McNair, *Law of the Air* (3rd ed, 1964), pp 259–71. See also *Air Line Stewards and Stewardesses Association International v Northwest Airlines Inc* (1959), ILR, 28, p 115, and *Air Line Stewards and Stewardesses Association International v Trans World Airlines Inc, ibid*, p 125.

[6] *R v Martin* [1956] 2 QB 272; *US v Cordova* (1950) 89 F Suppl 298; *Chumney v Nixon*, AJ, 74 (1980), p 9935; cf *R v Naylor* [1962] 2 QB 527. See also *Decision No R(S) 8/59)* (1958), ILR, 27, p 115, holding an aircraft not to be part of the territory of the state of registration. See also *Air India v Wiggins* [1980] 1 All ER 192, as to an offence committed on board a foreign aircraft *en route* to a destination in the UK; and UKMIL, BY, 53 (1982), p 453.

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, nn 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 *Kamolpraimpna* (1971), ILR, 72, p 671; *Orsini* (1975), 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).

[7] UNTS 704, p 219; TS No 126 (1969). See generally Fitzgerald, Can YBIL, 1 (1963), pp 230–51, and 2 (1964), pp 191–204; Hirano, *Japanese Annual of International Law*, 8 (1964), pp 44–59; Boyle and Pulsifer, *Journal of Air Law and Commerce*, 30 (1964), pp 305–54; Johnson, *Rights in Airspace* (1965), pp 74–9; Mendelsohn, Vir Law Rev, 53 (1967), p 509ff; Denaro, *Journal of Air Law and Commerce*, 35 (1969), pp 171–203; Richard, *La Convention de Tokyo* (1971); Shubber, *Jurisdiction over Crimes on Board Aircraft* (1973).

The Convention was given effect in the UK by the Tokyo Convention Act 1967 (on which see Samuel, BY, 42 (1967), pp 271–7); see also the Aviation Security Act 1982. On the US legislation giving effect to the Convention, see Lissitzyn, AJ, 67 (1973), pp 306–13.

[8] 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.

high seas or of any other area outside the territory of any state.[9] 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[10] may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board unless the offence has effect on the territory of that state, or the offence 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

[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 continued hijacking of aircraft,[11] however, called for more comprehensive provisions, and in 1970 the Hague Convention for the Suppression of Unlawful Seizure of Aircraft was concluded.[12] 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,

[11] For a list of cases of hijacking of aircraft from 1948 until the end of 1972, see Shubber, *Jurisdiction over Crimes on Board Aircraft* (1973), App II, pp 344–53.

For discussion within the UN of certain hijacking incidents, see UNYB (1969), pp 792–5; *ibid* (1970), pp 262–4, 803–5; *ibid* (1972), pp 223–4; GA Res 2551 (XXIV) (1969), 2645 (XXV) (1970), and SC Res 286 (1970). See also the resolutions of the ICAO Council and Assembly in 1970: AJ, 65 (1971), pp 452, 453, and see Mankiewicz, ILA, *Report of the 54th Conference* (1970), pp 385–404. As to the hijacking incidents leading to military action at Entebbe and Mogadishu airports in 1976 and 1977, see § 131, n 11, and § 130, n 11.

Several cases arising out of the hijacking of aircraft have come before national courts, many involving claims under insurance policies for injury or loss suffered as a result: see eg *Husserl v Swiss Air Transport Co Ltd*, AJ, 67 (1973), p 549; *Herman v Trans World Airways Inc*, *ibid*, p 550; *Pan American World Airways Inc v Aetna Casualty and Surety Co*, ILM, 12 (1973), p 1445; *US v Busic*, AJ, 73 (1979), p 685; *Public Prosecutor v Janos V* (1972), ILR, 71, p 229; *Public Prosecutor v SHI* (1974), ILR, p 162. See also the proceedings before the ICJ in *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)*, ICJ Rep (1972), p 46, and UNYB (1971), p 144.

A hijacker of an aircraft may nevertheless be entitled to refugee status in the state to which he diverted the aircraft: *Antonin L v Federal Republic of Germany* (1979), ILR, 80, p 674.

[12] UNTS, 860, p 105; TS No 39 (1972). On the Hague Convention, and on hijacking of aircraft generally, see Shubber, BY, 43 (1968–69), pp 193–205, and ICLQ, 22 (1973), pp 687–726; Evans, AJ, 63 (1969), pp 695–710, and AJ, 67 (1973), pp 641–71; Fitzgerald, Can YBIL, 7 (1969), pp 269–97; Mankiewicz, AFDI, 15 (1969), pp 462–89; Guillaume, AFDI, 16 (1970), pp 35–61; Johnson in ILA, *Report of the 54th Conference* (1970), pp 730–5; Mankiewicz, *ibid*, pp 336–65; Nys, *ibid*, pp 366–84; McWhinney, *Annuaire*, 54 (1971), pp 520–696, and (ed) *Aerial Piracy and International Law* (1971), and Hag R, 138 (1973), i, pp 263–369; Cheng, *Journal of the Royal Aeronautical Society*, 76 (1972), pp 529–35; Green, Alberta Law Rev, 10 (1972), pp 72–88; Glaser, RG, 76 (1972), pp 12–35; Faller, *Gewaltsame Flugzeugentführungen aus Völkerrechtlicher Sicht* (1972); Agrawala, *Aircraft Hijacking and International Law* (1973); Sundberg in *International Criminal Law* (eds Bassiouni and Nanda, vol 2, 1973), pp 478–90; Poulantzas, Anglo-Am Law Rev, 2 (1973), pp 4–46; Joyner, *Aerial Hijacking as an International Crime* (1974); Abeyratne, ICLQ, 33 (1984), pp 596–613. See also, more generally as to terrorism, § 122, n 42ff.

The Convention was given effect in the UK by the Hijacking Act 1971, later repealed and replaced by the Aviation Security Act 1982. For anti-hijacking legislation enacted in Brazil and Mexico, see AJ, 64 (1970), p 492; in the GDR and the USSR, ILM, 12 (1973), pp 1158, 1160; and in the USA, ILM, 13 (1974), p 1515. Under the Diplomatic Security and Anti-Terrorism Act 1986 US courts have jurisdiction over anyone found in the USA who abroad kills a US national, with the intention of coercing, intimidating or retaliating against a government or civilian population. See also n 13.

For a bilateral agreement on hijacking of aircraft see the exchange of letters between the USA and Cuba, ILM, 13 (1974), p 370. For certain proposals, including amendment of the Chicago Convention on Civil Aviation 1944, to make more effective the legal provisions against hijacking, see ILM, 13 (1974), pp 377–91. See also § 122, n 48, as to the Bonn Declaration on Hijacking 1978.

Note also the interception by US military aircraft of an Egyptian aircraft in international airspace carrying members of the Palestine Liberation Organisation believed to have been engaged in terrorist activities against US interests and nationals, particularly the *Achille Lauro* incident (see § 305): see RG, 90 (1986), pp 425–7, and Borkowski, Harv ILJ, 27 (1986), pp 761–71.

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).[13] 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.[14] This follows a pattern similar to that of the Hague Convention. Article 1 defines the offences with which the Convention deals,[15] 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

[13] In 1989 Fawaz Yunis was convicted in the USA under the Aircraft Sabotage Act which implemented the Hague Convention, in respect of the hijacking and subsequent destruction of a Jordanian aircraft at Beirut airport in 1985, some US nationals being among the hostages. See generally Lowenfeld, AJ, 84 (1990), pp 444–93; Abramovsky, Yale JIL, 15 (1990), pp 121–61; Schuertz, Harv ILJ, 29 (1988), pp 499–531, and with particular reference to the circumstances of Yunis' seizure on the high seas, *ibid*, pp 500–2, 523–4, and RG, 92 (1988), p 125; *United States v Younis*, AJ, 83 (1989), p 94; RG, 93 (1989), p 670; Wegner, *Law and Policy in International Business*, 22 (1991), pp 409–40.

[14] TS No 10 (1974); ILM, 10 (1971), p 1151. See Mankiewicz, AFDI, 17 (1971), pp 855–75; Thomas and Kirby, ICLQ, 22 (1973), pp 163–72. The Convention was given effect in the UK by the Protection of Aircraft Act 1973, later repealed and replaced by the Aviation Security Act 1982.

[15] Article 1 must be read with Art 4, which qualifies the extent to which the Convention applies to certain of the offences defined in Art 1.

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.[16]

§ 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.[1]

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.[2]

§ 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.[1] 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

[16] ILM, 27 (1988), p 627. See § 122, n 57.

[1] UNTS, 137, p 11; TS No 11 (1933); Cmd 4284; BFSP, 134 (1931), p 406. The Warsaw Convention was amended by the Hague Protocol 1955, TS No 62 (1967), and supplemented by the Guadalajara Convention 1961, TS No 23 (1964); UNTS, 500, p 31, which extends the application of the Warsaw Convention to an actual carrier who was not a party to the contract of carriage. On the four Protocols adopted at Montreal in 1975, see Mankiewitz, AFDI, 21 (1975), pp 784–91. See Goedhuis, *La Convention de Varsovie* (1933); also, *National Air Legislation and the Warsaw Convention* (1937); Sack, *Air Law Review*, 4 (1933), pp 345–88; Skubiszewski, *Rev Belge* (1967), pp 69–83; Bin Cheng, Zeitschrift für Luft- und Weltraumrecht (1989), pp 319–44, and (1990), pp 3–39; in the UK, see Carriage by Air Act 1932 (22 & 23 Geo 5 c 36), as repealed and replaced by the Carriage by Air Act 1961, as amended by the Carriage by Air and Road Act 1979.

See also *Grein v Imperial Airways Ltd* [1937] 1 KB 50; McNair, *Law of the Air* (3rd ed, 1964), pp 198ff.

[2] AJ, 52 (1958), p 593. This replaced a convention of 1933. See Wilberforce, ICLQ, 2 (1953), pp 90–97; also Rinck, *Journal of Air Law and Commerce*, 28 (1961–62), pp 405–17; Brown, *ibid*, pp 418–43. This convention at the time of writing had only 22 parties, none of them of major importance in civil aviation.

[1] See in particular § 112, as to the reluctance of courts to question foreign 'acts of State'.

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,[2] 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,[5] and facilitating the taking of evidence in one state for use in proceedings before the courts of

[2] See § 113.

[3] See § 140.

[4] 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.

[5] See eg the Convention between the Nordic States regarding the Recognition and Enforcement of Judgments 1932 (LNTS, 139, p 165); the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971; the Brussels Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments 1968 between member states of the EEC (ILM, 8 (1969), p 229), the Convention of 1978 providing for the accession of those states which became members of the EEC in 1973 (TS No 10 (1988); ILM, 18 (1979), p 8, on which see Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments* (1987)), the Conventions of 1982 and 1989 providing for the accession of Greece (ETS No 46 (1983)), and Spain and Portugal (ETS No 21 (1991); ILM, 29 (1990), p 1413, with explanatory Report on the 1989 accession Convention at p 1470), and the Lugano Convention of 1988 extending the principles of the Brussels Convention to member states of EFTA as well as EEC states (ILM, 28 (1989), p 620, with explanatory Report at ILM, 29 (1990), p 1481; and see Minor, CML Rev, 27 (1990), pp 507–19); the Inter-American Convention on Extra-territorial Validity of Foreign Judgments and Arbitral Awards 1979 (ILM, 18 (1979), p 1224), and the Inter-American Convention on Jurisdiction in the International Sphere for the Extra-territorial Validity of Judgments (ILM, 24 (1985), p 468). Many such bilateral conventions have been concluded: those concluded by the UK follow a generally similar pattern, eg those concluded with the Netherlands in 1967 (TS No 97 (1969)) and Israel in 1970 (TS No 2 (1970)). Apart from such multilateral and bilateral treaties the laws of most states provide for the recognition, within limits laid down by the national law, of civil and commercial judgments given in other states.

See generally on enforcement of foreign judgments von Mehren, Hag R, 167 (1980), ii, pp 9–112; Dicey and Morris, pp 418–533; *Restatement (Third)*, i, pp 591–628; Collier, *Conflict of Laws* (1987), pp 93–133. On recognition and enforcement of foreign arbitral awards, see Luzzatto, Hag R, 157 (1977), iv, pp 9, 66–86; Bowett, Hag R, 180 (1983), ii, pp 216–21; Brotons, Hag R, 184 (1984), i, pp 169–354; Dicey and Morris, pp 534–93; *Restatement (Third)*, i, pp 629–41; Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

See § 139, nn 41, 52, as to cooperative agreements on enforcement in relation to securities control and anti-trust matters. See also § 119, n 11, as to the exercise of authority by one state within the territory of another, with the latter's consent.

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

[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 Corpn v Westinghouse Electric Corpn* [1978] AC 547. As to the grant of powers in English law for UK authorities to carry out certain inquiries into companies in the UK at the request of foreign regulatory authorities, 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 considerations of international comity: *Société Nationale Industrielle Aerospatiale v US District Court for the Southern District of Iowa* (1987), 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 Schlunk*, ILM, 26 (1987), p 1092, on which see Leiner, *Journal of World Trade Law*, 23 (1989), No 1, pp 37–46; White, Harv ILJ, 30 (1989), pp 277–86.

See also *Restatement (Third)*, i, pp 525–56; the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters 1956 (UNTS, 658, p 163); Inter-American Convention on Taking of Evidence Abroad in Civil and Commercial Matters 1975, with Additional Protocol 1984; Inter-American Convention on Letters Rogatory 1975, with Additional Protocol 1979 (on which see AJ, 81 (1987), pp 197–9); the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters 1978 (European TS No 100).

Treaties dealing with particular matters often include provisions for mutual assistance. See eg Art 28 of the Double Taxation Convention between the UK and Austria, 1969 (TS No 9 (1971)), and Art 26 of the similar convention between the UK and USA in 1975 (ILM, 17 (1978), pp 836, 862); on the application of a similar provision in Art XVI of the USA–Switzerland Double Taxation Convention 1951, see *X v Federal Tax Administration*, ILM, 10 (1971), pp 1029, 1031–2; and the Council of Europe Convention on Mutual Administrative Assistance in Tax Matters 1988 (ILM, 27 (1988), p 1160; on which see Fletcher, Harv ILJ, 30 (1989), pp 514–23). See also as to violations of customs laws, the Pan-American Convention on the Repression of Smuggling 1935 (Hudson, *Legislation*, vii, p 100); the Convention on Mutual Assistance between Customs Administrations 1967 between member states of the EEC (Cmnd 6331); and, generally, the activities of the Customs Cooperation Council established by a convention signed in 1950 (UNTS, 157, p 131). As to matters of road traffic, see the European Convention on the Punishment of Road Traffic Offences 1964 (European TS No 52).

See generally Whiteman, *Digest*, 6, §§ 10–14; Smit (ed), *International Cooperation in Litigation: Europe* (1965); Nagel, *Nationale und internationale Rechtshilfe im Zivilprozess; das Europäische Modell* (1971); Jodlowski, Hag R, 158 (1977), v, pp 271–392. And see generally as to mutual international assistance in combating criminality, the writers referred to in § 122.

[7] See §§ 415–24.

[8] See eg European Agreement on Mutual Assistance in Criminal Matters 1959 (European TS No 30) and its Additional Protocol 1978 (*ibid*, No 99); and see the decision of the French Constitutional Council in 1980 in connection with this Convention, and comment by Vallée, RG, 85 (1981), pp 202–20. Bilateral agreements and arrangements include the USA–Switzerland Treaty on Mutual Assistance in Criminal Matters 1973 (ILM, 12 (1973), p 916; Johnson, Harv ILJ, 15 (1974), pp 349–64; Frei and Terechsel, Harv ILJ, 31 (1990), pp 77–97), supplemented by an Understanding in 1975 (ILM, 15 (1976), p 283) and Memoranda of Understandings concluded in 1982 and 1987 (ILM, 22 (1983), p 1, and 27 (1988), p 480); USA–Netherlands Treaty on Mutual Legal Assistance 1981 (ILM, 21 (1982), p 48; USA–Canada Treaty on Mutual Legal Assistance in Criminal Matters 1985 (ILM, 24 (1985), p 1092); USA–UK Treaty concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters 1986 (TS No 82 (1990); ILM, 26 (1987), p 536; AJ, 82 (1988), pp 112–18); USA–Mexico Treaty on Mutual Legal Cooperation 1987 (ILM, 27 (1988), p 443). In 1990 the UN General Assembly adopted a Model Treaty on Mutual Assistance in Criminal Matters: GA Res 45/117. As to the Commonwealth initiative on mutual assistance in criminal matters, agreed in Harare in 1986, see McClean, ICLQ, 37 (1988), pp 177–90; the Commonwealth scheme was amended in 1990 (Commonwealth Law Bulletin, 16 (1990), pp 1043–50; 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.

As to international cooperation and assistance in criminal matters see generally Cameron, ICLQ, 38 (1989), pp 954–65; and the proceedings of a conference on the matter, Harv ILJ, 31 (1990), pp 1–127. As to Interpol see Ruzie, AFDI, 2 (1956), pp 673–9; UN Juridical YB (1982), pp 179–80; Pezard, AFDI, 29 (1983), pp 564–75; Valleix, RG, 88 (1984), pp 621–52.

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

[9] Eg the European Convention on the Transfer of Criminal Proceedings 1972 (ILM, 11 (1972), p 709). In 1990 the UN General Assembly adopted a Model Treaty on the transfer of proceedings in Criminal Matters: GA Res 45/118.

[10] See, eg European Convention on the International Validity of Criminal Judgments 1970 (European TS No 70).

[11] Eg USA–Mexico Treaty on the Execution of Penal Sentences 1976 (ILM, 15 (1976), p 1343); European Convention on the Transfer of Sentenced Persons 1983 (ILM, 22 (1983), p 530); USA–France Convention on the Transfer of Sentenced Persons 1983 (*ibid*, p 542). The Commonwealth arrangements agreed in 1986 and amended in 1990 (see n 8) covered also the transfer of convicted offenders.

[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, 19 February 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)); BFSP, 134 (1931), p 361); Agreement concerning the Suppression of Opium Smoking, 27 November 1931 (LNTS, 177, p 373); Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 26 June 1936 (LNTS, 198, p 300); Protocol of 11 December 1946, amending various previous treaties (UNTS, 12, p 179; TS No 35 (1947)); Protocol bringing under international control certain additional drugs, 11 December 1946 (UNTS, 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 (UNTS, 456, p 3). For writings before 1945, see 8th ed of this vol, p 984, n.

Drugs 1961[14] (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 Drugs[18] (established in 1946 by the Economic and Social Council of the United Nations) and the International Narcotics Control Board (provided 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 foreign states[1] – a subject which falls within the domain of private international law[2] – 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[3] (unless otherwise

14 UNTS, 520, p 521; TS No 34 (1965).

15 ILM, 11 (1972), p 804; UNTS, 976, p 3; TS No 23 (1979). See Vignes, AFDI, 18 (1972), pp 629–48.

16 ILM, 10 (1971), p 261; UNTS, 1019, p 175. See Vignes, AFDI, 17 (1971), pp 641–56.

17 ILM, 28 (1989), p 493. See Roucherau, AFDI, 34 (1988), pp 601–17.

18 A Sub-Commission on Illicit Drug Traffic and Related Matters in the Near and Middle East was established by ECOSOC in 1973.

19 See eg the UK–USA Agreement of 13 November 1981 concerning cooperation in the suppression of the unlawful importation of drugs into the USA, allowing, on certain conditions, boarding of British vessels on the high seas and, if drugs were found, seizure of the vessel and trial of the crew in the USA: TS No 8 (1982), on which see Siddle, ICLQ, 31 (1982), pp 726–47, and eg *United States v Bierman*, AJ, 83 (1989), p 99; UK–USA Agreement concerning the Obtaining of Evidence from the Cayman Islands with regard to Narcotics Activities 1984 (TS No 70 (1984); ILM, 24 (1985), p 1110); UK–USA Narcotics Cooperation Agreement 1987, with respect to the British Virgin Islands (TS No 46 (1987)).

20 Action of this kind was made possible for the UK by the Drug Trafficking Offences Act 1986. The first agreement to be considered by the UK pursuant to the Act was the Agreement concerning the Seizure and Forfeiture of the Proceeds of Drug Trafficking 1988 with the USA (TS No 32 (1989)). By mid-1990 a further 13 such agreements had been concluded, with Bahamas, Canada, Australia, Bermuda, Anguilla, Switzerland, Spain, Nigeria, Sweden, Gibraltar, Malaysia, Mexico and the Republic of Ireland; of these, three (with Sweden, Nigeria and the Republic of Ireland) cover all serious crime and not just drug-related crimes. See also the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990: ILM, 30 (1991), p 148.

21 *ILC Report* (42nd Session, 1990), paras 77–88.

1 See § 62, n 32.

2 See § 1, n 10.

3 See generally Fedozzi, Hag R, 27 (1929), ii, pp 145–240; Schwarz, *Die Anerkennung ausländischer Staatsakte* (1935); F A Mann, *Grotius Society*, 40 (1954), pp 25–47, and Hag R, 132 (1971), i, pp 115, 166–96; McNair and Watts, *Legal Effects of War* (4th ed, 1966), pp 428–38; *Annuaire* (1975), pp 157–278, 374–410, 550–53; Carter, BY, 55 (1984), pp 111–31; ILA, *Report of 63rd Conference* (1988), pp 719–63 (with summaries of the position in various states); Dicey and Morris, pp 100–9; Collier, *Conflict of Laws* (1987), pp 329–45; Carter, CLJ, 48 (1989), pp 417–35. See also § 112.

required by any relevant treaty).[4] In particular they refuse, in respect of assets within their jurisdiction, to enforce directly or indirectly[5] on behalf of a foreign state[6] its revenue laws[7] as well as its penal[8] and confiscatory[9] legislation. It is in

The distinction between 'public' and 'private' law, although very widely adopted in the present context and of undoubted 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 *iure imperii*' as terms conveying the meaning of 'public law'.

4 The existence of an agreement between the USA and the USSR was one of the significant elements in *US v Pink*, as to which see n 32. See also 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), ILR, 47, p 57. For a bilateral Franco–Czechoslovak agreement providing for the mutual recognition of exchange control legislation, see *Statni Banka v Englander* (1966), ILR, 47, p 157.

5 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 court ostensibly on the basis of the judgment debt (*US v Harden* (1963), ILR, 43, p 114; *Commissioner of Taxes (Federation of Rhodesia and Nyasaland) v McFarland* (1965) (1) SA 470(W), with comment by Spiro, ICLQ, 14 (1965), pp 987–92); or by a company being allowed to sue for sums to be used solely to meet a revenue debt (*Buchanan and Macharg v McVey*, ILR, 22 (1955), p 46); or by a defendant being allowed to rely upon a foreign state's garnishee upon a debt owed to the plaintiff, where the garnishee was in respect of unpaid taxes (*Rossano v Manufacturers Life Insurance Co* [1963] 2 QB 352; but cf *Korthinos v Niarchos*, ILR, 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 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 to be enforced even though that law may have provided the occasion for the contract: see *Ilgovski v Shprinski*, 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), ILR, 28, pp 88, 90; *Re State of Norway's Application* [1989] 1 WLR 458.

6 Thus the foreign state itself will not be allowed to enforce abroad its public law, nor will an agency or instrumentality acting for the state. So too, a foreign company, which while still retaining a corporate existence has in effect been confiscated by a foreign state and acts under the state's control, may not be allowed to assert title to the company's assets in the state of the forum: see *Frankfurter v Exner* [1947] 1 Ch 629; *Zwack v Kraus Brothers & Co Inc*, ILR, 23 (1956), p 10; *Buchanan and Macharg v McVey*, ILR, 22 (1955), p 46 (liquidator appointed to recover revenue debts); *Nationalisation of Czechoslovak Savings Bank Case*, ILR, 24 (1957), p 40.

7 See *Re Visser: the Queen of Holland v Drukker* [1928] Ch 877; *Government of India v Taylor* [1955] AC 491 (with comment by M Mann, ICLQ, 3 (1954), pp 465–78, and 4 (1955), pp 564–7), and other cases cited at n 5; *Re Gibbons* (1960), ILR, 30, p 24; *Metal Industries (Salvage) Ltd v Owners of ST Halle* (1961), ILR, 33, p 21; *Brockaw v Seatrain UK Ltd* [1971] 2 All ER 98; *Province of British Columbia v Gilbertson*, AJ, 74 (1980), p 190. See also other authorities cited by F A Mann, *Grotius Society*, 40 (1954), at p 28, n 8. See also Albrecht, BY, 30 (1953), pp 454–74; Stoel, ICLQ, 16 (1967), pp 663–79; Smart, ICLQ, 35 (1986), pp 704–10; *Restatement (Third)*, i, pp 611–16. Note *Lange v Minister of Justice* (1959), ILR, 28, pp 88, 90, and *Re State of Norway's Application* [1989] 1 WLR 458, allowing judicial assistance in relation to revenue offences before a foreign court.

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.

each case a question of substance rather than of form whether the foreign law in question is of such a character as to bring the rule into operation,[10] and whether the proceedings involve the enforcement of such a law.[11]

Although in such matters courts often base their refusal to enforce foreign public law upon considerations of public policy, in international law a basis for that widespread practice is to be found in the principle of territorial authority, from which it follows that states have no right to perform acts of sovereignty within the territory of other states.[12] For a state's public law to be enforced in another state would in effect involve the performance of acts of sovereignty in foreign states in derogation of their territorial authority.[13]

While the practice of not enforcing a foreign state's revenue, penal and confiscatory laws is well established, the distinction between them is not always clear cut. Thus the distinction between penal and confiscatory laws cannot

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.

8 It has long been established that a state does not enforce the penal laws of another state: see *Folliott v Ogden* (1789) 1 H Bl, 123, 135; *The Antelope* (1825) 10 Wheat 66, 123 (US Supreme Court, *per* Marshall CJ); *Huntingdon v Attrill* [1893] AC 150. For a modern example see *USA v Inkley* [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).

But see *Cooley v Weinberger* (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.

9 See n 27ff.

10 See eg *Huntingdon v Attrill* [1893] AC 150; *Frankfurter v Exner* [1947] 1 Ch 629; *Novello & Co Ltd v Hinrichsen Edition Ltd* [1951] 1 Ch 595; *United States of America v Inkley* [1988] 3 WLR 304.

11 Thus in appropriate cases a claim will be rejected even though the party presenting it is not the foreign state, and even though the claim might in form be founded in contract or tort, or might have some other private law basis. See eg *Huntingdon v Attrill* [1893] AC 150; *Banco de Viscaya 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; *Zwack v Kraus Brothers & Co Inc*, ILR, 23 (1956), p 10; *Rossano v Manufacturers Life Insurance Co* [1963] 2 QB 352.

12 See § 118.

13 There is thus 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 n 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* (1965), 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.

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.[14] It is also uncertain to what extent enforcement is to be refused to categories of public law other than revenue, penal or confiscatory laws.[15] An underlying principle of territorial sovereignty would suggest that all foreign public laws should be refused enforcement; in practice, however, courts have not always acted in that way,[16] 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.[17] In this context exchange control laws call for particular

14 See *Banco di Viscaya v Don Alfonso de Bourbon y Austria* [1935] 1 KB 140 in which the action was dismissed on the ground that judgment in favour of the plaintiffs would, in effect, amount to the execution of a foreign penal law: *Frankfurter v Exner* [1947] 1 Ch 629; *Attorney-General of New Zealand v Ortiz* [1982] 3 All ER (affirmed, on other grounds, by the House of Lords, [1984] AC 1).

15 This uncertainty may in part be responsible for the tendency of some courts to assimilate, at a cost of some artificiality, other kinds of public law to one or other of the well-established categories whose enforcement is clearly to be refused. See eg *Metal Industries (Salvage) Ltd v Owners of ST Halle* (1961), ILR, 33, p 21 (assimilating social security legislation to a revenue law), and *Société Clermont-Bonte v Groeninghe Ververij* (1967), ILR, 48, p 84 (assimilating patent laws to penal and administrative laws).

16 Thus a foreign state's public law was enforced in eg *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217 (perhaps an anomalous case, on which see Mann, *Grotius Society*, 40 (1954), at pp 37–9); *Kahler v Midland Bank* [1950] AC 24 (on which see n 21); *Kingdom of Belgium v EMJCH*, ILR, 20 (1953), p 26; *Kingdom of Belgium v Albrecht and Willem Wannijn*, *ibid*, p 28; *Jabbour v Custodian of Absentee's Property* [1954] 1 All ER 145; *Ammon v Royal Dutch Company*, ILR, 21 (1954), p 25 (holding a public law enforceable if it is primarily aimed at the protection of private interests: a similar consideration is evident from the decision (as opposed to *dicta*) in *Huntingdon v Attrill* [1893] AC 150).

As to public policy as a ground for refusing to apply a foreign law, see Carter, BY, 55 (1984), pp 111, 122–31; and *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep 171 (and comment by Carter, BY, 54 (1983), pp 297–301).

17 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] 78 ALR 449; the New Zealand Court of Appeal reached a different conclusion in *HM Attorney-General v Wellington Newspapers Ltd* [1988] 1 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 Objets d'Art Export Case* (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 Julich v SA des Ateliers de Godarville*, AD, 5 (1929–30), No 63; *Metal Industries (Salvage) Ltd v Owners of ST Halle* (1961), ILR, 33, p 21; *SA Principe di Paterno Moncada v INPS* (1966), ILR, 71, p 219; and discussion by F A Mann, Hag R, 132 (1971), i, at pp 173–5; (*iii*) as to trading with the enemy, *Hopf Products Ltd v Paul Hopf and Skandinaviska Banken Aktiebolag*, AD, 12 (1943–45), No

mention.[18] They are undoubtedly part of the public law of the state. They may in particular cases be properly regarded as in substance confiscatory, or as so closely connected with confiscatory laws that to enforce them would be indirectly to enforce that confiscatory law, and will for that reason not be enforced rather than because of their character as exchange control laws.[19] 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.'[20] 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.[21]

16; *Assignment of Confiscated Debt (Germany) Case* (1957), ILR, 24, p 31; *Confiscation of Assets of German-Controlled Company in the Netherlands Case* (1960), ILR, 32, p 12; cf *Lepage v San Paulo Coffee Estates Co* (1917) 33 TLR 457; *Jabbour v Custodian of Absentee's Property* [1954] 1 All ER 145 (and comment by Thomas, ICLQ, 3 (1954), pp 495–9); (*iv*) as to patent law, *Société Clermont Bonté v Gruninghe Vernerij* (1967), ILR, 48, p 84; *Officina Meccanica Confezioni v Burgambiller* (1973), ILR, 70, p 428; (*v*) as to anti trust laws, see generally § 139, n 43, and Whiteman, *Digest*, 6, § 8; (*vi*) as to currency laws, *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217 (and comment by Mann, *Grotius Society*, 40 (1954), at pp 37–9); see also § 139, n 29, as to the protection of a foreign state's currency against counterfeiting, and, as to various aspects of recognition of foreign currency, F A Mann, *The Legal Aspect of Money* (4th ed, 1982), pp 463–82 and BY, 26 (1949), pp 278–81; (*vii*) as to a moratorium law, *National Bank of Greece and Athens SA v Metliss* [1958] AC 509; (*viii*) as to bankruptcy orders, *Felixstowe Dock and Railway Co v United States Lines Inc* [1988] 2 All ER 77; Dicey and Morris, pp 1115–26; (*ix*) as to labour law, Morgenstern and Knapp, ICLQ, 27 (1978), pp 769, 787–8.

18 See generally on various questions which arise in this connection, F A Mann, *The Legal Aspect of Money* (4th ed, 1982), pp 379–452, 553–84; Nussbaum, *Money in the Law* (1950), pp 446–91, especially pp 471–7; *Restatement (Third)*, ii, pp 324–31; and as to currency matters, see (*vi*) in the preceding note.

19 See eg *Frankfurter v Exner* [1947] 1 Ch 629; *Indonesian Corporation PT Escomptobank v NV Assurantie Maatschappij de Nederlanden van 1845* (1964), ILR, 40, p 7. Although genuine exchange control laws, like other currency laws, may cause undoubted loss to those affected by them, they are not solely on that account usually regarded as confiscatory: see *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323, 351–4. In *Menendez v Saks and Co* a US Court of Appeals regarded 'currency controls as but a species of revenue law', and refused on that basis to give effect to foreign currency regulations: AJ, 68 (1974), pp 325, 327.

20 UNTS, 2, p 39. The extent to which Art VIII(2)(b) requires effect to be given to a foreign state's exchange control laws has been considered in a number of cases: see eg a group of nine cases, with Notes, reported in ILR, 22 (1955), pp 713–31; *X v Zagreb Bank*, ILR, 26 (1958–II), p 232; *Southwestern Shipping Corpn v National City Bank of New York* (1959), ILR, 28, p 539; *Frantzmann v Ponijen* (1959), ILR, 30, p 423; *De Boer v Ducro* (1961), ILR, 47, p 46; *Banco de Brasil SA v Israel Commodity Co* (1963), ILR, 32, p 371; *Theye y Ajuria v Pan American Life Insurance Co* (1964), ILR, 38, p 456; *Constant v Lanata* (1969), ILR, 52, p 10; *Sharif v Azad* [1967] 1 QB 605; *Wilson, Smithett & Cope Ltd v Terruzi* [1975] 2 All ER 649; *Banco Frances e Brasileiro SA v John Doe No 1*, ILM, 14 (1975), p 1440 (and comment by Williams, AJ, 70 (1976), pp 101–11); *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168 (on which see F A Mann, LQR, 98 (1982), pp 526–30); *Mansouri v Singh* [1986] 2 All ER 619. Article VIII(2) has been held applicable in proceedings before an international tribunal between parties to the IMF Agreement: *Dallal v Islamic Republic of Iran* (1983), ILR, 75, p 126.

See generally Nussbaum, *Money in the Law* (1950), pp 540–46, and Yale LJ, 59 (1950), pp 421–30; Gold, *The Fund Agreement in the Courts* (1962), and ICLQ, 33 (1984), pp 777–810; Mann, *The Legal Aspect of Money* (4th ed, 1982).

21 See eg *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678; *X v Zagreb Bank*, ILR, 26 (1958–II), p 232; *Lembaga Alat-Alat Pembajaran Luan Negeri and Republic of Indonesia v Brummer et al* (1959), ILR, 30, p 25; *Stichting Leids Kerkhovenfonds v Bank Indonesia* (1960), ILR, 33, p 28; *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 Corpn PT Escomptobank v NV Assurantie Maatschappij de Nederlanden van 1845* (1964), ILR, 40, p 7; *Constant v Lanata* (1966), ILR, 52, p 10; *Basso v Janda* (1967), ILR, 48, p 229; *Wilson, Smithett & Cope Ltd v Terruzi* [1975] 2 All ER 649; *Menendez v Saks & Co* (1973), ILR, 66, p 126; *R v Governor of Pentonville Prison, ex parte Khubchandani* (1980) 71 Cr App R 241; and see also many of the insurance cases cited below.

It seems, however, that in *Kahler v Midland Bank* [1950] AC 24 the House of Lords attributed extra-territorial effect to foreign exchange regulations. For a criticism of this decision see F A Mann, MLR, 13 (1950), p 206, and *The Legal Aspect of Money* (4th ed, 1982), pp 424–8.

Much of the litigation concerning foreign exchange control laws has concerned the payment of sums due under insurance policies, where the state where the policy was originally taken out has subsequently enacted legislation restricting payment on maturity to certain currencies (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 have usually turned on findings as to where the contract was originally concluded, where the parties were resident, where the place of performance was, and what law was the proper law of the contract. See eg *Rossano v Manufacturers Life Assurance Co* [1963] 2 QB 352; *Confederation Life Association v Ugalde* (1964), ILR, 38, p 138; *Theye y Ajuria v Pan American Life Insurance Co* (1964), ILR, 38, p 456; *Pan American Life Insurance Co v Blanco* (1966), ILR, 42, p 149; *Confederation Life Association v Vega y Arminan*, AJ, 62 (1968), p 986; *Johansen v Confederation Life Association*, AJ, 66 (1972), p 398.

22 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 before the courts of other states, see Mann, Hag R, 132 (1971), i, pp 182–96.

23 See § 112, as to the 'act of state' doctrine.

24 See eg *R v International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] AC 500; *Kahler v Midland Bank* [1950] AC 24; *Buchanan and Macharg v McVey*, ILR, 22 (1956), pp 46, 47–8, 50; *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323 (see comment by M Mann, ICLQ, 5 (1956), pp 295–301; F A Mann, MLR, 19 (1956), pp 301–4); *Confederation Life Association v Ugalde* (1964), ILR, 38, p 138. But cf *Deklo v Levi*, ILR, 26 (1958–II), p 56; *X v Zagreb Bank*, *ibid*, p 232. See also *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 as to the unenforceability of a contract which is contrary to the public policy of both the UK and the state of performance.

In *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep 171, the Court of Appeal acknowledged a foreign law, apparently penal, as a circumstance leading to the frustration of a contract. The court noted that it should be slow to refuse to give effect to foreign legislation in a sphere in which the foreign state had jurisdiction, although if it would seriously offend against the public policy of the forum it might have to be ignored. See also *Re State of Norway's Application* [1989] 1 WLR 458 in which the House of Lords allowed evidence to be taken in England to be used by a foreign state for the enforcement by it of its revenue laws within its own territory; see also *Lange v Minister of Justice* (1959), ILR, 28, pp 88, 90.

The reluctance of courts to enforce a foreign state's public law does not involve a complete refusal to acknowledge it.[22] 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,[23] 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 a public law of that state renders the contract invalid, or its performance illegal, the courts of the forum state may also regard the contract as invalid and decline to enforce performance.[24] Furthermore, the courts also refuse

to enforce a contract which calls for conduct which would involve the commission of a criminal offence in a foreign state.[25] 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.[26]

With foreign confiscatory legislation[27] 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 effect[28] will in principle be regarded by the courts of the legislating state as having that effect,[29] it will not normally be enforced[30] 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

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25 See eg *Foster v Driscoll* [1920] 1 KB 470; *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287; *De Beéche v South American Stores Ltd* [1935] AC 148; *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301. Cf *Bureaux Brasseur v Cebelac*, 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.

27 Amongst the extensive literature on the effects of foreign confiscatory (and penal) legislation see, in addition to works cited at § 113, n 6, Wortley, Hag R, 67 (1939), i, pp 345–425, and Hag R, 94 (1958), ii, pp 192–252; Schindler, *Ann Suisse*, 3 (1946), pp 65–94; Seidl-Hohenveldern, MLR, 13 (1950), pp 69–75, Mich Law Rev, 49 (1951), pp 851–68, *Internationales Konfiskations- und Enteignungsrecht* (1952), *Clunet*, 83 (1956), pp 380–441, and AJ, 56 (1962), pp 507–10; van Hecke, ILQ, 4 (1951), pp 345–57; Adriaanse, *Confiscation in Private International Law* (1956); Verzijl, ZöV, 19 (1958), pp 531–50; Munch, Hag R, 98 (1959), iii, pp 415–502; Stoel, ICLQ, 16 (1967), pp 663–79; F A Mann, BY, 48 (1976–77), pp 46–57; *Restatement (Third)*, i, pp 383–9; Staker, BY, 58 (1987), pp 151–252 (especially 234–51).

See also § 112, on the 'act of state' doctrine, and § 113, on legislation contrary to international law, which cover certain aspects of confiscatory legislation. On the effects of Indonesian nationalisation measures of 1958 against Dutch property, see Domke, AJ, 54 (1960), pp 305–23; Baade, *ibid*, pp 801–35; Wortley, AJ, 55 (1961), pp 680–83; Neth IL Rev, 5 (1958), pp 227–47; McNair, *ibid*, 6 (1959), pp 218–59; Rolin, *ibid*, pp 260–75; Verdross, *ibid*, pp 278–89.

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 § 20, n 3, as to the presumption against the extra-territorial operation of the legislation. As to the retroactive effect of recognition of a government on its prior confiscatory laws, see above, § 47, n 11.

29 See *Re Law on the Nationalisation of French Banks* (1982), 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 y 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 *Vladikavkazsky Railway Co v New York Trust Co* (1934) 363 NY 369; AD, 7 (1933–34), No 27; *US v Bank of New York and Trust Co* (1935) 77 F (2d) 866; (1936) 296 US 463; AD, 7 (1933–34), No 29; *Moscow Fire Insurance Co v Bank of New York and Trust Co* (1939) 280 NY 286; AD, 9 (1938–40), No 53.

There have been numerous other judicial decisions to the same effect, given by courts in many states. See eg *Plesch v Banque Nationale de la République d'Haiti* (1948) 77 NYS (2d) 41, AD, 15 (1948), No 7; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248; *Re Metallwerke Z & G*, ILR, 20 (1953), p 38; *Danuvia Feinmechanische und Werkzeugfabrik Nationalunternehmen v Seiberth*, ILR, 21 (1954), p 38; *Zilka v Darwish*, ILR, 21 (1954), p 35; *Molnar v Wilsons A/B*, *ibid*, p 30; *Estonian State Shipping Company v Jacobson*, *ibid*, p 33; *Expropriation of Eastern Zone Company (Germany) Case*, ILR, 22 (1955), p 14; *Bauer Marchal et Cie v Pioton*, *ibid*, p 13; *Vereinigte Carborundum- und Elektritwerke v Federal Department for Intellectual Property*, ILR, 23 (1956), p 24; *Zwack v Kraus Brothers & Co Inc*, *ibid*, p 10; *Amato Narodni Podnik v Julius Keilwerth Musikinstrumentenfabrik*, ILR, 24 (1957), p 435; *Ex-King Farouk of Egypt v Christian Dior Sarl*, *ibid*, p 228; *Jenaer Glaswerk Schott & Gen v Waldmüller (Carl Zeiss Foundation Case)*, *ibid*, p 42; *Nationalisation of Czechoslovak Savings Bank Case*, *ibid*, p 40; *Expropriation of Sudenten-German Cooperative Society Case*, *ibid*, p 35; *Assignment of Confiscated Debt (Germany) Case*, *ibid*, p 31; *Societa Ornati v Archimedes Rechenmaschinenfabrik Reinhold Pothig* (1959), ILR, 28, p 39; *Nationalisation of Czechoslovak Enterprise (Austrian Assets) Case* (1959), *ibid*, p 14; *Bank Indonesia v Senembah Maatschappij and Twentsche Bank* (1959), ILR, 30, p 28; *Expropriation of Czechoslovak Cooperative Society (Germany) Case* (1960), ILR, 32, p 19; *Confiscation of Assets of German-Controlled Company in the Netherlands Case* (1960), ILR, 32, p 12; *Confiscation of Shares of German-Controlled Company in the Netherlands Case* (1961), *ibid*, p 26; *Compania Ron Bacardi SA v Bank of Nova Scotia* (1961), *ibid*, p 8; *Effect of Nationalisation of Foreign Company on Rights of Shareholders (Austria) Case* (1961), ILR, 40, p 16; *Republic of Iraq v First National City Bank* (1965), ILR, 42, p 29; *Foundation Carl Zeiss Stiftung v Fondation Carl Zeiss Heidenheim* (1966), ILR, 47, p 129; *Tabacalera Severiano Jorge SA v Standard Cigar Co* (1968), ILR, 43, p 18; *Cie Française de Credit et de Banque v Atard* (1969), ILR, 52, p 8; *Rousseau* (1969), ILR, 69, p 7; *Carl Zeiss Stiftung v VEB Carl Zeiss Jena* (1968–70), ILR, 61, p 35; *Bibliographisches Institut AG (Mannheim) v VEB Bibliographisches Institut (Leipzig)* (1971), ILR, 72, p 26; *Hungarian Aircraft Co Case* (1971), ILR, 72, p 82; *Maltina Corpn v Cawy Bottling Co* (1972), ILR, 66, p 92; *Sociedad Minera el Teniente SA v Norddeutsche Affinerie AG* (1973), ILR, 73, p 230; *Carl Zeiss Heidenheim v VEB Carl Zeiss Jena* (1975), ILR, 73, p 580; *Czechoslovak National Corpn Bata v Bata-Best BV* (1975), ILR, 74, p 102; *Zeevi and Sons Ltd v Grindlays Bank (Uganda) Ltd* (1975), ILR, 66, p 168; *Rupali Bank v Provident National Bank* (1975), ILR, 66, p 192; *United Bank Ltd v Cosmic International Inc* (1976), ILR, 66, p 246; *Société Méditerranéenne de Combustibles v Sonatrach* (1979), ILR, 80, p 428; *Vishipco Line v Chase Manhattan Bank* (1981), ILR, 66, p 461; *Libra Bank Ltd v Banco Nacional de Costa Rica*, AJ, 78 (1984), p 443; *Allied Bank v Banco Credito Agricola de Cartago*, ILM, 24 (1985), p 762 (and as to this case and the previously cited case see Ebenroth and Teitz, *Banking on the Act of State* (1985)); *Bandes v Harlow & Jones Inc*, AJ, 82 (1988), p 820, affirming (1983), ILR, 79, p 571; *Trinh v Citibank NA*, AJ, 83 (1989), pp 573, 577. In a series of cases decided between 1958 and 1960 involving the firm *Koh-I-Noor–L & C Hardtmuth*, courts in France, Austria, Norway, Italy and Belgium reached the same conclusion, denying extra-territorial effect to a Czech law confiscating the firm's property: see ILR, 26, pp 40, 50; ILR, 30, p 33; ILR, 40, p 17; and ILR, 47, p 31.

As several of these cases demonstrate, extra-territorial effect will be denied to a foreign state's confiscatory laws in relation to that state's nationals as well as to those who are not its nationals. While possession of the legislating state's nationality gives that state personal jurisdiction over its nationals (§ 138), it does not justify the infringement of the territorial state's supremacy which would be involved in giving effect there to its confiscatory laws, although this consideration does not prevent the operation abroad of a law depriving a national of his personal titles (*Russian Nobleman Nationality Case* (1971), ILR, 72, p 435). In the course of the negotiations preceding the Allied–Swedish Agreement of 18 July 1946, concerning German assets in Sweden, it was contended on behalf of the Allied Powers that as they were exercising sovereignty in Germany and as it was a rule of international practice to give effect to foreign decrees regulating the property of nationals if such decrees were consistent with the public policy of the foreign state, Sweden was bound to give effect to Allied decrees concerning the seizure of German property in Sweden. This argument was not accepted by Sweden. See *Bulletin of State Department*, 17 (1947), p 155. See also Mann, BY, 23 (1946), pp 354–58, on a similar agreement with Switzerland of 25 May 1946.

courts to deny extra-territorial operation to a foreign state's confiscatory laws may occasionally be overridden 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 inapplicable 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 'Litvinov 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 alien to its purpose as generally understood, see Borchard, AJ, 36 (1942), p 275, and Jessup, *ibid*, p 282. See also *Banco Nacional de Cuba v Chemical Bank New York Trust Co* (1981), ILR, 66, p 450. See also *Shareholders of the Z A G 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 in the territory of that other party.

In 1968 the UK and USSR concluded a Claims Agreement (TS No 12 (1968)) in which gold reserves deposited in London by the central banks of the three Baltic States, which were nationalised in 1940, were paid to the USSR in circumstances which raised questions not only about the recognition of that state's absorption of the Baltic States in 1940 (see § 47, n 7, and § 50, n 14), but also about acknowledgement of the passing of title to those extra-territorial assets (see Lillich, ICLQ, 21 (1972), pp 1–2, 11–12).

[33] See eg *Lorentzen v Lydden* [1942] 2 KB 202, and comment in BY, 21 (1944), pp 185ff.; *Anderson v NV Transandine Handelmaatschappij*, AD, 10 (1941–42), No 4; *Zivnostenska Banka v Wismeyer*, ILR, 20 (1953), p 34; *Jabbour v Custodian of Absentee Property* [1954] 1 All ER 145, 157; *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323; *Cassan v Koninklijke Nederlandsche Petroleum Maatschappij* (1966), ILR, 47, p 58; *Plichon v Koninklijke Nederlandsche Petroleum Maatschappij, ibid*, p 67; *Banque Nationale pour le Commerce et l'Industrie (Afrique) v Société Algérienne de Commerce et Lavie* (1967), ILR, 41, p 266; *Banque Nationale pour le Commerce et l'Industrie (Afrique) v Narbonne* (1965), ILR, 47, p 120.

In addition to the first two cases mentioned above, see also other cases – in particular AD, 10 (1941–42), Nos 35, 36, 37, 55, 63 – relating to extra-territorial decrees of the governments in exile during the Second World War: see also McNair and Watts, *Legal Effects of War* (4th ed, 1966), pp 424–45. But see *Bank voor Handel en Scheepvaart v Slatford* [1951] 2 All ER 779 (not affected on these points on appeal [1953] 1 QB 248, 279) where the court declined to follow *Lorentzen v Lydden* as distinguishable by reference to the particular situation of an allied government-in-exile. It may be difficult to follow the suggestion, which seems to underlie the former case, that the denial of extra-territorial effect to foreign legislation is the general rule and that therefore the question of the penal character of such legislation is irrelevant.

[34] See § 112. Thus Russian legislation, including confiscatory decrees, was given effect with regard to the operation of such legislation within Russian territory: *Dougherty v The Equitable Life Assurance Society* (1934), 266 NY 71; AD, 7 (1933–34), No 28; *Princess Paley Olga v Weisz* [1929] 1 KB 718; *A M Luther Co v James Sagor & Co* [1921] 3 KB 532. In *US v Belmont* (1937) 301 US 324; AJ, 31 (1937), p 537: AD, 8 (1935–37), No 15, the decision of the Supreme Court affirming the right of the USA under the so-called 'Litvinoff Assignment', to the assets of a Russian company confiscated by the Soviet Government and deposited by the company in a New York bank, was largely based on the view that the assets had become vested in the Soviet Government in Russia, and not in the USA.

The effect of Cuban legislation confiscating US assets in Cuba was similarly acknowledged: see *Pons v Republic of Cuba* (1961), ILR, 32, p 10; *National Institute of Agrarian Reform v Kane* (1963), ILR, 34, p 12; *Banco Nacional de Cuba v Sabbatino* (1964), ILR, 35, pp 2, 25; *Palicio y Compania v Brush* (1966), ILR, 42, p 41; *Banco Nacional de Cuba v First National City Bank of New York* (1971), ILR, 51, p 11, and ILR, 66, pp 48, 102; *Menendez v Saks and Co* (1973), ILR, 66, p 126; *Dunhill v Republic of Cuba* (1976), ILR, 66, p 212 (these two last cases, and *Palicio y Compania v Brush* also denied effect to Cuban legislation as regards assets held to have a *situs* in the US). On the *Sabbatino* litigation, see § 113. The Iranian nationalisation of the Anglo-Iranian Oil Company's assets in Iran was similarly given effect in Italy and Japan: see *Anglo-Iranian Oil Co Ltd v SUPOR Co*, ILR, 22 (1955), pp 19, 23; *Anglo-Iranian Oil Co Ltd v Idemitsu Kosan Kabushiki Kaisha*, ILR, 20 (1953), p 305; but cf *Anglo-Iranian Oil Co Ltd v Jaffrate (The Rose Mary)* [1953] 1 WLR 246, in which a court in Aden refused to recognise the effect of the Iranian law on the ground that it was contrary to international law (see § 113, n 16). See also *Schweizerische Levensversicherungs- und Rentenanstalt v Elkan*, ILR, 20 (1953), p 36; *Ilitch v Banque Franco-Serbe*, ILR, 23 (1956), p 19; *Epoux Reynolds v Ministre des Affaires Etrangères* (1965), ILR, 47, p 53; *Expropriations in Czechoslovakia (Austria) Case* (1965), ILR, 51, p 22; *Cohen v Credit du Nord* (1967), ILR, 48, p 82; *Trujillo v Bank of Nova Scotia*, AJ, 61 (1967), p 610; *Sociedad Minera el Teniente SA v Aktiengesellschaft Norddeutsche Affinerie*, ILM, 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 Proceedings* (1973), pp 72–80, and Seidl-Hohenveldern, AJ, 69 (1975), pp 110–19, and compare the decision of a French court in *Braden Copper Co v Groupement d'Importation des Métaux*, ILM, 12 (1973), pp 182, 187); *BP Exploration Co (Libya) Ltd v Astro Protector Compania 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); *Stroganoff-Scherbatoff v Weldon* (1976), ILR, 66, p 207; *Société Total Afrique v Serrure* (1981), ILR, 80, p 425; *Tchacosh Co Ltd v Rockwell International Corpn* (1985), ILR, 79, p 582; *Settebello Ltd v Banco Totta and Acores* [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; F A Mann, LQR, 102 (1986), pp 191–7, and LQR, 103 (1987), pp 26–8; but cf 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 676); *Dayton v Czechoslovak Socialist Republic* (1986), ILR, 79, p 590. The nationalisation of shares of a company by the state under whose laws it was 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 v Cie de Saint-Gobain*, ILM, 26 (1987), p 1251. 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 Jupiter (No 3)* [1927] P 122. In *The Elise* the Supreme Court of Canada, reversing the decision of the court below, held that it would be contrary to public policy for Canadian courts to enforce a foreign confiscatory decree purporting to have extra-territorial effect by seeking to reach in a Canadian port a merchant ship which was never in the possession of the foreign government in question: [1949] SCR 530; AD, 15 (1948), No 50. See too *Latvian State Cargo and Passenger Steamship Line v The United States*, ILR, 20 (1953), p 193. On the other hand, the US Supreme Court held in *The Navemar* (1939) 304 US 68; AD, 9 (1938–40), No 68, that in view of the quasi-territoriality of ships, ie the doctrine that they are part of national territory, there

property within the territory of the legislating state, courts in other countries sometimes still decline to recognise the law's consequences because of domestic considerations such as their notions of public policy,[35] or for other reasons such as that the confiscation involved a violation of international law.[36]

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, *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, ZöV, 9 (1939), pp 354–82; Riesenfeld, Minn Law Rev, 25 (1940), pp 62ff.

[35] Eg *Cie Francaise de Credit et de Banque v Atard* (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 *Plesch v Banque Nationale de la République 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.

Chapter 4

Responsibility of states

ON STATE RESPONSIBILITY IN GENERAL

Harvard Draft Convention (and Comment), AJ, 23 (1929), April, Special Suppl, pp 133–215 Conference for the Codification of International Law: *Bases of Discussion*, iii (cited as *Bases of Discussion*, iii), pp 10–107, 121–52 Dunn, *The Protection of Nationals* (1932), pp 113–87 Strupp, *Das völkerrechtliche Delikt* in Stier-Somlo's *Handbuch des Völkerrechts* (1920), and Strupp, *Die völkerrechtliche Haftung des Staates, insbesondere bei Handlungen Privater* (1927) Burckhardt, *Die völkerrechtliche Verantwortlichkeit der Staaten* (1924) Charles de Visscher in *Bibliotheca Visseriana*, ii (1924), pp 89–122 Dupuis, Hag R (1924), i, pp 350–68 Ralston, §§ 231–348, 403–74, 578–698 H Lauterpacht, *Analogies*, §§ 58–66 Ruegger-Burckhardt, *Die völkerrechtliche Verantwortung des Staates für die auf seinem Gebiete begangenen Verbrechen* (1924) Decencière-Ferrandière, *La Responsabilité internationale des États à raison des dommages subis par les étrangers* (1927) Eagleton, *The Responsibility of States in International Law* (1928) Dumas, *Responsabilité internationale des États à raison des crimes ou des délits commis sur leur territoire au préjudice d'étrangers* (1930), and Hag R, 36 (1931), ii, pp 187–259 Dunn, *The Protection of Nationals* (1932) Roth, *Das völkerrechtliche Delikt* (1932) Soldati, *La Responsabilité des États dans le droit international* (1934) Arató, *Die völkerrechtliche Haftung* (1937) Freeman, *The International Responsibility of States for Denial of Justice* (1939) Jessup, *A Modern Law of Nations* (1948), pp 94–122 Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerrecht* (1952) (in relation to the Nuremberg trials) Cheng, *General Principles of Law as Applied by International Tribunals* (1953), pp 161–253 Eagleton, AJ, 19 (1925), pp 293–314 Heilborn, ZöR, 7 (1927), pp 1–10 Charles de Visscher, RI, 3rd series, 8 (1927), pp 245–72 Borchard, ZöV, 1 (1929), pp 222–50 and AJ, 24 (1930), pp 517–40 Hoijer, RI (Paris), 4 (1929), pp 577–602 Hille, RI, 3rd series, 10 (1929), pp 531–71 Eagleton, ZV, 15 (1930), pp 337–58 Kelsen, ZöR, 12 (1932), pp 481–608 Salvioli, Hag R, 46 (1933), iv, pp 96–103 Strupp, *ibid*, 47 (1934), i, pp 557–67 Basdevant, *ibid*, 58 (1936), iv, pp 656–75 H Lauterpacht, *ibid*, 62 (1937), iv, pp 339–70 Starke, BY, 19 (1938), pp 10417 Friedmann, *ibid*, pp 118–50 Cohn, Hag R, 68 (1939), ii, pp 209–324 Ago, *ibid*, pp 419–545 Biscottini, *Rivista*, 34 (1942), pp 3–43 Puente, *Tulane Law Review*, 18 (1944), pp 408–36 Freeman, AJ, 40 (1946), pp 121–47 Berlia, in *Etudes Georges Scelle* (1950), pp 875–94 Eustathiades, Hag R, 84 (1953), iii, pp 397–614 Garcia-Amador, AJ, 49 (1955), pp 339–45, and Hag R, 94 (1958), ii, pp 369–487 Accioly, Hag R, 96 (1959), i, pp 353–436 Sorensen, Hag R, 101 (1960), iii, pp 217–33 Reuter, Hag R, 103 (1961), ii, pp 583–619 Sohn and Baxter, AJ, 55 (1961), pp 545–84 (cited as *Harvard Draft (1961)*) Carlebach, *La Problème de la faute et sa place dans la norme du droit international* (1962) Münch, *Das Völkerrechtliche Delikt in der Modernen Entwicklung der Völkerrechtsgemeinschaft* (1963) Jennings, Hag R, 121 (1967), ii, pp 473–514 ILC Draft Articles on State Responsibility, in the Commission's Annual Reports to the General Assembly 1973–90 (YBILC (1973), ii, and equivalent passages in subsequent vols of the YBILC) Verzijl, *International Law in Historical Perspective* (vol vi, 1973), pp 616–774 UN Secretary-General, *Study on State Responsibility* (1977) (ST/LEG/13 A/CN 4/303) Arechaga, Hag R, 159 (1978), i, pp 267–313 Riphagen in *The Structure and Process of International Law* (eds Macdonald and Johnston, 1983), pp 581–

626 Graefrath, Hag R, 185 (1984), ii, pp 9–150 Dupuy, Hag R, 188 (1984), v, pp 9–134 Spinedi and Simma (eds), *United Nations Codification and State Responsibility* (1987) Brownlie, *System of the Law of Nations: State Responsibility* (pt 1, 1983) UN Secretariat, *Study of State Practice Relevant to International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law* (1984) UN Doc A/CN 4/384 *Restatement (Third))*, ii, pp 338–55.

§ 145 Nature of state responsibility Since, formerly, states alone used to be the subjects of international law[1], 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.[2]

A state may sometimes, in municipal law, enjoy freedom from legal responsibility,[3] or immunity from the jurisdiction of national courts.[4] In international law, however, a state bears responsibility for its[5] conduct in breach of its

1 See § 6.

2 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.

The international responsibility of international organisations is discussed by Wright, AJ, 43 (1949), pp 95–104; Eagleton, Hag R, 76 (1050), i, pp 387–421; Eustathiades, Hag R, 84 (1953), iii, pp 397–627; Parry, Hag R, 90 (1956), ii, pp 714–21; Garcia Amador, Hag R, 94 (1958), ii, pp 409–13; de Visscher, Hag R, 102 (1961), i, pp 480–88; Pescatore, Hag R, 103 (1961), ii, pp 67–74, 210–36; Ritter, AFDI (1962), pp 427–56; YBILC (1963), ii, pp 181–2; *ibid* (1967), ii, pp 218–22, 302; Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (1969); Bowett, *The Law of International Institutions* (4th ed, 1982), pp 362–5; Meng, ZöV, 45 (1985), pp 324–55; Gonzalez, RG, 92 (1988), pp 63–102.

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 Rayner (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.

3 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 § 112, n 15. From 'act of state' in the technical sense of English law it is necessary to distinguish what is sometimes, particularly in the USA, known as the 'act of state doctrine', and involves certain restrictions upon the extent to which courts of one state will question foreign state acts: see § 112.

As to act of state pleaded by a foreign government sued in its own courts see *Finck v Egyptian Minister of the Interior*, BY (1925), pp 219–26, and the *Egyptian Debt Case*, LQR, 42 (1926), pp 3–5, and see § 62, n 32.

As to the liability of the state in the law of various European countries, see the *Proceedings of the Ninth Colloquy on European Law*, held in Madrid in 1979 (published by the Council of Europe, 1981).

4 See § 109.

5 See generally on questions of attribution, § 159.

As to problems arising in cases of participation by one state in the internationally wrongful acts of another, including the effects of incitement and coercion to commit such acts and the granting of aid or assistance in their commission, see Draft Articles on State Responsibility, pt I, Art 27, and Commentary, YBILC (1978), ii, pt 2, pp 99–105: the ILC regard 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 in a field of activity where one state has the power of direction or control over the conduct 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.

international obligations.[6] Such responsibility attaches to a state by virtue of its position as an international person.[7] The sovereignty of the state affords it no basis for denying that responsibility. Failure to comply with an international obligation constitutes an international wrong[8] by the state giving rise to international responsibility of that state from which flow certain legal consequences,[9] both for that state (such as the obligation to make reparation)[10] 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.[11] 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.[12]

A distinction is sometimes made between the original and so-called vicarious responsibility of a state.[13] 'Original' responsibility is borne by a state for acts

6 Draft Articles on State Responsibility, pt I, Art 3 and Commentary, YBILC (1973), ii, p 179.

7 Draft Articles on State Responsibility, pt I, Art 2 and Commentary, YBILC (1973), ii, p 176. See also § 103.

8 See § 146.

9 See Draft Articles on State Responsibility, pt II, Art 1: YBILC (1983), ii, pt 2, p 42.

10 See § 155.

11 See Draft Articles on State Responsibility, pt II, Art 2: YBILC (1983), ii, pt 2, pp 42–3.

12 See *Anglo-Chinese Shipping Co Ltd v US*, ILR, 22 (1955), p 982. See also Brownlie, *System of the Law of Nations: State Responsibility* (pt 1, 1983), pp 189–92.

13 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 *Janes' Case* (1925), RIAA, iv, p 82, and AD, 3 (1925–26) No 158. See also Verdross, ZöR, 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 *stricto sensu*. 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.

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[14] 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[15] covering the first phase of its work, and the first five articles[16] 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.[1] That duty must generally have been incumbent upon the state at the time the act complained of was committed.[2] The comprehensive notion of an international wrong

[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.

[1] See Draft Articles on State Responsibility, pt I, Arts 3, 16, 17 and 19.1 and Commentaries, YBILC (1973), ii, pt 2, pp 179–84 and *ibid* (1976), ii, pt 2, pp 75–87, 96–7.

[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 *ius cogens* on state responsibility, see Gaja, Hag R, 172 (1981), iii, pp 290–301.

ranges from relatively minor breaches of treaty obligations to grave violations of particular international laws amounting to a criminal act.[3]

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.[4]

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.[5] The acknowledgement of a limited degree of criminal responsibility of states[6] and of a category of obligations owed *erga omnes*[7] 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.[8]

§ 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;[1] and even then the circumstances of each case determine whether

[3] See §§ 156 and 157.

An international wrong must not be confused with so-called 'Crimes against the Law of Nations' (see *Harv Research* (1935), pp 573–92; Efremoff, RI (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 5.2 (e) and (f), and 5.3 (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*.

[1] 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; Verzijl, *International Law in Historical Perspective*, vi (1973), pp 705–12; Draft Articles on State Responsibility, pt I, Art 7 and Commentary paras (1)–(13), YBILC (1974), ii, pp 277–81, and Art 28 and Commentary paras (4)–(18), *ibid* (1979), ii, pp 94–9; *The 'Montigo'* (1875), Moore, *International Arbitrations*, ii, p 1440; *Davy Claim* (1903), RIAA, 9, 467; *Pieri Dominique & Co Claim* (1905), RIAA, 10, pp 139, 156; *Brown Claim* (1923), RIAA, 6, p 120; *Youmans Claim* (1926), RIAA, 4, p 110; *Mallén Claim* (1927), RIAA, 4, p 173; *Pellat Claim* (1929), RIAA, 5, p 534.

With particular reference to federal states, see also Donot, *De la Responsabilité de l'état fédéral à raison des actes des états particuliers* (1912), where a number of important cases are discussed. See also Stoke, *The Foreign Relations of the Federal State* (1931), pp 133–74; Gammans, AJ, 8 (1914), pp 73–80; Cohen, ZV, 8 (1914), pp 134–53; Borchard, § 82; and *Annuaire*, 18 (1900), p 255. For a number of awards upon the responsibility of a federal state in regard to the contracts of its member states, see Ralston, §§ 601–7; as to the responsibility of the USA for the repudiated

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

debts of the Southern States, see Randolph, AJ, 25 (1931), pp 63–82; and see § 75; and Germany's acceptance of responsibility for the failure of the Bavarian Government in October and November 1922 to prevent attacks upon the members of an Inter-Allied Control Commission, discussed by Strupp, *Wört*, ii, p 247. See also Resolution of the Institute of International Law in AJ, 22 (1928), Special Suppl, at pp 331, 332, which holds a federal state, and, within limits, a protecting state, responsible for the conduct of a member state and a protected state and lays down expressly that the federal state cannot invoke the provisions of the Federal Constitution in order to avoid liability. See *Bases of Discussion*, iii, p 122, where the British Government accepted as good law the rule formulated by the Institute. See *ibid*, p 124, for the Swiss reply to the effect *inter alia* that were a Swiss Canton to adopt a measure incompatible with international law the federal authorities would, under the constitution, insist on its repeal. See also Sibert, RG, 44 (1937), pp 544–48. See also § 76. As to the conflict which arose in 1906 between Japan and the USA, on account of the segregation of Japanese children by the Board of Education of San Francisco, and the demand of Japan that this measure should be withdrawn, the US Government at once took the side of Japan, and endeavoured to induce California to comply with the Japanese demands, see Hyde in *The Green Bag*, (vol xix, 1907), pp 38–49; Root, AJ, 1 (1907), pp 273–86; Barthélemy, RG, 14 (1907), pp 636–85; Woolsey in AJ, 15 (1921), pp 55–9.

For some similar acts of state legislatures and executives, see Buell, AJ, 17 (1923), pp 29–49.

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 provided[4] 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

[2] See generally §§ 161 and 166.

[1] On the international criminal responsibility of individuals see generally Eustathiades, Hag R, 84 (1953), iii, pp 397–627; Sperduti, Hag R, 90 (1956), ii, pp 766–87; Glaser, Hag R, 99 (1960), i, pp 473–585, and *Droit international pénal conventionnel* (2 vols, 1970 and 1978); Hoffmann, *Strafrechtliche Verantwortung im völkerrecht* (1962); Oehler, *Internationales Strafrecht* (1972); Bassiouni and Nanda, *International Criminal Law* (2 vols, 1973); Dinstein, Israel YBHR, 5 (1975), pp 55–87; Draper, Israel YBHR, 6 (1976), pp 9–48; Green, ICLQ, 29 (1980), pp 567–84, and Israel YBHR, 11 (1981), pp 9–40; Komarow, *ibid*, pp 21–37; Bassiouni, *International Criminal Law: A Draft International Criminal Code* (1980) and *International Crimes: Digest/Index of International Instruments 1815–1985* (2 vols, 1986); Bassiouni (ed), *New Horizons in International Criminal Law* (1985), and *International Criminal Law* (vols 1 and 2, 1986; vol 3, 1987). See also nn 5, 27.

[2] See §§ 299–305 as to piracy; see § 429 as to slave trade.

[3] See vol II of this work (7th ed), §§ 253–257*c*. See also Lauterpacht, BY, 21 (1944), pp 63–88, and Wright, AJ, 39 (1945), pp 257–85; Levy, *University of Chicago Law Review*, 12 (1945), pp 313–32; Guggenheim, pp 512–19, 538–52.

[4] Article 6 of the Charter provided that there 'shall be individual responsibility' for 'crimes against peace', 'war crimes', and 'crimes against humanity': AJ, 39 (1945), Suppl, p 259; Cmd 6668 (1945). See also the Indictment of 18 October 1945: Cmd 6696 (1945).

As to crimes against humanity, see further § 435. 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

[5] *Transcript of Proceedings*, p 16,878; AJ, 41 (1947), p 220. See generally on the Nuremberg trials and other similar war crimes trials after the Second World War, vol II of this work (7th ed), § 257 and literature there cited; Knieriem, *The Nuremberg Trials* (1959); Woetzel, *The Nuremberg Trials in International Law* (2nd ed, 1962); Brownlie, *International Law and the Use of Force by States* (1963), pp 167–213; Rückerl, *NS Prozesse* (1971); Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–51* (1979).

As to war crimes in relation to the fighting in Vietnam in the 1960s and early 1970s see Taylor, *Nuremberg and Vietnam* (1970); contributions by Falk, Rubin, Paust and Taylor in *The Vietnam War and International Law* (ed Falk, vol 3, 1972), pp 327–96; Goldstein, Marshall and Schwartz (eds), *The My Lai Massacre and its Cover-Up* (1976).

[6] GA Res 95 (I). For the ILC's formulation of the Nuremberg Principles, see YBILC (1950), ii, pp 374–8.

[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 'criminal offences 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).

[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 § 122.

[10] See § 434.

of the 1949 Geneva Conventions (and of the 1977 Protocols to them)[11] and apartheid.[12]

In 1982[13] 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] international terrorism (Article 16)[26a], 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

[11] UNTS, 75, pp 31, 85, 135 and 287; and ILM, 16 (1977), pp 1391, 1442.

[12] International Convention on the Suppression and Punishment of the Crime of Apartheid, GA Res 3068 (XXVIII) (1973). The UK is not a party to the Convention. See generally § 439.

[13] Following GA Res 36/106 (1981); YBILC (1982), ii, pt 2, p 121.

[14] GA Res 42/151 (1987); YBILC, ii, pt 2, pp 12–13.

[15] YBILC (1983) ii, pt 2, p 14 (para 48).

[16] See the successive annual reports of the ILC to the General Assembly from 1982 onwards. For comment on the ILC's work see Green, Israel YBHR, 13 (1983), pp 9–51; Gross, *ibid*, 15 (1985), pp 224–73, and 16 (1986), pp 162–216.

[17] YBILC (1987), ii, pt 2, p 15.

[18] *Ibid*, p 16.

[19] *Report of the ILC* (40th Session, 1988), para 280.

[20] *Ibid*.

[21] *Ibid*.

[22] *Ibid*.

[23] *Ibid*.

[24] *Report of the ILC* (41st Session, 1989), para 217.

[25] *Ibid*.

[26] *Ibid*.

[26a] *Report of the ILC* (42nd session, 1990), para 158.

[26b] *Ibid*.

[26c] *Ibid*, paras 77–88, 158.

[27] See vol II of this work (7th ed) §§ 257*a* and 257*b* for a discussion of and the literature on the subject. See also Glaser, *Introduction à l'etude du droit international pénal* (1954); Liang, AJ, 45 (1951), pp 514–25; Donnedieu de Vabres and others, *Annuaire*, 44(1) (1952), pp 361–457; Pella, RG, 56 (1952), pp 357–459; *Revue critique de droit international privé* (1952), pp 337–459; Wright, AJ, 46 (1952), pp 60–72; Wehberg in 'Gegenwartsprobleme,' *Laun Festschrift* (1953), pp 379–94; Glaser, *Revue de droit pénal* (1953), pp 283–330; Thorneycroft, *Personal Responsibility and the Law of Nations* (1961); Bridge, ICLQ, 13 (1964), pp 1255–81; Stone and Woetzel (eds),

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[2] conduct on

Towards a Feasible International Criminal Court (1970); Bassiouni and Nanda, *International Criminal Law* (vol 1, pt V, 1973); Ferencz, *An International Criminal Court* (2 vols, 1980); Graefrath, *European Journal of International Law*, 1 (1990), pp 67–88. See also the Statute for an International Commission of Criminal Inquiry adopted by the ILA in 1980 (*Report of the 59th Conference* (1980), pp 5, 402–8) and the Statute for an International Criminal Court adopted by the ILA in 1984 (*Report of the 61st Conference* (1984), pp 4–6, 257–67).

In 1948 the UN General Assembly requested the ILC to consider the question of international criminal jurisdiction (Res 260 (III) B): see YBILC (1950), ii, pp 378–9, and *Historical Survey of the Question on International Criminal Jurisdiction*, prepared by the UN Secretary-General, UN Doc A/CN 4/7. In 1950 the General Assembly set up a Committee of representatives of 17 member states charged with the task of drafting proposals and conventions relating to the establishment of an international criminal court. For an analysis of the report of the Committee, see Wright, AJ, 46 (1952), pp 60–72, and Liang, *ibid*, pp 73–88. For the proposed statute, see AJ, 46 (1952), Suppl, p 1. In 1953 another Committee revised the draft for final submission to the General Assembly (for text see *UN Bulletin*, 15 (1953), p 196). The draft provides for the establishment of an international criminal court 'to try natural persons accused of crimes generally recognised under International Law' (Art 1). Such persons may be 'constitutionally responsible rulers, public officials, or private individuals' (Art 25). The Assembly deferred consideration of this second committee's report: Res 898 (IX) (1954) and 1187 (XII) (1957).

Article VI of the Genocide Convention 1948 (§ 434), and Art V of the Apartheid Convention 1973 (§ 439) contained contingent provision for an 'international penal tribunal' in the event of one being established. In its resumed work on the Draft Code of Crimes against the Peace and Security of Mankind (see above in text) the ILC is considering the question of an international criminal court, as part of the procedures for implementing the Code. It was expressly asked to do so, with particular reference to illegal drug trafficking, in GA Res 44/39 (1989). As a result the ILC prepared a Report on the possible establishment of an international criminal jurisdiction in 1990, which it submitted to the General Assembly: see *Report of the ILC* (42nd Session, 1990), para paras 93–157.

28 Thus the courts of many European states tried numerous people for war crimes committed during the Second World War. As to the trial by Israel of Eichmann, see § 119, n 15, para 3. As to periods of limitation for such war crimes trials, see § 435, n 11.

1 See discussion in H Lauterpacht, *Analogies*, pp 135–43, § 62, and also *Annuaire*, 33 (1927), pp 455–562, upon Strisower's Report on the International Responsibility of States for Injury on their Territory to the Person or Property of Foreigners, and AJ, 21 (1927), pp 720–24, and *ibid*, 22 (1928), Special Suppl, pp 330–33; Borchard, ZöV, 1 (1929), pp 224–27; Starke, BY, 19 (1938), pp 104–17; Ago in *Scritti giuridici in onore di Santi Romano* (1939), pp 3–32; Guggenheim, pp 552–60; Cheng, *General Principles of Law as Applied by International Tribunals* (1953), pp 218–32; Sperduti, *Comunicazioni e studi*, 3 (1950), pp 79–104; Parry, Hag R, 90 (1956), ii, pp 669–98; Garcia Amador, Hag R, 94 (1958), ii, pp 382–92; Accioly, Hag R, 96 (1959), i, pp 353–70; Carlebach, *La Problème de la faute et sa place dans la norme du droit international* (1962), Ch 4; Perret, *De la Faute et du devoir en droit international* (1962); Quadri, Hag R, 113 (1964), iii, pp 453–77; Goldie, ICLQ, 14 (1965), pp 1189–1264; Gray, *Judicial Remedies in International Law* (1987), pp 222–4; Barboza, AFDI, 34 (1988), pp 513–22; Boyle, BY, 60 (1989), pp 257, 287–97.

2 Not necessarily 'gross' negligence: see *Re Rizzo and Others (No 3)*, ILR, 22 (1955), pp 317, 322–3.

the part of the state before a breach by it of an international obligation can be established; or to be strict or objective,[3] 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.[4]

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.[5] Similarly, a need to show fault of varying degrees has been incorporated into treaty provisions.[6] 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.'[7]

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.

3 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.

4 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.

5 See § 166.

6 See eg n 12.

7 ICJ Rep (1949), p 18. However, see § 121, n 8, as to the admissibility of circumstantial evidence for the possible benefit of the injured state. See also *Military and Paramilitary Activities Case*, ICJ Rep (1986), pp 82–6; and Lenoble, *Rev Belge*, 16 (1981–82), pp 95–110.

However, in certain areas responsibility may arise without fault. Either absolute or strict responsibility has been adopted by treaty for some particularly dangerous activities.[8] These include the Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960,[9] the Brussels Convention on the Liability of Operators of Nuclear Ships 1962,[10] the Vienna Convention on Civil Liability for Nuclear Damage 1963,[11] the Convention on International Liability for Damage Caused by Space Objects 1971,[12] the International Convention on

[8] On ultra-hazardous activities generally see Jenks, Hag R, 117 (1966), i, pp 105–200; Cahier in *International Relations in a Changing World* (1977).

[9] TS No 69 (1968); AJ, 55 (1961), p 1082, on which see Berman and Hydeman, *ibid*, pp 966–9, and the Explanatory Memorandum printed in Europ YB, 8 (1960), pp 25–59. See also the 1963 Brussels Convention Supplementary to the 1960 Paris Convention, TS No 44 (1975), and the Protocol of 21 September 1988 on Civil Liability in Cases of Nuclear Damage (Cm. 774). See also n 11.

See generally on liability arising out of the civil and industrial use of nuclear materials Hardy, BY, 36 (1960), pp 223–49, and ICLQ, 10 (1961), pp 739–59; Hyderman and Berman, *International Control of Nuclear Maritime Activities* (1960); Arangio-Ruiz, Hag R, 107 (1962), iii, pp 575–630; Könz, AJ, 57 (1963), pp 100–11; Rousseau, *Report on Legal Implications of Disposal of Radioactive Wastes into the Seas* (IAEA, 1963); Pelzer, *Rechtsprobleme der Beseitigung radioaktiver Abfalle in das Meer* (1970); Dickstein, ICLQ, 23 (1974), pp 426–46; Miatello, *La Responsabilité internationale encourue en raison des activités liées à l'utilisation de l'energie nucléaire* (1986); Cameron, Hancher and Kuhn (eds), *Nuclear Energy Law after Chernobyl* (1988).

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.

One particular aspect of liability for ultra-hazardous activities has arisen in the context of the international carriage and dumping of hazardous (and particularly nuclear) waste. The matter has been increasingly the subject of international action. See eg Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (ILM, 11 (1972), p 1291); OECD Council Decision and Recommendation on Transfrontier Movements of Hazardous Waste 1984 (ILM, 23 (1984), p 214); OECD Decision-Recommendation on Exports of Hazardous Wastes 1986 (ILM, 25 (1986), p 1010); OECD Decision on Transfrontier Movements of Hazardous Wastes 1988 (ILM, 28 (1989), p 257); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (ILM, 28 (1989), pp 6649, 657), Art 12 of which envisages the later conclusion of a protocol on questions of liability and compensation for damage resulting from transboundary movement and disposal of hazardous and other wastes.

Although calling for more detailed treatment in vol II of this work, it should here be noted that realisation 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 Tlatelolco) (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)).

[10] AJ, 57 (1963), p 268. See Hardy, ICLQ, 12 (1963), pp 778–88; Cigoj, ICLQ, 14 (1965), pp 809–44. See also the Brussels Convention on Civil Responsibility for Maritime Transport of Nuclear Material 1971 (Cmnd 5094), on which see Strohl, AFDI, 18 (1972), pp 753–84. And see generally on the international transfer of hazardous materials and technology, Handl and Lutz, Harv ILJ, 30 (1989), pp 351–75.

[11] ILM, 2 (1963), p 727. See also the Convention on Third Party Liability in the Field of Nuclear Energy 1960, at n 9. On these two Conventions see Cigoj, ICLQ, 14 (1965), pp 809–44, especially p 822ff.

[12] 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.

Civil Liability for Oil Pollution Damage 1969[13] and the Convention for the Regulation of Antarctic Mineral Resource Activities 1988.[14] Absolute, or strict, responsibility probably does not yet attach to any conduct by virtue of customary international law,[15] although some tendency in that direction can be discerned in discussion of the limited extent to which a state may be internationally responsible for acts which are in principle lawful but which involve an abuse of rights.[16]

Not every act by one state which injures another state constitutes an internationally wrongful act, even where *prima facie* it is inconsistent with an international obligation owed to the injured state. Thus some acts, while undeniably causing injury, do not involve a violation of any international obligation. Other acts may be justified,[17] so as to deprive them of any wrongful character which they might otherwise have, by consent given by the injured state; by being committed by one state in exercise of its right of self-defence[18] or as a lawful counter-measure (such as reprisals[19] or measures of enforcement under Articles 41 or 42 of the Charter of the United Nations),[20] against the wrongful act of another State; by considerations of *force majeure*[21] or severe distress depriving the state organ committing the act of any other practicable choice; or by the necessity of safeguarding essential interests of the state.[22]

§ 150 Nationality of claims A state which puts forward a claim before an international tribunal[1] must be in a position to show that it has *locus standi* for that purpose. Where the injury complained of has been suffered by the state itself, as where its naval vessels have been sunk or its territorial sovereignty

[13] AJ, 64 (1970), p 481; see Art III.

[14] ILM, 27 (1988), p 859; see Art 8.

[15] 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.

[16] See § 124.

[17] 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.

[18] See § 127.

[19] See § 127, n 12. See also § 129, n 13ff.

[20] See § 132.

[21] 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).

[22] See § 126.

[1] As to measures of diplomatic protection before the formal presentation of an international claim, see §§ 158, 410.

violated or a treaty obligation owed to it by another state has not been fulfilled,[2] the state's *locus standi* to present a claim is not in doubt. But where it is a private person (either natural or legal) who has suffered injury, a state wishing to establish its *locus standi* to present a claim on account of that injury must show that the person concerned was its national.[3] For by 'taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law'.[4] It is the bond of nationality which establishes the connection between the injury suffered by a private person and the right of the state to seek redress. It may accordingly be stated as a general principle[5] that from the time of the occurrence of the injury until the making of the award[6] the claim must continuously and without interruption have belonged to a person or to a series of persons (a)

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 is of such a kind that a breach by a state party to it would give any other party a basis for a claim in the absence of some particular injury to itself or its nationals. Note also the absence in international law of any *actio popularis*: see § 1, n 9.

3 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 § 411.

4 *Mavrommatis Palestine Concessions* (1924), PCIJ, Series A, No 2, p 12. See also 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 Eysinga 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 1(b) of the Resolution adopted by the Institute of International Law 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 *Nottebohm 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 Apostolidis) 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*, ILM, 14 (1975), p 1409.

5 See Hurst, BY (1926), pp 163–82; Hyde, §§ 275, 280; Ralston, §§ 291–348; Lambie, AJ, 24 (1930), pp 264–78; Borchard, *Annuaire*, 36 (1931), i, pp 277–356; Witenberg, Hag R, 41 (1932), 3, pp 44–50; Borchard, RI, 3rd series, 14 (1933), pp 421–467; Ch de Visscher, *ibid*, 17 (1936), pp 481–84; *Bases of Discussion*, iii, pp 140–45; Sibert, RG, 44 (1937), pp 514–20; Sinclair, BY, 27 (1950), pp 125–44; Parry, Hag R, 90 (1956), ii, pp 699–712; Garcia Amador, Hag R, 94 (1958), ii, pp 426–39; *Harvard Draft (1961)*, Art 23; Blaser, *La Nationalité et la protection juridique internationale de l'individu* (1962); Briggs, *Annuaire*, 51 (1965), i, pp 5–173, and discussion at *ibid*, 51 (1965), ii, pp 157–253 and the resolution adopted at pp 260–62; Vallat, *International Law and the Practitioner* (1966), pp 19–29; Jennings, Hag R, 121 (1967), ii, pp 474–80; Drucker, ICLQ, 16 (1967), pp 1157–61; Joseph, *Nationality and Diplomatic Protection* (1969) (with special reference to the Commonwealth); Leigh, ICLQ, 20 (1971), pp 453–75; AJ, 76 (1982), pp 836–9 (for a reaffirmation of the US Government's view as to the validity of the 'continuous nationality' rule); Rules I, II and XI of the UK Government's Rules Applying to International Claims 1985, cited by Warbrick, ICLQ, 37 (1988), pp 1006–8.

6 See *Eschauzier 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.

having the nationality of the state by whom 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 *Nottebohm* case the International Court of Justice held

7 Departures from the rule may be agreed by treaty. Thus by virtue of Art 78.9(a) of the Treaty of Peace with Italy 1947 (TS No 50 (1948)), claims were allowed on behalf of persons who had the nationality of one of the United Nations on the date of entry into force of the treaty and on the date of the armistice with Italy (which date was in many cases after the date on which injury was suffered), as well as on behalf of persons who had been 'treated as enemy' under Italian law, even if they did not satisfy those nationality requirements. See eg *Menkes, Bartha* and *Feldman Claims*, ILR, 22 (1955), pp 389, 391 and 642; *Fubini Claim* (1959), ILR, 29, p 34; and *De Leon Claim* (1962), ILR, 40, p 117.

Similarly, treaties may vary, or add to, the dates on which the possession of the claimant state's nationality is relevant. Thus Art 24.9(a) of the Treaty of Peace with Roumania 1947 establishes the date of the armistice with Roumania as a relevant date in this context: see eg *Hoffman Claim*, ILR, 26 (1958–II), p 333. Treaties may also allow for changes from one nationality to another: see eg *Stankovic Claim* (1963), ILR, 40, p 153. See also *French National Compensation Case* (1973), ILR, 74, p 280.

It is no departure from the rule if a state in distributing compensation obtained from another state, chooses to make payments to persons who would not qualify under the rule. In making arrangements for the distribution of compensation by a national tribunal, the state may, but need not necessarily, require the tribunal to act in accordance with the nationality of claims rule. See, eg as to the distribution by the USA of certain compensation received from Italy, Peselj, AJ, 53 (1959), pp 144–51. See also Lillich, ICLQ, 13 (1964), pp 899–924, and other works cited below, § 158, n 7, as to national distributions of compensation.

Where a state is unable to assert any formal standing to present a claim on behalf of non-national interests which were damaged as part of a wider incident in respect of other parts of which it has standing to present a claim, it may condition its agreement to a settlement of its claim upon satisfactory arrangements being made in respect of the non-national interests involved. New Zealand so acted in relation to a foreign national who was killed, and a foreign flag ship which was sunk, in the course of an action by France in New Zealand territory: see *Rainbow Warrior (New Zealand v France)* (1986), ILR, 74, pp 241, 259.

8 However, the rule has not been followed invariably, and exceptional cases exist in which a state has been allowed to support a claim on the joint basis of the claimant's domicile within its territory and of his having made a declaration of intention to acquire its nationality: see Hyde, § 275, and Ralston, § 300, and § 411, para (9); but see *Szunyogh Claim*, ILR, 26 (1958–II), p 331, rejecting a claim presented on the basis of a declaration of intention to acquire nationality. See also the observations of Fitzmaurice, BY, 17 (1936), pp 104–10, in connection with the *I'm Alone Case*, AD, 7 (1933–34), No 86, especially at pp 205, 206; RIAA, iii, p 1609, in which the owners of the ship, which the Commissioners held to have been illegally sunk, were nationals of the *defendant* state. As to the two cases – *Martin Koszta* and *August Piepenbrink* – of the successful assertion by the USA of a right of protection over persons who were not its nationals, see Wharton, ii, § 175; Moore, iii, §§ 490, 491; Martens, *Causes célèbres*, v, pp 583–99; Borchard, § 250. But see Hyde, i, § 396, who cites a passage in Moore, iii, p 844, which makes it clear that the claim to protect was based upon Koszta's admission to American protection *ad interim* by the American Consul and Chargé d'Affaires at Constantinople by the grant of a passport or safe-conduct in accordance with the recognised usage in Turkey. See also the case of *Edward Hilson v Germany* in AJ, 19 (1925), pp 810–15, and AD, 3 (1925–26), No 198. As to the *August Piepenbrink* case, see AJ, 9 (1915), Suppl, pp 353–60. See also § 411, for certain other exceptional circumstances in which the diplomatic protection of non-nationals is allowed.

On the other hand, it has been held that the fact that a state denies to certain categories of its nationals the full status or privileges of citizenship (see § 378, nn 23–6) does not affect its rights in the matter of claims by or in respect of the individuals in question. See eg *Kahane v Parisi and the Austrian State*, AD, 5 (1929–30), No 131. See also Wilson, AJ, 33 (1939), pp 146–48. On nationality and war claims, see Hanna, Col Law Rev, 45 (1945), pp 301–44.

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.[9] In cases of succession on death,[10] and of assignment,[11] 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 way of 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 compensation.[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.

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9 See § 378. See also *Flegenheimer Claim*, ILR, 25 (1958–I), 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 he 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.

10 *Gleadell Claim* (1929), RIAA, v, p 44; *Flack Claim* (1929), *ibid*, p 61; *Eschauzier Claim* (1931), *ibid*, p 207; *Kren Claim*, ILR, 20 (1953), p 233; *Bogovic Claim*, ILR, 21 (1954), p 156; *Hanover Bank Claim*, ILR, 26 (1958–II), p 334; *Friede Claim*, ILR, 26 (1958–II), p 352; *Ruchwarger Claim* (1959), ILR, 30, p 215. Cf *Straub Claim*, ILR, 20 (1953), p 228.

See also *Harvard Draft (1961)*, Art 20. It may be regarded as established that the rule *actio personalis moritur cum persona* – now abolished in English law – is not recognised by international tribunals: see eg the *Dujay* case, decided by the US–Mexican Claims Commission on 8 April 1929, AD, 5 (1929–30), No 107.

11 *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; *Einhorn-Fielstein v Netherlands Claims Commission (Czechoslovakia)* (1971), ILR, 73, p 378. 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.

12 See *La 'Réunion'* (1922), *Recueil TAM*, 1, p 773; *La Foncière*, *ibid*, 9, p 400; *Federal Insurance Co Claim*, ILR, 26 (1958–II), p 316; *Continental Insurance Co. Claim*, *ibid*, p 318.

See generally McNair, *Opinions*, ii, pp 290–92; Meron, AJ, 68 (1974), pp 628–47.

13 See *Provident 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.

14 *Binder-Haas Claim*, ILR, 20 (1953), p 236; *Knesevich Claim*, ILR, 21 (1954), p 154; *American Security and Trust Co Claim*, ILR, 26 (1958–II), p 322; *Methodist Church Claim*, *ibid*, p 279; *Hanover Bank Claim*, *ibid*, 334; *Chase National Bank Claim*, *ibid*, p 463. See generally Bederman, ICLQ, 38 (1989), pp 935–46; and § 152 as to shareholding interests in companies.

15 See § 151.

16 See § 152.

The rule as to nationality of claims is subject to exceptions in cases in which a treaty lays down obligations of the contracting parties with regard to the treatment of individuals as in the case of protection of minorities, trusteeship agreements or human rights generally.[17] In such cases, any of the contracting parties having a general interest in the observance of the treaty may bring an international claim which may, in effect, be a claim in the interest of persons who are not their nationals. This applies, in particular, to treaties concerning the treatment of stateless persons.[18] Similarly, the rule as to the nationality of claims does not necessarily apply to claims on behalf of certain limited categories of persons[19] such as those who, while not nationals of a state, are in its service.[20]

Moreover, it must be noted that the capacity to advance an international claim is not limited to states. Thus in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* the International Court of Justice held that as the United Nations is a subject of international law and is capable of possessing international rights and duties,[21] it has the capacity to maintain its rights by bringing international claims.[22] Where the claim is in respect of injury to a person in the service of the organisation it is not dependent upon the rule as to nationality of claims being satisfied.[23] Again, there is nothing to prevent states from conferring an international right of action upon other international organisations and even individuals by granting them a right of direct access to international tribunals, and they have done so to a limited extent.[24] Here too there is no place for the rule as to nationality of claims.

§ 151 Nationality of claims: double nationality The provisions of Articles 4 and 5 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930[1] (providing respectively, in effect, that a state may not give diplomatic protection to one of its nationals against a state whose nationality that person also possesses, and that a dual national in a third state shall be treated

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17 See § 425ff, and § 89ff and § 431ff.

18 See § 398.

19 See § 411.

20 It is probably with reference to these and similar cases that the ICJ observed, in the *Reparation for Injuries Case* (ICJ Rep (1949), p 181) with regard to the rule that diplomatic protection can be exercised only by the national state that 'there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality'. See § 411, n 11.

21 See § 7, n 15ff and § 145, n 2, and § 627. See also Eagleton in Hag R, 76 (1950), i, pp 346–87; Hardy, BY, 37 (1960), pp 516–26.

22 ICJ Rep (1949), pp 179, 181–84. The ICJ pointed out that unless the UN possessed capacity to bring an international claim it could not obtain reparation for a breach by a member of its international obligation. It held that the UN must be deemed to possess the powers which, although not expressly provided for in the Charter, must be regarded as implied in it for the reason that they are essential to the performance of the task of the UN.

23 Where the person injured retains his nationality of a particular state, the possibility of concurrent claims by the organisation and by that state arises: such concurrent claims are not excluded (*Barcelona Traction Case*, ICJ Rep (1970), at p 38).

24 See § 375.

1 See § 395.

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.[2] 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 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 underlying 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:

[2] See generally Bar-Yaacov, *Dual Nationality* (1961), pp 63–77, 146–58, 210–38; Sinclair, BY, 27 (1950), pp 125–44; Rule III of the UK Government's Rules Applying to International Claims, cited by Warbrick, ICLQ, 37 (1988), pp 1006–7; Klein, *Rev Belge*, 21 (1988), pp 184–216.

Note also the situation of a person who, in the service of an international organisation, may be protected both by his national state and by the organisation. 'This however is a case of one person in possession of two separate bases of protection, each of which is valid': *Barcelona Traction Case*, ICJ Rep (1970), p 38.

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; *Salvoni Estate Claim*, *ibid*, p 455; *Graniero Claim* (1959), ILR, 30, p 451; *Di Ciccio Claim* (1962), ILR, 40, p 148.

[4] 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; *Ganapini Claim* (1959), ILR, 30, p 366; *Turri Claim* (1960), *ibid*, p 371; *Esphahanian 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, Harv ILJ, 26 (1985), pp 208–16); *Golpira v Iran* (1983), ILR, 72, p 493.

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: *Esphahanian v Bank Tejarat*, above.

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:[2] such cases are those in

[5] See eg *Vereano Claim*, ILR, 24 (1957), p 464; *Stankovic Claim* (1963), ILR, 40, p 153.

[6] See eg *Sadat v Mertes*, AJ, 74 (1980), p 937; *Uzan and Sultan v Ministère Public* (1967), ILR, 48, p 162; Weis, *Nationality and Statelessness in International Law* (2nd ed, 1979), pp 193–6.

[1] See § 380, as to the nationality of companies.

[2] In addition to the literature cited at § 380, see, with particular reference to the protection of companies, Beckett, *Grotius Society*, 17 (1931), pp 175–94 (on which see also ICLQ, 17 (1968), pp 318–25); Hackworth, v, pp 840–46; Friedman, *Expropriation in International Law* (1953), pp 171–6; Bindschedler, Hag R, 90 (1956), ii, pp 231–42; McNair, *Opinions*, ii, pp 32–9; Jones, *British Nationality Law* (1956), pp 195–9; Parry, *Nationality and Citizenship Laws of the Commonwealth and Ireland* (1957), pp 138–42; Watts, BY, 33 (1957), pp 79–83; Battaglini, *La protezione diplomatica delle società* (1957); Nial, Hag R, 101 (1960), iii, pp 311–22; P de Visscher, Hag R, 102 (1961), i, pp 399–506; Sohn and Baxter, Draft Articles on Responsibility of States for Injuries to Aliens, Arts 21.3(d), 23.1 and 23.4, AJ, 55 (1961), pp 545–84; F A Mann, ICLQ, 11 (1962), pp 471–502; Whiteman, *Digest*, 8, pp 1269–91; Petren, Hag R, 109 (1963), ii, pp 503–10; Hochpied, *La Protection diplomatiques des sociétés et des actionnaires* (1965); Parry, *BDIL*, 5 pp 503–73; Feliciano, Hag R, 118 (1966), ii, pp 286–95; Vallat, *International Law and the Practitioner* (1966), pp 25–9; Lillich, *International Claims: Post-War British Practice* (1967), pp 36–40; Caflisch, *La Protection des sociétés commerciales et des intérêts indirects en droit international public* (1969); Judge Jessup's Individual Opinion in the *Barcelona Traction Case*, ICJ Rep (1970), pp 182–91, 195–9, 204–7; Harris, ICLQ, 19 (1970), pp 275–317; Velasco, Hag R, 141 (1974), i, pp 87–186; Stern, AFDI, 30 (1984), pp 425, 440–5; Rules IV, V and VI of the UK Government's Rules Applying to International Claims, cited by Warbrick, ICLQ, 37 (1988), p 1007.

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 25(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[3] 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,[6] and that in principle it is only in special circumstances that international law permits any 'piercing of the corporate veil'[7]

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 submitted to arbitration 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 Corpn v Government of the Republic of Liberia*, ILM, 26 (1987), pp 647, 652–4.

3 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 *siège social*, but not of considerations related to the nationality of its shareholders.

4 ICJ Rep (1970), p 4. For comment on the case, see C de Visscher, *Rev Belge*, 6 (1970), pp i–iv, and 7 (1971), pp 1–6; Charpentier, AFDI, 16 (1970), pp 307–28; Briggs, AJ, 65 (1971), pp 327–45; Lillich, *ibid*, pp 522–32; Metzger, *ibid*, pp 532–41; Grisel, *Ann Suisse*, 17 (1971), pp 31–48; Seidl-Hohenveldern, ÖZöR, 22 (1971–72), pp 255–309; F A Mann, AJ, 67 (1973), pp 259–74.

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 (*siège 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 Simitis, ICLQ, 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.

so as to permit a state to protect its national shareholders in a foreign country in respect of loss they suffer because of the situation of the company:[8] 'where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorises the national state of the company alone to make a claim'.[9] Thus normally the shareholders' national state will not be entitled to claim on their behalf in respect of their losses resulting from loss suffered by the company, or on behalf of the company itself.[10]

A different conclusion has, however, sometimes been reached by international arbitral tribunals, upholding a state's right to present a claim on behalf of its nationals who are shareholders in a foreign company which has suffered loss.[11] 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*.[12]

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.[13] The Court refrained from any decision as to the validity of the view that a state may protect its shareholders in cases where the

8 At p 39.

9 At p 46.

10 See eg *Compania Unida de Navigación* case (1865–6), Moore, 6, p 644; *Ruden & Co Claim* (1870), Moore, *International Arbitrations*, p 1653; *Baasch & Römer Case* (1903), RIAA, 10, pp 723, 726; *Niobe Arbitration*, BY, 8 (1927), pp 156, 161ff; *De Leon Claim* (1962), ILR, 40, p 117.

But see nn 17–19, as to cases where a company, although foreign in form, is a wholly-owned subsidiary of a company having the nationality of the claimant state.

11 See eg cases cited at nn 14, 21; and see *Ziat Claim* (1924), RIAA, 2, p 729; *Standard Oil Company of New York v Germany* (1926), RIAA, 7, p 301.

12 See ICJ Rep (1970), pp 39–40. Some of the literature referred to at n 2, deals in part with the protection of shareholders in companies registered abroad; and see also C de Visscher, RI, 3rd series, 15 (1934), pp 624–51; Jones, BY, 26 (1949), pp 224–58; Bagge, BY, 34 (1958), pp 162–75; Whiteman, *Digest*, 8, pp 1269–91; Petren, Hag R, 109 (1963), ii, pp 506–10; Arechaga, Philip ILJ, 4 (1965), pp 71–98; Parry, BDIL, 5, pp 535–71; Feliciano, Hag R, 118 (1966), ii, pp 295–310; Lillich, *International Claims: Post-War British Practice* (1967), pp 40–52; Individual Opinions in the *Barcelona Traction* case of Judges Fitzmaurice (ICJ Rep (1970), pp 68–79, 86–99), Tanaka (pp 115–41), Jessup (pp 191–4, 211–19), Morelli (pp 231–43), Gros (pp 274–83), and Amoun (pp 295–321); Weston, *International Claims: Post-War French Practice* (1971), pp 167–71; Velasco, Hag R, 141 (1974), i, pp 129–62.

See also § 407 on investments abroad and their protection in the event of expropriation.

13 ICJ Rep (1970), at pp 39–45: it might, however, be observed that the ICJ, in considering whether or not the company was still in existence, took a very formal view of the matter (at pp 40–41).

company suffering damage has the nationality of the state causing the damage.[14]

The variation in forms of business structure[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.[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[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 *Elettronica Sicula* case[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[19] as to the lawfulness of such espousal by the Unied 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.[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

[14] ICJ Rep (1970), at p 48. But a majority of the ICJ supported the existence of a right to protection of the shareholders in such a case. See also *Delagoa Bay Railway Company Case* (1900), Moore, *International Arbitrations*, p 1865; Parry, BDIL, 5, pp 535–61; *Mexican Eagle Oil Company Claim*, Wortley, *Grotius Society*, 43 (1957), pp 15–37. But note Judge Oda's Separate Opinion in the *Eletronica Sicula Case*, ICJ Rep (1989), at p 83ff.

[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 Lillich, *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.

[16] See Francioni, *Imprese multinazionali, protezione diplomatica e responsabilità internazionale* (1979). See generally on multinational companies § 380, n 15.

[17] See eg *Raibl 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.

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 *Ultrasystems Incorporated v Islamic Republic of Iran* (1983), ILR, 71, p 663.

[18] ICJ Rep (1989), p 15. For comment see Jeancolas, RG, 94 (1990), pp 701–42. See also *Société Anomye du Charbonnage Frédéric Henri v Germany*, AD, 1 (1919–22), No 158.

[19] But note Judge Oda's Separate Opinion, at pp 83, 88ff.

[20] *Barcelona Traction Case*, ICJ Rep (1970), p 36, para 47.

through diplomatic channels. This may result in the conclusion of treaties making provision for the protection of such shareholding interests.[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.[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,[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.[24]

[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, 30, 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 have had an interest exceeding 50% of the total capital'; and the US–Peru Claims Settlement Agreement 1974 (AJ, 68 (1974), p 583), 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.

Under the Algiers Declaration 1981 providing for the settlement of US–Iran claims (ILM, 20 (1981), p 230) 'claims of nationals' included claims owned indirectly by them through ownership interests in companies (no nationality being stipulated) provided that those ownership interests were sufficient to control the company: Art VII.2. This provision thus covers claims of US nationals for losses suffered by their non-US subsidiaries. For application of this provision see eg *Re Refusal to File Claim of AMF Overseas Corpn* (1982), ILR, 69, p 602; *Re Refusal to Accept the Claim of Raymond International* (1982), *ibid*, p 604; *Alcan Aluminium Ltd v Ircable Corpn* (1983), ILR, 72, p 725; *R N Pomeroy v Government of the Islamic Republic of Iran*, AJ, 78 (1984), p 240; *Starrett Housing Corpn v Government of the Islamic Republic of Iran*, ILM, 23 (1984), pp 1090, 1106; *Morrison-Knudsen Pacific Ltd v Ministry of Roads and Transportation*, AJ, 79 (1985), p 146; *American International Group Inc v Islamic Republic of Iran*, ILM, 23 (1984), pp 1, 3–5; *Amoco International Finance Corpn v Islamic Republic of Iran*, AJ, 82 (1988), p 358, ILM, 27 (1988), pp 1314, 1325–6.

See also, as to the operation of the Franco–Polish Agreement 1948, *Re Pioton* (1964), ILR, 45, p 111.

Article 20.2(c) of the Draft Convention on the Responsibility of States for Injuries to Aliens (Sohn and Baxter, AJ, 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).

[22] See eg *Riley Claim*, ILR, 26 (1958–II), p 342; *Westinghouse Air Brake Company Claim* (1959), ILR, 30, p 181; *Standard Oil Company Claim* (1959), *ibid*, p 176; *Petschek Claim* (1959), *ibid*, p 171; *Niagara Shore Corpn Claim* (1959), *ibid*, p 198; *Ford Motor Company Claim* (1959), ILR, 30, p 207; *Dayton Claim* (1961), ILR, 42, p 158.

[23] See *Chamberlain & Hookham Ltd v Solar Zahlerwerke*, AD, 1 (1919–22), No 249; *Société Transports Fluviaux en Orient v Société Impériale Ottomane du Chemin de Fer de Baghdad*, AD, 5 (1929–30), No 151; *The Interoceanic Railway of Mexico Claim* (1931), RIAA, 5, p 178; *Agency of Canadian Car and Foundry Co Case* (1939), RIAA, 8, p 460; and Parry, BDIL, 5, p 514ff. But compare the *I'm Alone Case* (1933, 1935) RIAA, 3, p 1609, 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.

[24] See Harris, ICLQ, 18 (1969), pp 275–317, considering this question in the light of the *Nottebohm* 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.[25] 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[1] in its territory[2] 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[3] unless he has exhausted the legal remedies available to him in the state concerned.[4] So long as

[25] See n 21. See also eg Art 3 of the Convention establishing the UK–Mexico Claims Commission (TS No 11 (1928)), covering claims against Mexico for damage suffered by 'any partnership, company or association in which British subjects or persons under British protection have or have had an interest exceeding 50% of the total capital'. The USA–Yugoslavia Claims Agreement 1948 required that claimant US companies be incorporated in the USA and have at least 20 per cent US ownership of shares in the company (on which see *Cisatlantic Claim*, ILR, 21 (1954), p 293; and, for the interpretation of the 20 per cent requirement in the sense that it referred to beneficial ownership, see *Westhold Corpn Claim*, ILR, 20 (1953), p 226). The USA–Hungary Claims Agreement 1973 required claimant US companies to be both incorporated in the USA and have at least 50 per cent of their outstanding capital stock or other beneficial interest owned directly or indirectly by natural persons who are US nationals; but Hungarian companies need only be incorporated or constituted under Hungarian law: ILM, 12 (1973), pp 407, 409.

The Algiers 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 eg *Harza Engineering Company 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 Corpn* (1983), *ibid*, p 688.

For treaty provisions which deal with the position of companies solely by reference to the place of incorporation, see eg Art 78.9(a) of the Treaty of Peace with Italy 1947; Art 3(1)(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 ILC 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).

[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–I), 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 *Interhandel* 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.

[4] Borchard, §§ 381–3; Ralston, §§ 129–33; *Bases of Discussion*, iii, pp 136–39; Eagleton, *The Responsibility of States in International Law* (1928), pp 95–124, and RI, 3rd series, 11 (1930), pp 643–59, and *ibid*, 16 (1935), pp 504–26; Dunn, *The Protection of Nationals* (1932), pp 156–59; Witenberg, *La Procédure et la sentence internationales* (1937), pp 153–55, and Hag R, 41 (1932), iii, pp 50–6; Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp 403–55; Borchard, ZöV, 1 (1929), pp 233–42; Borchard, *Annuaire*, 35, (2) (1931), pp 424–35, and AJ, 28 (1934), pp 729–33; Fachiri, BY, 12 (1931), pp 95–106, and *ibid*, 17 (1936), pp 19–36; Friedmann, RI, 3rd series, 14 (1933), pp 318–27; Ténékidès, *ibid*, pp 514–35; Ago in *Archivio di diritto publico* (vol iii, 2, 1938) pp 181–249. See also the dispute between Persia and Great Britain in 1932 and 1933 concerning the Anglo-Persian Oil Company's Concession in Persia; Toynbee, *Survey*, 1934, pp 224–47; Verzijl and others, *Annuaire*, 45 (1954), i, pp 5ff, and 46 (1956), i, pp 1ff; Fawcett, BY, 31 (1954), pp 452–8; Briggs, AJ, 50 (1956), pp 921–7; Bagge, BY, 34 (1958), pp 162, 165–9; Garcia Amador, Hag R, 94 (1958), ii, pp 445–61; Meron, BY, 35 (1959), pp 83–101; Simpson and Fox, *International Arbitration* (1959), pp 111–17; Law, *The Local Remedies Rule in International Law* (1961); Fitzmaurice, BY, 37 (1961), pp 53–64; *Harvard Draft (1961)*, Art 19; Amerasinghe, ICLQ, 12 (1963), pp 1285–1325, ZöV, 25 (1965), pp 445–77, *State Responsibility for Injuries to Aliens* (1967), pp 169–269, ZöV, 36 (1976), pp 727–59 and *Local Remedies in International Law* (1990); Mummery, AJ, 58 (1964), pp 389–414; Jenks, *Prospects for International Adjudication* (1964), pp 527–37; Schwebel and Wetter, AJ, 60 (1966), pp 484–501; Mann, BY, 42 (1967), pp 31–6; Head, Can YBIL, 5 (1967), pp 142–58; Jennings, Hag R, 121 (1967), ii, pp 480–86; Dawson, ICLQ, 17 (1968), pp 404–27; Dawson and Head, *International Law, National Tribunals and the Rights of Aliens* (1971); Chappez, *La Règle de l'épuisement des voies de recours internes* (1972); McGovern, ICLQ, 24 (1975), pp 112–27; Trinidade, *Rev Belge*, 12 (1976), pp 499–527, Neth IL Rev, 24 (1977), pp 373–92, and *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983); Draft Articles on State Responsibility, pt 1, Art 22 and Commentary, YBILC (1977), ii, pt 2, pp 30–50; Arechaga, Hag R, 159 (1978), i, pp 291–7; Rule VII of the UK Government's Rules Applying to International Claims 1985, cited by Warbrick, ICLQ, 37 (1988), pp 1006, 1008; Adler, ICLQ, 39 (1990), pp 641–53. As regards the burden of proof when the local remedies rule is invoked, see Robertson, ICLQ, 39 (1990), pp 191–6.

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.[5] 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.[6]

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.[7] The International Court of Justice has confirmed that the rule 'is a well-established rule of customary international law'.[8]

[5] Various reasons for this rule have been given. These include: (*a*) an alien resident in a state should, and normally does, have recourse to local courts before seeking external assistance from his state, and the rule accordingy reflects what usually happens, and what ought to happen if the legal system is to function properly; (*b*) a 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 real reason for the existence of the principle of the 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 result required by the obligation': YBILC (1977), ii, pt 2, 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, pt 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': *Ambatielos Arbitration (Greece v UK)* (1956), RIAA, 12, p 83; ILR, 23 (1956), p 306, and 24 (1957), p 291; and see Lipstein, ICLQ, 6 (1957), at pp 654–5. Also *Lawless v Republic of Ireland*, ILR, 25 (1958–I), pp 216, 222. See generally on procedural remedies, Amerasinghe, ICLQ, 12 (1963), pp 1285–325. It is sufficient if the claims asserted in seeking a domestic remedy are in substance equivalent to, even if not identical with, the international obligations which are in question: *Guzzardi Case* (1980), ILR, 61, pp 276, 304–5; *Elettronica Sicula Case*, ICJ Rep (1989), pp 45–6; cf *Van Oosterwijck Case* (1980), ILR, 61, pp 360, 372–5.

The rule requires 'that 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, pp 210, 227ff. 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 *Pietroraia v Uruguay* (1981), ILR, 62, pp 246, 252–3; *Teti v Uruguay* (1982), ILR, 70, pp 287, 294. An *ex gratia* remedy is not among those which have to be exhausted: *Greece v United Kingdom*, ILR, 25 (1958–I), pp 27, 29.

[7] See eg Art 26 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (on the interpretation and application of which there are many decisions of the European Court and Commission of Human Rights: see Fawcett, *The Application of the European Convention on Human Rights* (1969), pp 288–309; Trinidade, *Human Rights Journal*, 10 (1977), pp 141–86 and *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983); Couvreur, *Rev Belge* 16 (1981–82), pp 130–71); Arts 26 and 27(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965; Art 46 of the American Convention on Human Rights 1969; Arts 11(3) and 14(7)(a) of the Convention on the Elimination of All Forms of Racial Discrimination 1966; and Art 41.1(c) of the Covenant on Civil and Political Rights 1966. At the 1930 Hague Codification Conference the Third Committee adopted the following text (Art 4.1): 'the State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State'.

However, failure to exhaust local remedies will not constitute a bar to a claim if there are no available remedies which should have been pursued;[9] or if available remedies are inappropriate for the subject matter of the claim[10] or are in practice shown to be ineffective in relation to the matter complained of;[11] or if it is clearly[12] established that, in the circumstances of the case, an appeal to a higher municipal authority would have had no effect, for instance, when the supreme judicial tribunal is under the control of the executive organ whose acts are the subject matter of the complaint,[13] or when the decision complained of has been given in pursuance of an unambiguous municipal enactment with the result that there is no likelihood of a higher tribunal reversing the decision or awarding compensation, or, as a rule, when the injury to the alien is the result of an act of the government as such.[14] Nor do local remedies have to be exhausted where the

[8] The *Interhandel Case*, ICJ Rep (1959), p 27. See generally Briggs, AJ, 53 (1959), pp 547–63. The local remedies rule has to be distinguished from a requirement, such as that in Art 6(1) of the European Convention on Human Rights, that, as a matter of substantive obligation, a state must provide for recourse to an independent tribunal to adjudicate upon civil rights and obligations.

[9] See eg *Altesor v Uruguay* (1982), ILR, 70, pp 248, 253. See also Advisory Opinion OC–11/90 of the Inter-American Court of Human Rights on *Exceptions to the Exhaustion of Domestic Remedies* (1990) to the effect that indigency, or a general fear in the legal community to represent a complainant, may justify non-exhaustion of domestic remedies: *Human Rights Law Journal*, 12 (1991), p 20.

[10] *Velasquez Rodriguez Case*, ILM, 28 (1989), pp 291, 304–9.

[11] *Ibid.*

[12] If there is any doubt whether a possible remedy will be effective the issue must be submitted to the national courts before recourse may be had to an international tribunal: *Panevezys-Saldutiskis Railway Case* (1939), PCIJ, Series A/B, No 76, p 19; *Retimag SA v Federal Republic of Germany*, *YBECHR*, 4 (1961), pp 384, 400; *X v Federal Republic of Germany*, *Decisions and Reports of the European Commission on Human Rights*, 6 (1977), pp 62, 63. See also *Levey Co v Federal Republic of Germany* (1961), ILR, 42, p 380.

[13] See eg *Salvador Commercial Company Claim* (1902), RIAA, 15, pp 467, 476–7; *Brown's Case*, AD, 2 (1923–24), No 35; *Re Arbitration between Valentine Petroleum & Chemical Corpn and Agency for International Development* (1967), ILR, 44, pp 79, 91.

[14] See the Award of March 1933 given by Undén, Arbitrator, in the dispute between Greece and Bulgaria concerning the *Interpretation of Article 181 of the Treaty of Neuilly*: AJ, 28 (1934), p 787; and *X, Cabales and Balkandali v United Kingdom* [1983] 5 EHRR 132, 139. See also the *Finnish Ships Arbitration* (1934), RIAA, 3, p 1481, between Finland and the UK: for comment thereon see Borchard, AJ, 28 (1934), pp 729–33; Beckett, Hag R, 50 (1934), iv, pp 198–303; Freeman, *The International Responsibility of States for Denial of Justice* (1939), pp 423–34; and Fachiri, BY, 17 (1936), pp 19–36. See also ZöV, 4 (1934), pp 671–84; and *Re Arbitration between Valentine Petroleum & Chemical Corpn and Agency for International Development* (1967), ILR, 44, pp 79, 91–2; and *Cyprus v Turkey* (1978), ILR, 62, pp 4, 76ff. See also *Inter-ocean Transportation Company of America v The United States of America*, AD, 8 (1935–37), No 115 (at pp 272–74), on purely illusory remedies. The interpretation given to the Calvo Clause (see § 408, n 22) in some cases – eg *Mexican Union Railway Case*, AD, 5 (1929–30), No 129 – substantially reduces the operation of that clause to a condition of observing the local remedies rule.

states concerned have agreed that that requirement should not apply,[15] or where the state for whose benefit it would apply has waived the requirement[16] or is estopped from invoking it.[17] It is for the state claiming that local remedies have not been exhausted to demonstrate that such remedies exist;[18] and if they are shown to exist, it is for the opposing party to show that they were exhausted or were inadequate.[19] If pending proceedings have been unreasonably prolonged through no fault of the aggrieved person it may be concluded that no further domestic remedies remain to be exhausted.[20]

§ 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.[1] It has been applied by arbitration tribunals in a number of cases.[2] 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 Corpn 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 sole jurisdiction of Iranian courts: see Art II of the US–Iran Claims Settlement Agreement 1981 (ILM, 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.

16 *Government of Costa Rica Case (Re Viviana Gallardo)* (1981), ILR, 67, p 578. But waiver will not be implied from silence on the matter in a general disputes settlement provision in a treaty: *Elettronica Sicula Case*, ICJ Rep (1989), p 42.

17 *Foti 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: *Elettronica Sicula Case*, ICJ Rep (1989), p 44.

18 *Greece v United Kingdom*, ILR, 25 (1958–I), pp 27, 29; *Foti and Others Case* (1982), ILR, 71, pp 366, 381; *Dermit v Uruguay* (1982), *ibid*, pp 354, 358; *Elettronica Sicula Case*, ICJ Rep (1989), pp 46–8.

19 *Velasquez Rodriguez Case*, ILM, 28 (1989), pp 291, 305.

20 See *Teti v Uruguay* (1982), ILR, 70, pp 287, 294.

1 See Verykios, *La Prescription en droit international public* (1934), pp 129–93; Ralston, §§ 683–98; Fauchille, §§ 856–57(3), and the Report of Politis and Charles de Visscher, *Annuaire*, 32 (1925), pp 1–24; H Lauterpacht, *Analogies*, § 129; Cavaglieri, *Rivista*, 3rd series, 5 (1926), pp 169–204; Witenberg, *La Procédure et la sentence internationales* (1937), pp 138–43, and Hag R, 41 (1932), iii, pp 27–35; Sørensen, *Nordisk TA*, 3 (1932), pp 161–70; Borchard, *Annuaire*, 36 (1931), i, pp 435–41; King, BY, 15 (1934), pp 82–97; Bin Cheng, *General Principles of International Law* (1953), pp 373–86; Pinto, Hag R, 87 (1955), i, pp 438–48; Simpson and Fox, *International Arbitration* (1959), pp 122–6; *Harvard Draft (1961)*, Art 26. The League Codification Committee studied prescription in 1928.

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.

2 See *Gentini Case* (1903), RIAA, 10, pp 552–5; *Williams Case*, Moore, *International Arbitrations*, iv, pp 4179–203; *Cayuga Indians Case* (1926), RIAA, 6, pp 173, 189; *Sarropoulos v Bulgarian State*, *Recueil TAM*, 7 (1927), p 47; AD, 4 (1927–28), No 173; *Cook Case*, AD, 4 (1927–28), No 174; *Ambatielos Arbitration*, ILR, 23 (1956), pp 306, 314–17 (on which see Lipstein, ICLQ, 6 (1957), pp 646–7, and Vallat, *International Law and the Practitioner* (1965), pp 30–32); *Lighthouses Arbitration*, ILR, 23 (1956), pp 659, 671–2; *Kahane v Secretary-General of the United Nations* (1968), ILR, 43, pp 290, 299–300.

The apparent rejection of the principle of extinctive prescription by the Hague Court of Arbitration in the *Pious 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.[3] Delay in the prosecution of a claim once notified to the defendant state is not so likely to prove fatal to the success of 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;[4] 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.[5] 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 failing to protest or otherwise, given evidence of acquiescence.[6]

3 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, 1008.

4 Ralston, §§ 688–95. See also the *Stevenson 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.

5 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 *Cayuga Indian 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 574–94, and 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 notifies to his own government a claim against a foreign state and asks for help.

6 See generally as to protest and acquiescence, § 579.

Questions of protest and acquiescence are often associated with considerations of preclusion (the analogue in international law of rules of estoppel known to common law jurisdictions), and *res judicata*, on which see generally H Lauterpacht, *Analogies* §§ 87–9 and arbitrations there cited, *Development of International Law by the International Court* (1958), pp 168–72, and *Collected Papers*, i, p 71, n 3; McNair, BY (1924), pp 31–7; Holohan, Boston U Law Rev, 14 (1934), pp 78 *et seq*; Friede, ZöV, 5 (1935), pp 517–45; Schwarzenberger, *International Law* (1957), p 127; Bowett, BY, 33 (1957), pp 176–202; MacGibbon, ICLQ, 7 (1958), pp 468–513; Dominicé in *Receuil d'études de droit international en hommage a Paul Guggenheim* (1968), pp 327–65; Martin, *Estoppel en droit international* (1979); Thirlway, BY, 60 (1989), pp 29–49. See also the *Nottebohm Case*, ICJ Rep (1955), pp 17–20; *Temple of Preah Vihear Case*, ICJ Rep (1962), pp 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 24ff; *Military and Paramilitary Activities Case* (Jurisdiction), ICJ Rep (1984), pp 413–15; *Elettronica Sicula Case*, ICJ Rep (1989), p 44. And see *Indo-Pakistan Western Boundary Case (Rann of Kutch)* (1968), ILR, 50, p 409ff (Dissenting Opinion of Judge Bebler); *De Wilde, Ooms and Versyp Cases ('Belgian Vagrancy Cases')* (1970), ILR, 56, pp 336, 369ff; *Canton of Valais v Canton of Tessin* (1980), ILR, 75, pp 114, 119–20; *Re Arbitration between Amco Asia Corpn and the Republic of Indonesia*, ILM, 23 (1984), pp 351, 380–82. In the *El Salvador–Honduras Land, Island 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, pp 92, 118.

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 principal[1] legal consequences of an international wrong are reparation of the moral and material harm done.[2] The Permanent Court of International Justice held that it 'is a principle of international law that the breach of an international engagement[3] involves an obligation to make reparation in an adequate form',[4] 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.[5] 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'.[6]

The circumstances of each case are, however, so different that international law cannot prescribe in advance the precise legal consequences which an international wrong should have. The principle is clear: out of an international wrong arises a right for the wronged state to request from the wrong-doing state the performance of such acts as are necessary for reparation of the wrong done. What

by a political party outside the government critical of a governmental law and made in a purely political context do not raise an estoppel against that party in proceedings on the legality of that law when that party has become the government: *Lithgow Case* (1986), ILR, 75, pp 438, 500. Questions of estoppel frequently arise in relation to officially published maps: as to the international legal significance of maps generally see Akweenda, BY, 60 (1989), pp 205–55. As to estoppel in the context of issuing passports and visas, see § 378, n 16.

1 As to the criminal responsibility of states, see § 157.

2 See Stowell, pp 557–99; Eagleton, *The Responsibility of States in International Law* (1928), pp 182–205; Dunn, *The Protection of Nationals* (1932), pp 172–87; Laïs, *Die Rechtsfolgen völkerrechtlicher Delikte* (1932); Reitzer, *La Réparation comme conséquence de l'acte illicite en droit international* (1938); Personnaz, *La Réparation du préjudice en droit international public* (1938); Kelsen, ZöR, 12 (1932), pp 481–608; Rice, AJ, 28 (1934), pp 246–54; *Bases of Discussion*, iii, pp 146–52; Bissonnette, *La Satisfaction comme mode de réparation en droit international* (1952); Garcia-Amador, Hag R, 94 (1958), ii, pp 462–87; *Harvard Draft (1961)*, Arts 27–40; Bollecker-Stern, *La Préjudice dans la théorie de la responsabilité internationale* (1973); Przetacznik, RG, 78 (1974), pp 919, 943–74; Mann, BY, 48 (1976–77), pp 1, 2–14; Brownlie, *System of the Law of Nations: State Responsibility* (pt 1, 1983), pp 199–240; Graefrath, Hag R, 185 (1984), ii, pp 9–150; Gray, BY, 56 (1985), pp 25–48, and *Judicial Remedies in International Law* (1987). See § 442, as to the operation of Art 50 of the European Convention on Human Rights providing that the European Court of Human Rights may, if necessary, afford 'just satisfaction' to the party injured by a breach of the Convention. See also works cited at n 10, on the measure of damages. The concept of damage covers both material and non-material damage. For a finding of non-material damage of a moral, political and legal nature, and the award of suitable satisfaction therefor, see *Rainbow Warrior (New Zealand v France)* (1990), ILR, 82, pp 500, 568–70.

3 The term 'international engagement' includes any duty under international law.

4 *Chorzów Factory Case* (Jurisdiction) (1927), PCIJ, Series A, No 9, p 21; to the same effect *Interpretation of Peace Treaties Case*, ICJ Rep (1950), p 228. See also *Spanish Zones of Morocco Claims* (1924–25), RIAA, 2, pp 615, 641; *Chorzów Factory Case* (Indemnity) (1928), PCIJ, Series A, No 17, pp 29, 47; *Corfu Channel Case*, ICJ Rep (1949), p 23; *United States Diplomatic and Consular Staff in Teheran*, ICJ Rep (1980), pp 34, 41–2.

5 See *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 142.

6 Article 36.2(d). Differences relating to reparations resulting from a failure to apply a treaty are differences relating to its application for purposes of a disputes settlement provision in the treaty: *Chorzów Factory Case* (Jurisdiction) (1927), PCIJ, Series A, No 9, p 21.

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 reparation 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.'[8]

It is obvious that there must be pecuniary reparation for any material damage,[9] although there has been great diversity of practice amongst international tribun-

7 Thus in the *Temple of Preah Vihear* case the ICJ, in holding that the temple belonged to Cambodia, held Thailand under an obligation to restore to Cambodia any sculptures and other artefacts removed by Thailand: ICJ Rep (1962), p 6.

Particularly in cases involving breaches of concession agreements the question has been much discussed whether the remedies which may be awarded include an order that the agreement continues in existence, an order for specific performance, or an order for *restitutio in integrum*: see eg *BP Exploration Co (Libya) Ltd v Government of the Libyan Arab Republic* (1973–74), ILR, 53, pp 297, 331ff; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic* (1975–77), ILR, 53, pp 389, 495–509; *Libyan American Oil Co v Government of the Libyan Arab Republic* (1977), ILR, 62, pp 141, 197–9; and see Bowett, BY, 59 (1988), pp 49, 59–74. See also § 407, n 35, para 5, as regards the distinction, in regard to possible remedies, between lawful and unlawful takings of property.

8 (1927) PCIJ, Series A, No 17, p 47. Works constructed unlawfully may have to be discontinued, modified or dismantled; *Passage through the Great Belt* case, ICJ Rep (1991), para 31.

9 Thus, according to Art 3 of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, a belligerent party which violates these laws shall, if the case demands, be liable to make compensation. The ICJ has declined to make a general statement of liability to pay compensation in proceedings before it in the absence of detailed evidence relating to the damage suffered or a request that such evidence be received and compensation assessed in a later phase of the proceedings: *Fisheries Jurisdiction Case*, ICJ Rep (1974), pp 174, 203–5.

Resolutions adopted by the UN General Assembly or Security Council in response to incursions by one state into the territory of another sometimes include a call for the payment of compensation for loss and damage occasioned by the incursion: see eg § 119, n 6. See also SC Res 674 (1990), paras 8 and 9, 686 (1991), para 2(b), 687 (1991), paras 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, Hag R, 90 (1956), ii, p 674ff; but see § 165, n 5, para 3, for the award of damages to New Zealand in the *Rainbow Warrior* affair), the payment of reparation 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 mob violence (TS No 34 (1967)); RG, 85 (19), p 540, for the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on 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

als as to the appropriate measure of damages[10] and as to the application in particular cases of the requirement, itself generally accepted, that interest is also payable.[11]

At least a formal apology[12] on the part of the wrongdoer will usually be

payment by Pakistan to the USA of compensation for the sacking of the US Embassy in Islamabad in 1979. As to the apology and payment of compensation by Iraq to the USA for an attack by Iraqi aircraft on the *USS Stark* in May 1987, see § 127, n 41.

When a state agrees to make monetary payments 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 Mauritius concerning the Ilois 1982 (TS No 6 (1983)); and see Goldie, ICLQ, 14 (1965), pp 1199–200, 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, n 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), §§ 259*b*–260; Brownlie, *International Law and the Use of Force by States* (1963), pp 133–49; *Equalisation of Burdens Taxation Case* (1968), ILR, 61, p 162; *Attorney-General of the United States v NV Bank voor Handel en Scheepvaart* (1969), ILR, 74, p 150. See also, as to the Agreement of 10 September 1952 between Israel and the Federal Republic of Germany, Balabkins, *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 1047–102. After the Argentine invasion of the Falkland Islands in 1982 and related hostilities the UK Government considered the question of claiming reparations from Argentina, but did not consider it expedient to do so: *Parliamentary Debates (Lords)*, vol 435, col 223 (21 October 1982); UKMIL, 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: UKMIL, 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, 1978, ii, pt 2, p 17, para (6).

10 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 (*damnum 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: for an analysis of a large number of cases upon the measure of damages, see Ralston, §§ 435–74, H Lauterpacht, *Analogies*, §§ 65, 66, and, in particular, Whiteman, *Damages in International Law* (3 vols, 1937–43) (a comprehensive work). See also the preliminary administrative decisions of the German–American Mixed Claims Commission (see AJ, 18 (1924), pp 175–86, and BY (1924), pp 222–5); *Janes'* claim before the American–Mexican Claims Commission: AJ, 21 (1927), pp 362–71. An authoritative exposition of an decision on the measure of damages will be found in the Judgment of the PCIJ of 13 September, 1928, in the *Chorzów Factory Case* (1928), PCIJ, Series A, No 17, pp 331, 46–8. If compensation is to be paid for indirect damage such as loss of profit and loss of use of property, such losses will usually have to be assessable with reasonable accuracy and not be conjectural or speculative: see *Dorner Claim*, ILR, 21 (1954), p 164; *Sapphire International Petroleums Ltd v National Iranian Oil Co* (1963), ILR, 35, pp 136, 187–90; *Libyan American Oil Co v Government of the Libyan Arab Republic* (1977), ILR, 62, pp 141, 202–4. But the terms of a treaty (or contract) may exclude loss of profit from the assessment of compensation: see eg Art 78.4(d) of the Treaty of Peace with Italy 1947; *The Ditta Luigi Gallotti v Somali Government* (1964), ILR, 40, p 158. Even if loss of profit is not as such compensatable, failure to show a reasonable profit during a period when a business is being run by state agents may be relevant to assessing the fall in capital value of the business: see *Ousset Claim*, ILR, 22 (1955), p 312; see also *Raibl Claim* (1964), ILR, 40, pp 260, 281–2. Where a concession contract has been wrongfully terminated prematurely, loss of expected annual profits for the period lost by the premature termination was used in the

Lighthouses Arbitration between France and Greece, Claim No 27, ILR, 23 (1956), p 299, as the basis for calculating the compensation payable; and where losses have been caused by currency devaluation, 'normal working profit' has been used as providing the applicable standard for assessing compensation (*ibid, Claim No 26*, at p 342). See also *AGIP Spa v Government of the Republic of The Congo* (1979), ILR, 67, pp 319, 340–2 (a case 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.

See also Roth, *Schadenersatz jür Verletzungen Privater bei völkerrechtlichen Delikten* (1934); Wise, AJ, 17 (1923), pp 245–61; Yntema, Col Law Review, 24 (1923–24), pp 511–27; Hauriou, RG, 31 (1924), pp 203–31; Spiropoulos, ZI, 35 (1925–26), pp 59–134; Strupp, *Das völkerrechtliche Delikt* (1920), pp 211–13; Brierly, BY (1928), pp 42–9; Hyde, AJ, 22 (1928), pp 140–42; Anzilotti, pp 517–33; Eagleton, Yale LJ, 39 (1929), pp 52–75; Salvioli, Hag R, 28 (1929), iii, pp 235–76; Bouvé, RI, 3rd series, 11 (1930), pp 660–86; Feller, *Mexican Claims Commissions, 1923–34* (1936), pp 290–307; Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp 571–603; Sibert, pp 317–28; Cheng, *General Principles of Law as Applied by International Tribunals* (1953), pp 233–53; Parry, Hag R, 90 (1956), ii, p 693ff; Bollecker-Stern, *Le Préjudice dans la théorie de la responsabilité internationale* (1973); Gray, *Judicial Remedies in International Law* (1987), pp 18–29, 77–95; Seidl-Hohenveldern, AFDI, 33 (1987), pp 7–31; Wolf, ZöV, 49 (1989), pp 402–43. *Harvard Draft (1961)*, Arts 28–35, sets out in some detail the matters to be taken into account in calculating damages payable in respect of a variety of wrongful acts.

It is necessary to distingush from the assessment and payment of damages for breach of an international obligation, the assessment of the compensation to be paid by a state in order for the expropriation of the property in its territory belonging to aliens to be in accordance with the requirements of international law: as to the latter, see § 407.

11 The date from which interest is payable has varied from the date when a debt or other liquidated demand became due, or when the injury complained of occurred, the date a claim is presented, or the date of the judgment or award (as, for instance, in the *Wimbledon* case by the PCIJ (PCIJ (1923), Series A, No 1); there may, however, have been conduct on the part of the claimant which disentitles him to the award of interest. See cases discussed in Ralston, §§ 210–30, 439, 443, 467, 650, and H Lauterpacht, *Analogies*, §§ 63, 64; Eagleton, *The Responsibility of States in International Law* (1928), pp 203–05; Feller, *Mexican Claims Commissions 1923–1934* (1936), pp 308–11, and, in particular, Whiteman, *Damages in International Law* (vol iii, 1943), pp 1913–2006; *Harvard Draft (1961)*, Art 38; Subilia, *L'Allocation d'intérêts dans la jurisprudence internationale* (1972); Gray, *Judicial remedies in International Law* (1987), pp 29–33. See also the *Russian Indemnity Case* (1912), Scott, *Hague Court Reports* (1916), pp 298–323 (and note the discussion of the award of interest upon the debt by Strupp, ZV, 6 (1912), pp 353–566, Anzilotti, *Rivista*, 7 (1913), pp 53–67, and Lapradelle-Politis, ii, p 981); *Senser Claim*, ILR, 20 (1953), p 240; *Lighthouses Arbitration between France and Greece*, ILR, 23 (1956), pp 659, 675–6; *Lucas Claim* (1957), ILR, 30, p 220; *Proach Claim* (1962), ILR, 42, pp 189, 192; *American Cast Iron Pipe Company Claim* (1966), ILR, 40, p 169; *Granite 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 *Fatovitch Claim*, ILR, 22 (1955), p 409. Payment of interest on compensation for losses may similarly be denied where the tribunal assesses compensation reflecting values as at the date of the award, leaving only interest payable from that date (see *Lighthouses Arbitration between France and Greece*, ILR, 23 (1956), pp 659, 675–6), or where the claim was neither for a liquidated sum nor readily computable, eg in personal injury cases (see *Danon Claim* (1959), ILR, 30, p 538).

Where payable, the applicable rate of interest has varied greatly. In the *Senser Claim*, ILR, 20 (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 Bonfant Srl v Government of the Congo* (1980), ILR, 67, pp 345, 379. But cf *Sylvania 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'.

12 Thus in the *'I'm Alone'* case (1935) the Commissioners considered that the USA 'ought formally to acknowledge its illegality, and to apologise to His Majesty's Canadian Government therefor', 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 either[16] ground has a justification in international law for non-payment of damages which a state is 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]

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ing' for the acts described in the document, but at the same time made a statement declaring that the document was at variance with the true position: AJ, 63 (1969), pp 682–5; *AS Proceedings* (1969), pp 1–30. In the *Rainbow Warrior* affair France was required to give a 'formal and unqualified apology' to New Zealand: see § 165, n 5, para 3.

13 See eg *Corfu Channel Case*, ICJ Rep (1949), pp 4, 35. In the *Northern Cameroons* case the ICJ refused to grant a declaratory judgment, although acknowledging that its power in appropriate cases to grant such a judgment was 'indisputable': ICJ Rep (1963), at pp 36–8. In the case of the *Carthage*, decided on 6 May 1913, the Permanent Court of Arbitration, while refusing to award the sum of one franc for the offence against the French flag, held that the establishment of the fact that a state had failed to fulfil its obligations 'constitutes in itself a serious penalty': RIAA, 11, p 457. See also *Saudi Arabia v Arabian American Oil Company* (1958), ILR, 27, pp 117, 144–6; *Rainbow Warrior (New Zealand v France)* (1990), ILR, 82, pp 500, 575–7.

On declaratory judgments generally see H Lauterpacht, *The Development of International Law by the International Court* (1958), pp 205–6, 250–52; Gross, AJ, 58 (1964), pp 419–23; Ritter, AFDI, 21 (1975), pp 278–93.

14 For an example of the cumulation of several means of redress see the Japanese Note of 14 December 1937, to the US concerning the sinking by Japanese aircraft of the US gunboat *Panay* and three American vessels in the course of the hostilities in China. Japan expressed her profound regret at the incident, presented sincere apologies, promised indemnification for all losses, and undertook 'to deal appropriately' with those responsible for the incident and to issue instructions with a view to preventing similar incidents in the future: *Documents* (1937), pp 757–67.

15 *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 143.

16 If a state literally does not have, and cannot borrow, the sums necessary, those facts will have to be taken into account in arriving at a political solution.

17 See § 21. See also the US State Department's Memorandum in relation to Iranian Foreign Exchange Regulations, ILM, 23 (1984), pp 1182–9.

§ 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 responsibility[2] 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.

3 See eg *Janes' Case*, AD, 3 (1925–26), No 158, and comment thereon by Brierly, BY, 9 (1928), pp 42 *et seq*, in particular p 49. See also Rice, AJ, 28 (1934), pp 246–54; Briggs in *Essays in Political Science in Honor of W W Willoughby* (1937), pp 339–53; H Lauterpacht, Hag R, 62 (1937), iv, pp 349–57; Parry, Hag R, 90 (1956), ii, p 694; Gray, *Judicial Remedies in International Law* (1987), pp 26–8.

4 See eg the decision of the Council of the League of 14 December 1925, Off J, 7 (1926), p 172, awarding to Bulgaria 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 therefor, should pay to Canada the sum of $25,000 'as a material amend in respect of the wrong': RIAA, 3, p 1609. Hyde, AJ, 29 (1935), p 300, adduces 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 1930, 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.

1 The ILC was unanimously of this view: YBILC (1976), ii, pt 2, pp 116–17, para (51).

2 See generally Pella, *La Criminalité collective des états et le droit pénal de l'avenir* (1925), Hag R, 33 (1930), iii, pp 677–830, and RG, 51 (1947), pp 1–27; *Annuaire*, 44 (1952), i, pp 361–457; Garcia-Amador, Hag R, 94 (1958), ii, pp 395–9, 405–9; Drost, *The Crime of State* (2 vols, 1959);

international law as by reason of their gravity, their ruthlessness, and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilised countries. Thus if the government of a state were to order the wholesale massacre of aliens resident within its territory the responsibility of the state and of the individuals responsible for the ordering and the execution of the outrage would be of a criminal character. The preparation and launching of an aggressive war – now that resort to war as an instrument of national policy has been condemned and renounced in solemn international engagements[3] – must be placed within the same category.[4] The International Law Commission has proposed that offences against the peace and security of mankind are crimes under international law,[5] and the notion of an international crime has also been applied, for example, to genocide[6] and apartheid.[7]

Brownlie, *International Law and the Use of Force by States* (1963), pp 150–213; Bassiouni and Nanda (eds), *International Criminal Law* (2 vols, 1973); *Draft Articles on State Responsibility*, Art 19 and Commentary, YBILC (1976), ii, pt 2, pp 95–122; Starace, Hag R, 153 (1976), pp 263–313; Marek, *Rev Belge*, 14 (1978–79), pp 460–85; Dupuy, AFDI, 25 (1979), pp 539–54, and RG, 84 (1980), pp 449–86; Hofman, ZöV, 45 (1985), pp 195–230; Malekian, *International Criminal Responsibility of States* (1985); Gray, *Judicial Remedies in International Law* (1987), pp 215–19; Weiler, Cassese and Spinedi (eds), *International Crimes of State* (1989); Gilbert, ICLQ, 39 (1990), pp 345–69.

For the view that the concept of criminal responsibility of a state is wholly unfounded, see Tunkin, *Theory of International Law* (1974), pp 396–404.

It is necessary to distinguish the criminal responsibility of the state for acts of the state, from the criminal responsibility of individuals (eg in connection with war crimes) for acts for which states are obliged to punish them (§ 148): see YBILC (1976), ii, pt 2, pp 118–19, para (59).

3 See vol II of this work (7th ed), §§ 52*fe*–52*l* as to the General Treaty for the Renunciation of War. See also Art 2(4) of the Charter of the UN.

4 As early as 1924 the Geneva Protocol for the Pacific Settlement of Disputes described, in the preamble, a war of aggression as 'an international crime'. In 1927 the Eighth Assembly of the League of Nations adopted a resolution in which war of aggression was described as an international crime: Records of the Eighth Assembly, Plenary Meetings, p 84. A resolution of the Sixth Pan-American Conference declared wars of aggression to be a 'crime against the human species': AJ, 22 (1928), pp 356, 357. See also H Lauterpacht, BY, 21 (1944), p 81. As to the definition of aggression by the General Assembly in Res 3314 (XXIX) (1974), see § 30, n 37. In the ILC's draft Code of Crimes against the Peace and Security of Mankind, Art 12 (provisionally adopted in 1988) covers the crime of aggression: see § 148, n 23.

5 Draft Code of Offences against the Peace and Security of Mankind, YBILC (1954), vol ii, pp 149–52. For later work by the ILC on this topic, see § 148, n 16ff. Paragraphs 2 and 3 of Art 19 of pt I of the ILC's Draft Articles on State Responsibility (YBILC (1976), ii, pt 2, pp 95–6) read:

> '2 An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.
>
> 3 Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
>
> (*a*) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> (*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
>
> (*c*) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;
>
> (*d*) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human enviroment, such as those prohibiting massive pollution of the atmosphere or of the seas.'

Internationally wrongful acts which are not international crimes in accordance with para 2 constitute international delicts: *ibid*, Art 19.4.

6 See § 434.

7 See § 439.

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,[8] 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 'the authorities of a State').[9] 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;[10] 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.[11]

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.[12] There is no tribunal with appropriate international criminal jurisdiction over states.[13] 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

8 YBILC (1984), ii, pt 2, p 11 (para 32). See also § 148.

9 See discussion of the scope of the Draft Code *rationae personae* in YBILC (1983), ii, pt 2, pp 14–15; *ibid* (1985), ii, pt 2, pp 13–14 (paras 53–60).

10 YBILC (1985), ii, pt 2, p 13 (para 56).

11 YBILC (1987), ii, pt 2, p 14.

12 This is a matter which the ILC will study at a later stage of its consideration of state responsibility: YBILC (1976), ii, pt 2, p 117, paras (52) and (53).

13 As to proposals for an international criminal court with jurisdiction over individuals, see § 148, n 27.

It may, however, be noted that nothing in Art 36 or 38 of the Statute of the ICJ limits the Court to deciding only 'civil' disputes submitted to it. To the extent that a treaty binding on the parties to the dispute, or a rule of customary law, treats as criminal the respondent states' conduct there would appear to be nothing to prevent the Court deciding that that conduct gave rise to criminal responsibility on the part of the state concerned.

and not exclusive of the international criminal liability of the individuals guilty of crimes committed in violation of international law.[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[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.[16] The universal recognition as part of international law of rules penalising war crimes by individuals responsible for violations of the laws of war[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;[1] and if adequate redress is not forthcoming the state of which the alien is a national may seek redress on his behalf.[2] 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.[3] If this does not result in a satisfactory settlement, the injured state may take the matter up more formally, presenting an international claim[4] against the other state and having recourse to such judicial or arbitral procedures as are available and to which the defendant state has already undertaken to submit; or the two states may agree to submit the claim to an existing tribunal, or to an *ad hoc* tribunal set up especially for the purpose.[5] The scope of the claims to be decided by the tribunal will be determined by the agreement by which it is set up. However, in the absence of any generally applicable procedures of compulsory jurisdiction, the settlement of international claims is often left to diplomatic negotiation rather than being submitted to judicial settlement.

In practice, particularly where the claim relates to a large number of acts or events, as where a state has seized the property of aliens generally or at least of

[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 § 122, n 43, and § 148, n 27, and in particular, vol II of this work (7th ed) § 257.

[15] See also Arts 5 and 6.

Article 16 of the Covenant of the League of Nations was a forerunner of Chapter VII of the Charter, although considerably less far-reaching.

[16] 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), Suppl, p 260, Cmd 6668.

[17] Volume II of this work (7th ed), § 251.

[1] See § 153, as to exhaustion of local remedies.

[2] See § 151, as to nationality of claims.

[3] Action through the diplomatic channel may, of course, be taken at earlier stages of a controversy, in order to alert the potential defendant state to the possible consequences of its actions, or to afford it the possibility of remedying a breach of an international obligation. See generally § 410.

Diplomatic negotiations will also, if they are unsuccessful, serve to define the legal issues over which the parties disagree, so establishing the existence of a dispute which may be a necessary prerequisite for the exercise of jurisdiction by an international tribunal, as it is for the ICJ. See *Mavromatis Palestine Concessions* (1924), PCIJ, Series A, No 2, p 15; Advisory Opinion on *Interpretation of Peace Treaties*, ICJ Rep (1950), p 74. No particular formal procedure would seem to be required in order to establish that a dispute exists: it would seem to depend on the substance of the attitudes of the parties, objectively determined from the circumstances of their dealings with each other.

[4] See Moller, *Grotius Society*, 44 (1958–59), pp 223–42; *Harvard Draft (1961)*, Arts 20–25; Lillich and Christenson, *International Claims: Their Preparation and Presentation* (1962); Lillich, *International Claims: Their Adjudication by National Commissions* (1962), *Current Legal Problems* (1964), pp 157–83, and *International Claims: Post-War British Practice* (1967); Cole, BY, 41 (1965–66), pp 368–400; Vallat, *International Law and the Practitioner* (1966), pp 41–50; Weston, *International Claims: Post-War French Practice* (1971); Lillich and Weston, *International Claims: Lump-Sum Agreements* (1975); Seidl-Hohenveldern, AJ, 70 (1976), pp 763–77; Lillich and Weston (eds), *International Claims: Contemporary European Practice* (1982). See also works cited below, n 6.

As to the causes of action in international law see Jennings, Hag R, 121 (1967), ii, pp 507–11; Brownlie, BY, 50 (1979), pp 13–41, and *System of the Law of Nations: State Responsibility* (pt 1, 1983), pp 53–88.

[5] *Ad hoc* tribunals, often referred to as claims commissions, have frequently been established to deal with general groups of claims arising out of a particular series of events or otherwise outstanding as between the states setting up the tribunal. Some of the classic claims commissions were those established to deal with claims arising out of events in certain Central and Latin American states; the awards of those commissions contributed greatly to the development of the law of state responsibility. See eg the scholarly treatise by Feller, *The Mexican Claims Commissions, 1923–34* (1936), pp 155–72, and a series of decisions given by Verzijl as President of the French–Mexican Claims Commissions and reported in AD, 4 (1927–28), and 5 (1929–30).

Examples of more recent commissions include the Conciliation Commissions established under Art 83 of the Treaty of Peace with Italy 1947; the US–Japanese Property Commission set up to deal with disputes arising under Art 15(a) of the Treaty of Peace with Japan 1951 (see Summers and Fraleigh, AJ, 56 (1962), pp 407–32). As to the Iran–United State Claims Tribunal established by Art II of the Declaration of the Algerian Government of 19 January 1981 in connection with the resolution of the 'hostages crisis' between Iran and the USA, see ILM, 20 (1981), p 230, and, for relevant Public Notices issued by the US Government, *ibid*, pp 782, 789, 1002, 1003, 1274; Stern, AFDI, 28 (1982), pp 425–53; Amin, ICLQ, 32 (1983), pp 750–56; Fagre, Harv ILJ, 22 (1981), pp 443–50; various contributors, *AS Proceedings* (1984), pp 221–40; Lillich (ed), *The Iran–United States Claims Tribunal 1981–83* (1985); Lagergren, in *Realism in Law-Making* (eds Bos and Siblesz, 1986), pp 113–30; Gray, *Judicial Remedies in International Law* (1987), pp 181–5; Crook, AJ, 83 (1989), pp 278–311; AJ, 83 (1989), pp 915–17; Caron, AJ, 84 (1990), pp 104–56; *ibid*, pp 729–37, 890–5; Westberg, *International Transactions and Claims Involving Government Parties: Case Law of the Iran–United States Claims Tribunal* (1991). For the circumstances which led ultimately to the establishment of the tribunal, see § 494. The decisions of the tribunal are reported in *Iran–US Claims Tribunal Reports*.

As to the payment of compensation by Iraq for claims arising out of Iraq's invasion of Kuwait in 1990 (see § 127, n 44), see paras 16–19 of SC Res 687 (1991), and § 155, n 9, para 2.

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.[6] It is then for that state to distribute that sum to individual claimants.[7] Such global settlements usually[8] 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.[9] 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

[6] On lump-sum settlements generally see Lillich, *The Protection of Foreign Investment* (1965), pp 167–88, and *International Claims: Their Settlement by Lump-Sum Agreements* (1975); Vallat, *International Law and the Practitioner* (1966), pp 41–50; Lagergren in *Realism in Law-Making* (eds Bos and Siblesz, 1986), pp 113–30; Gray, *Judicial Remedies in International Law* (1987), pp 178–81; Lillich and Weston, AJ, 82 (1988), pp 69–80.

On specific lump-sum settlement agreements, see eg Pechota, AJ, 76 (1982), pp 639–53 (USA–Czechoslovakia Agreement 1982: ILM, 21 (1982), pp 371, 414, 419); Lillich, ICLQ, 21 (1972), pp 1–14 (UK–USSR Baltic Claims Agreement 1968 (TS No 12 (1968)); Warbrick, ICLQ, 37 (1988), pp 1010–12 (on three agreements recently concluded by the UK, with the USSR, China and Bulgaria), and ICLQ, 38 (1989), pp 430–34 (on implementation of the first of those agreements).

[7] Some 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 1079, and AJ, 56 (1962), pp 728–34; Rode, 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.

[8] But see eg § 150, n 7, for some exceptions.

[9] See eg *Soc Européenne d'études et d'entreprises v Peoples Federal Republic of Yugoslavia*, ILR, 24 (1957), p 761; *Haas v Humphrey*, *ibid*, p 316.

generally much the same in the internal law of the various states, although the details vary with the particular national laws concerned.[10] 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.[11] 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.[12] 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;[13] 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 Marinoni, *La responsabilità degli stati per gli atti dei loro rappresentanti* (1914) Strupp, *Das völkerrechtliche Delikt* (1920), pp 63–88 Eagleton, *State Responsibility in*

[10] See Doehring, *Die Pflicht des Staates zur Gewährung diplomatisches Schutzes* (1959); Ress, ZöV, 32 (1972), pp 420–82. See also *Re Bouffard* (1967), ILR, 48, p 4; *Ministry of Foreign Affairs v Federici and Japanese State* (1968), ILR, 65, pp 275, 278–9; *Beinisch* (1968), ILR, 72, p 220; *Epoux Martin* (1970), ILR, 57, p 311; *Eastern Treaties Constitutionality Case* (1975), ILR, 78, pp 177, 192–3; and for a decision of the French Conseil d'Etat rejecting a complaint by a French company against the French Government for not having entered into diplomatic negotiations with another government on its behalf, or taking the matter to the ICJ, see *Soc SAPVIN v Ministre des Affaires Etrangères*, RG, 93 (1989), p 258. Failure to protect may make a state liable under its domestic law: see *Mauritius Transport Case* (1967), ILR, 60, p 208. See also § 410, n 3. An occupying power is under no duty to protect nationals of occupied territory in respect of measures taken against them abroad: *Slovak National Internment Case* (1970), ILR, 70, p 691.

[11] See *Mutasa v Attorney-General* [1979] 3 All ER 257, 261–2; *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai* (1985) 129 SJ 756.

[12] *Dames and Moore v Regan* (1981), ILR, 72, p 271, on which see Chinkin, ICLQ, 32 (1983), pp 600–15. See also the Statement of Interest filed on behalf of the US Government in *Crocker National Bank v Government of Iran*, ILM, 20 (1981), p 363. See also *Persinger v Islamic Republic of Iran* (1982), ILR, 72, p 132, upholding the executive's power to extinguish legal claims against a foreign state where necessary to resolve an international crisis. See also *Aris Gloves Inc v US* (1970), ILR, 56, p 536; and see Liverman, Harv ILJ, 12 (1971), pp 355–65; and *Ministry of Defence of the Islamic Republic of Iran v Gould Inc*, AJ, 84 (1990), pp 556, 558. Diplomatic settlement by the US Government of a private claim for less than its full value has been held not to constitute a taking of property by that government for which compensation is payable: *Shanghai Power Co v US*, AJ, 78 (1984), p 678.

As to the position in the UK, see Vallat, *International Law and the Practitioner* (1966), pp 38–41. See also, as to the waiver of claims by Japan in the Peace Treaty with Japan 1951, *Inao Horimoto v The State* (1959), ILR, 32, p 161; *Ryuichi Shimoda v The State* (1963), *ibid*, pp 626, 638, 640–42; and by Austria in the Austrian State Treaty 1955, *Austrian Citizen's Entitlement to Compensation (Germany) Case* (1960), *ibid*, p 153, and *Austrian State Treaty (Individual Claim to Compensation) Case* (1961), ILR, 40, p 184.

[13] *Rustomjee v R* [1876] 1 QBD 487; *Great Western Insurance Co v US* (1884) 112 US 193; *Civilian War Claimants Association v R* [1932] AC 14; *Buck v Attorney-General* [1965] 1 Ch 758, 759. See also *First National City Bank of New York v Gilliland*, ILR, 26 (1958–II), p 347; *Petes Allen Claim* (1959), ILR, 30, p 204. The state may, however, deliberately choose to act as trustee for the individual claimants, in which event its position may vary accordingly. See also § 374, n 3.

International Law (1928), pp 44–75 Harvard Draft Convention (and Comment), AJ, 23 (1929), April, Special Suppl, pp 145–88 Jescheck, *Die Verantwortlichkeit der Staatsorgane nach dem Völkerrecht* (1952) Salvioli, Hag R, 46 (1933), iv, pp 103–14 *Harvard Draft (1961)*, Arts 15–17 Amerasinghe, *Revue Egyptienne de droit international*, 22 (1966), pp 91–130 Draft Articles on State Responsibility, pt I, Arts 5–15 and Commentary, YBILC (1973), ii, pp 188–98; *ibid* (1974), ii, pt 1, pp 277–90; and *ibid* (1975), ii, pp 61–106 Przetacznik, RG, 78 (1974), pp 919, 936–41, and *Protection of Officials of Foreign States according to International Law* (1983), pp 172–92 Arechaga, Hag R, 159 (1978), i, pp 275–82 Brownlie, *System of the Law of Nations: State Responsibility* (pt 1, 1983), pp 132–58.

§ 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,[1] even though in the consideration of the state the organ is independent,[2] and irrespective of whether it is a superior or subordinate organ.[3] 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.[4]

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1 See *Chiessa Claim* (1901), RIAA, 15, p 399; *Sessarego Claim* (1901), *ibid*, p 401; *Sanguinetti 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 Claim* (1927), RIAA, 4, p 155; *Roper Claim* (1927), *ibid*, p 145; *Way Claim* (1928), *ibid*, p 391; *Finnish Shipowners Claim* (1934), RIAA, 3, pp 1479, 1501; *Mossé Claim*, ILR, 20 (1953), p 217; *Schappe Spinning Mill Claim*, ILR, 21 (1954), p 141; *Ousset Claim*, ILR, 22 (1955), p 312; *Re Rizzo and Others (No 3)*, *ibid*, p 317; *Texaco v Libyan Arab Republic* (1975), ILR, 53, pp 389, 415–16.

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, pt I, Art 7.2 and Commentary, 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, pp 285, 330.

2 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.

3 See YBILC (1973), ii, pp 196–7, paras (9)–(15).

4 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 by it of an internationally wrongful act. See § 145, n 5.

Acts of organs of an international organisation committed on a state's territory are similarly not imputable to that state by reason only that they have taken place in its territory: Draft Articles on State Responsibility, pt I, Art 13 and Commentary, YBILC (1975), ii, p 87.

In the *Namibia (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.

As to the situation where an official of one state is placed at the disposal of another, see § 165, n 8. As to the attributability 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.

5 ICJ Rep (1986), pp 3, 65; and see para (9) of the *dispositif*, at p 148. And see Boyle, AJ, 81 (1987), pp 86–93.

1 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.

A question may, however, arise whether persons in one state are or are not organs of another state or acting on its behalf, particularly when they are dependent on and controlled by that other state. Such matters were considered by the International Court of Justice in the *Military and Paramilitary Activities* case in the context of the relationship between the forces fighting in Nicaragua against the government of that state – the so-called 'contra' forces – and the United States Government. The Court concluded that acts of the contras could not be attributed to the United States so as to make the United States responsible for such of those acts as were contrary to international law: 'For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed'.[5]

The various organs of states have different characteristics, which affect the degree of the state's responsibility for their acts, particularly where they are performed in excess of the powers of the organ in question or in an otherwise unauthorised manner, or are performed in a private capacity by individuals holding an official position. It is therefore necessary to distinguish between internationally injurious acts of Heads of State, of members of a government, of diplomatic envoys, of parliaments, of judicial functionaries, of administrative officials, and of military and naval forces.

§ 160 Internationally injurious acts of Heads of States Internationally injurious acts committed by Heads of State in the exercise of their official functions constitute international wrongs, which have been discussed above (§§ 145–58). But a Head of State can, like any other individual, commit in his private life internationally injurious acts. The position of the Head of the State, who may in some cases be regarded as personifying the state and who enjoys considerable immunity from the jurisdiction of courts in foreign states,[1] and often even in the courts of his own state, suggests that in international law a state should bear a degree of vicarious responsibility for internationally injurious acts committed by its Head of State in private life.

§ 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

[1] See §§ 499–509.

[1] See Draft Articles on State Responsibility, pt I, Art 6 and Commentary, especially para (5): YBILC (1973), ii, p 193. See also § 159, n 2. The earlier view (see eg 8th ed of this vol, p 359) that the activity of parliaments can never constitute an international delinquency because they do not represent the state in its international relations is regarded by the ILC as obsolete: *loc cit*, p 194, para (3). See *Commission of the European Communities v Belgium* [1970] ECR 237; *Commission of the European Communities v Italy* [1970] ECR 961. See other cases cited at § 21, nn 13–16.

law.[2] As regards individual members of parliament acting either in their capacity as such a member or in their private capacity, the state would seem to bear no international responsibility for their conduct.

§ 164 Internationally injurious acts of judicial organs. Denial of justice Internationally injurious acts committed by judicial personnel in their private life are in no way different from such acts committed by other individuals. But these functionaries may in their official capacity commit such acts, and the question is how far the responsibility of a state for acts of its judicial personnel can reasonably be extended given that, although often entirely independent of the government, they are nevertheless organs of the state and their acts accordingly attributable to the state.[1]

A state will normally have an established procedure, usually through access to the ordinary courts but sometimes involving special tribunals, to which persons in the state who suffer injury may have recourse in order to seek redress. If the courts or other appropriate tribunals of a state[2] refuse to entertain proceedings for the redress of injury suffered by an alien,[3] or if the proceedings are subject to undue delay,[4] or if there are serious inadequacies in the administration of justice,

[2] See generally Borchard, § 75; Sibert, RG, 48 (1941–45), pp 5–34; Bilge, *La Responsabilité internationale des etats et son application en matière d'actes legislatifs* (1950). See also § 21; Accioly, Hag R, 96 (1959), i, pp 374–5.

[1] Draft Articles on State Responsibility, pt I, Art 6 and Commentary, especially para (5): YBILC (1973), ii, p 193.

[2] Courts operating within a state may not always be courts *of* that state so as to make it responsible for their acts: see eg as to Restitution Courts in the Federal Republic of Germany, *Re Application No 182/56 (X v German Federal Republic)*, ILR, 24 (1957), p 401; *Re Application No 235/56 (Mr X and Mrs X v German Federal Republic)*, ILR, 25 (1958-I), 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, 244ff. 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: *Nordsee 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 Arbitrations: Three Salient Problems* (1987), pp 61–143; and see also *Petition of Petrol Shipping Corpn* (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 Meese*, ILM, 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, Klaestad 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'[5] 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,[6] whether the failure is due to action by the courts or, more often, by the government (eg by granting an amnesty or remitting a sentence imposed by a court).[7]

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.

On denial of justice generally see Borchard, §§ 127–30; and ZöV, 1 (1929), pp 242–47; *AS Proceedings* (1927), pp 27–38; Strupp, *Das völkerrechtliche Delikt* (1920), pp 70–85; Harvard Draft Articles on Responsibility of States, Art 9, AJ, 23 (1929), Special Suppl, pp 173–87; Dunn, *The Protection of Nationals* (1932), pp 146–56; *The Diplomatic Protection of Americans in Mexico* (1933), pp 199–273; Moussa, *L'Etranger et la justice nationale* (1934); Feller, *The Mexican Claims Commissions, 1923–34* (1936), pp 128–54; Eustathiadès, *La Responsabilité internationale de l'état pour les actes des organes judiciaires et le problème du déni de justice en droit international* (1937); Freeman, *The International Responsibility of States for Denial of Justice* (1938) (a scholarly and exhaustive work); Eagleton, AJ 22 (1928), pp 538–59; Dumas, RI, 3rd series, 10 (1929), pp 277–307; Hoijer, RI (Paris), 5 (1930), pp 115–46; Fitzmaurice, BY, 13 (1932), pp 93–114; Ch de Visscher, Hag R, 52 (1935), ii, pp 369–440; Lissitzyn, AJ, 30 (1936), pp 632–46; Spiegel, AJ, 32 (1938), pp 62–81; Ténekidès, RG, 46 (1939), pp 373–89; Puente, Mich Law Rev, 43 (1944), pp 383–406; Sibert, RG, 48 (1) (1941–45), pp 5–34; McNair, *Opinions*, ii, pp 295–321; *Harvard Draft (1961)*, Arts 6–8; Jiménez de Arechaga in *Transnational Law in a Changing Society* (eds Friedmann, Henkin and Lissitzyn, 1972), pp 171–87; Adede, Can YBIL, 14 (1976), pp 73–95.

[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 *Mallén* 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 an amnesty 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.

For the assassination in Switzerland in May 1923 of Vorovski, the chief Russian delegate to the Lausanne Conference, and the subsequent acquittal of the person accused of the crime, see Toynbee, *Survey* (1924), pp 258, 259. And see Garner, BY, 10 (1929), pp 181–89.

theless pronounces a materially unjust judgment, it is controversial whether a denial of justice is thereby occasioned for which the state is internationally responsible.[8] The judgment giving rise to the material injustice (itself a relative concept) may be the result of the proper application by the court of a law which provides for such a result (in which case it is the law which should properly be the object of complaint), or of an erroneous application by the court of a law which is itself unexceptional. In this latter case, if the error is not remedied on appeal, there is probably no international responsibility for a denial of justice unless the error led to a breach of a treaty obligation resting upon the state[9] or, possibly, the result is so manifestly unjust as to offend against the standards of justice recognised by civilised nations. Even where there is no irregularity or error of procedure or law a decision by a court may still engage the international responsibility of the state: this would occur, for example, where a judicial decision produces a result which is contrary to the state's treaty obligations.[10]

§ 165 Internationally 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,[1] a state also bears responsibility[2] 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.[3] A state's administrative

[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; Otken, RI (Geneva), 4 (1926), pp 33–42. The whole correspondence on the subject and the award are printed in Martens, NRG, 2nd series, 23 (1898), pp 48, 715, and 808. See also the *Chevreau Case* (1931) RIAA, 2, p 1115.

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.

[9] Eg *H v United Kingdom* (1983), ILR, 75, pp 369, 377–8.

[10] See McNair, *Treaties*, p 346.

[1] See § 159.

[2] Borchard (§ 77) disagreed with this statement, in its original formulation of 'a wide and altogether unrestricted vicarious responsibility'. The US Court of Claims in *Royal Holland Lloyd v The United States*, AJ, 26 (1932), pp 399–419, 410, relied on that statement.

[3] The scope of the unauthorised acts for which a state can be held responsible is variously expressed. The *Harvard Draft (1961)*, Art 15, uses criteria such as 'apparent authority' and 'within the scope of [an official's] functions'; in Art 20 of the Draft Articles on State Responsibility the ILC adopts the test that the organ of the state must have 'acted in that capacity' (YBILC (1975), ii, pp 61 and 70 (para 28)). It is important to note that the attribution of unauthorised acts of the state is a matter determined by international law, not by the internal law of the state: so a state may be internationally responsible even if according to its internal law the act in question is not attributable to it. See *ibid*, p 61 (para 3).

officials and members of its armed forces are under its disciplinary control,[4] 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.[5] 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.[6] 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.

[4] In the *Zafiro* case (1925) the American–British Claims Arbitration Tribunal based the liability of the US for looting by the Chinese crew of a British supply ship attached to the American fleet upon the culpable lack of control by the officers: see AJ, 20 (1926), pp 385–90; RIAA, vi, p 160; AD, 3 (1925–26), No 161. For responsibility based on lack of supervision see also *Ousset Claim*, ILR, 22 (1955), pp 312, 314. See the *Mallén Case* (1927), RIAA, 4, pp 173, 175, for a state being held responsible for not punishing an official who, in his private capacity, had assaulted a foreign national, and for maintaining him in his official position, thus facilitating the commission by him of a further assault.

See generally, *Bases of Discussion*, iii, Basis No 13, and Art 8(2) as adopted by the Third Committee of the Hague Codification Conference; Freeman, Hag R, 88 (1955), ii, pp 267–410; Meron, BY, 33 (1957), pp 85–114; Accioly, Hag R, 96 (1959), i, pp 360–63; Quadri, Hag R, 113 (1964), iii, pp 465–8; Queneudec, *La Responsabilité internationale de l'état pour les fautes personnelles de ses Agents* (1966); Draft Articles on State Responsibility, pt I, Art 10 and Commentary, YBILC (1975), ii, pp 61–70.

Amongst many cases holding a state responsible for harmful acts of its administrative officials or members of its armed forces which exceeded the strict limits of their official duties but which were nevertheless committed under the cloak of their official character see the *Jeannaud* case, Moore, *International Arbitrations*, iii, p 3000; *Metzger Case* (1903), RIAA, 10, p 417; *Maal Case* (1903), *ibid*, p 730; *Roberts Case* (1904), RIAA, 9, p 204; *Crossman Case* (1903), *ibid*, p 356; *La Masica Case* (1916), RIAA, 11, p 554; *The Jessie* (1921), RIAA, 6, p 57; *Union Bridge Company Case* (1924), *ibid*, p 138; *Youmans Claim* (1926), RIAA, 4, p 110; *Garcia and Garza Claim* (1926), *ibid*, p 119; *Mallén Claim* (1927), *ibid*, pp 173, 176–7; *Stephens Claim* (1927), *ibid*, p 265; *Way Claim* (1928), *ibid*, pp 391, 400–401; *Caire Claim* (1929), RIAA, 5, pp 516, 528–32; *Bellon Case* (1929), AD, 5 (1929–30), No 104; *Kling Claim* (1930), RIAA, 4, p 575; *Royal Holland Lloyd v US*, AJ, 26 (1932), pp 399, 410; *Diaz Claim* (1933), AD, 7 (1933–34), No 100; *Mossé Claim*, ILR, 20 (1953), p 217; *Eis Claim* (1959), ILR, 30, p 116; *Military and Paramilitary Activities Case*, ICJ Rep (1986), p 3.

A state's responsibility will be engaged if members of its armed forces commit wrongful acts in the territory of another state while acting as clandestine agents. Accordingly France was held responsible for the acts of certain French military personnel who in July 1985 sank the *Rainbow Warrior* in Auckland harbour, New Zealand, and was required to make a 'formal and unqualified apology' to New Zealand and to pay compensation of $US 7m. See AFDI, 33 (1987), pp 922–3, and 34 (1988), pp 896–8; Charpentier, AFDI, 31 (1985), pp 210–20, and 32 (1986), pp 873–85; RG, 90 (1986), pp 216–25, 993–6, and 92 (1988), pp 395, 993; Pugh, ICLQ, 36 (1987), pp 655–69; AJ, 81 (1987), pp 325–8; ILM, 26 (1987), pp 1346–73; Palmer, *Commonwealth Law Bulletin*, 15 (1989), pp 585–98; *R v Mafart and Prieur* (1985) and *Rainbow Warrior (New Zealand v France)* (1986), ILR, 74, pp 241, 256, and the further award of an arbitral tribunal established to determine certain questions arising out of the premature removal by France of their two agents from the Pacific island on which they should have been detained for a further period (*Rainbow Warrior (New Zealand v France)* (1990), ILR, 82, p 500, on which see Marks, Cambridge LJ, 49 (1990), pp 387–90, and Scott Davidson, ICLQ, 40 (1991), pp 446–57).

Other cases involving responsibility for acts of state agents or armed forces in another state's territory include *Cyprus v Turkey* (1978), ILR, 62, pp 4, 74–5; *López v Uruguay* (1981), ILR, 68, p 29; *Celiberti de Casariego v Uruguay* (1981), *ibid*, p 41. See also § 440, n 30, and § 442, n 5, as to the jurisdiction of a state over its forces abroad.

See cases cited at n 10.

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.[7]

A state will not, however, normally be responsible for the acts of its officials committed while acting as agents for another state[8] or on behalf of an international organisation.[9] 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;[10] 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.[11]

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

[7] Some instructive cases in addition to those cited at n 5, may be quoted as examples:

(1) On 26 November 1905, Hasmann, a member of the crew of the German gunboat *Panther* (see RG, 13 (1906), pp 200–6), at that time in the port of Itajahy in Brazil, failed to return on board his ship. The commander of the *Panther* sent a search party, comprising three officers in plain clothes and a dozen non-commissioned officers and sailors in uniform, on shore for the purpose of finding the whereabouts of Hasmann. This party, during the following night, penetrated into several houses, and compelled some of the residents to assist them in their search for the missing Hasmann, who, however, could not be found. He voluntarily returned on board the following morning. As the search violated Brazilian territorial supremacy, Brazil lodged a complaint with Germany, who, after an inquiry, disowned the act of the commander of the *Panther*, formally apologised for it, and punished the commander of the *Panther* by relieving him of his command.

(2) Another example occurred in 1904, when the Russian Baltic fleet, on its way to the Far East during the Russo-Japanese War, fired upon the Hull fishing fleet off the Dogger Bank. See vol II of this work (7th ed), § 5.

(3) In December 1915, during the First World War and at a time when the US was still neutral, an Austrian submarine fired upon an American merchantman, flying the American flag, in the Mediterranean. The US Government demanded an apology for this 'deliberate insult to the flag of the United States', punishment of the submarine commander, and reparation for the damage done (AJ, 10 (1916), Special Suppl, p 306). For some other cases, see the previous editions of this vol, § 163.

[8] See *Chevreau Case* (1931), RIAA, 2, p 1115, at p 1141. See generally on the responsibility of a state for acts of another state's officials who have been placed at the disposal of the former state, Draft Articles on State Responsibility, Art 9 and Commentary, YBILC (1974), ii, pp 286–90. See *Prince Sliman Bey v Minister for Foreign Affairs* (1959), ILR, 28, p 79.

[9] *NK v Austria* (1979), ILR, 77, p 470.

[10] See YBILC (1973), ii, p 192, paras (8)–(10), and *ibid* (1975), ii, p 61, para (2) and p 69, para (26); *Bensley's Case* (1850), Moore, iii, p 3018; *Castelains Case*, *ibid*, pp 2999–3000; *Henriquez Case* (1903), RIAA, 10, p 727 (sacking and looting by ungoverned soldiery); *Santa Isabel Claims* (1926), RIAA, 4, pp 783, 790–91 (state not committed by statement made by senior army officer at a banquet); *Mallén Claim* (1927), *ibid*, pp 173, 174 (assault by police officer, acting as private individual); *Corrie Case* (1929), *ibid*, p 416 (injuries caused by local chief of police, not in uniform although his police status known to some of those involved); *Gordon Case* (1930), *ibid*, p 586 (injuries caused by army doctors engaged in private shooting practice).

[11] See § 166.

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,[12] or human rights obligations.[13] Therefore, since international law does not prevent a state from expelling aliens, the home state of an expelled alien cannot, as a rule,[14] 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,[15] insurrection,[16] 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

See literature quoted at the commencement of § 145 Borchard, §§ 86–96 Strupp, *Das völkerrechtliche Delikt* (1920), pp 89–108 Jess, *Politische Handlungen Privater gegen das Ausland und das Völkerrecht* (1923) Eagleton, *State Responsibility in International Law* (1928), pp 76–94, 125–56 Zellweger, *Die völkerrechtliche Verantwortlichkeit des Staates für die Presse* (1949) Harvard Draft Convention (and Comment), AJ, 23 (1929), April, Special Suppl, pp 188–96 Monaco, *Rivista*, 18 (1939), pp 3–30, 193–261 Conference for the Codification of International Law, *Bases of Discussion*, iii, C 75, M 69, 129 V, pp 93–121 Draft Articles on State Responsibility, pt I, Art 11 and Commentary, YBILC (1975), ii, pp 70–83 Brownlie, *System of the Law of Nations: State Responsibility* (pt 1, 1983), pp 159–79 Przetacznik, *Protection of Officials of Foreign States according to International Law* (1983), pp 193–211 See also works cited below, §§ 167, n 1, and § 167, n 11.

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 territory 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 1938 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 a 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.

16 See eg *Spanish Zone of Morocco Claims* (1925), RIAA, 2, pp 617, 644–5; *Luzon Sugar Refining Co's Claim*, AJ, 20 (1926), p 391, and AD, 3 (1925–26), No 164; and *National Board of Young Men's Christian Association v United States* (1969), ILR, 54, p 241. As to responsibility for acts of insurgents and rioters, see § 167.

17 See eg the *Chevreau 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 ostensibly official) acts of administrative officials and members of armed forces is extensive,[1] 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;[3] 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.[4] 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.[5]

It may happen that private individuals, although not formally part of the

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 *Janes' 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; *Janes' 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 [*scilicet*, 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 Dobrovolsky and Goukovitch*, AD, 4 (1927–28), No 255. 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; *Janes' 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 *Mallén 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.[6] 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.[7] The question may in particular arise in relation to the conduct of corporations 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.[8]

§ 167 Responsibility for acts of insurgents and rioters The responsibility of states for acts of rioters[1] 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

[6] See the *Zafiro Case* (1925), RIAA, 6, p 160; *Stephens Case* (1927), RIAA, 4, p 267; *Lehigh Valley Railroad Co Case* (1930), RIAA, 8, p 84; *Case concerning United States Diplomatic and Consular Staff in Teheran*, ICJ Rep (1980), p 3 (and text at § 167, n 8); Woolsey, AJ, 33 (1939), pp 737–40; Draft Articles on State Responsibility, pt I, Art 8 and Commentary, YBILC (1974), ii, pt 1, pp 283–6, and *ibid* (1975), ii, pp 79–80, para (32). Such questions may arise in connection with the activities of armed bands (see § 122, n 6); the despatch of 'volunteers' to assist another state or a rebel movement in another state (see § 122, n 2); subversive acts by refugees (see 122 at n 3, and § 402, n 14). See also § 119, n 15, para 3, as to the abduction from Argentina by Israeli nationals of Adolf Eichmann, and the question of the extent to which they acted as agents of Israel. On irregular apprehension abroad generally, see § 119, nn 14, 15.

[7] In the *Case concerning United States Diplomatic and Consular Staff in Teheran*, ICJ Rep (1980), p 3, the ICJ regarded it as necessary, in order for the acts of the rioters and other militants to be regarded as acts of the state, that it be 'established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation': at p 29. The subsequent transformation of the militants into agents of Iran came about as a result of statements and actions of the Ayatollah Khomeini and other organs of the Iranian State endorsing the militants' action and perpetuating the occupation of the Embassy and the detention of its inmates as hostages (at pp 33–5). See also *Yeager v Islamic Republic of Iran*, AJ, 82 (1988), p 353. The distinction between acts of agents of the state and acts of mere supporters, the state not being responsible for the latter, was also drawn in *Short v Islamic Republic of Iran*, AJ, 82 (1988), p 140. Note also the disinclination of the Court in the *Barcelona Traction (Preliminary Objections)* case to treat the acts of private interests as being those of authorised agents of the government: ICJ Rep (1964), pp 22–31. See generally on the imputability to a state of the acts of private persons, Amerasinghe, *Studies in International Law* (1969), pp 205–45; Wolf, ZöV, 45 (1985), pp 232–61. By delegating its responsibilities to private persons the state cannot escape liability if they do not act consistently with the state's international obligations: see *Van der Mussele* (1983), ILR, 73, pp 459, 470–71.

[8] See eg *Wintershall AG v Government of Qatar*, ILM, 28 (1989), pp 795, 811–12. Similar issues often arise in the context of the entitlement of corporations to state immunity on the basis that, despite their separate legal personality, they can be regarded as part of the sovereign organisation of the state: see § 109, n 20.

[1] See generally on state responsibility for acts of mobs and rioters, including some aspects of responsibility for acts of insurgents (but as to which see more fully n 11), Borchard, pp 213–28; Eagleton, *The Responsibility of States in International Law* (1928), pp 124–38; Harvard Draft Convention on State Responsibility, AJ, 23 (1929), Special Suppl, pp 188–93; McNair, *Opinions*,

responsible, nor does it have any duty to repair losses which they may occasion. Its duty[2] – for the breach of which the state may, and often has been, held responsible and required to pay damages – 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[3] 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 insurrections or riots no less than the risk of the outbreak of other calamities.[4] 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 injurious 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.[5] But the state itself is under no international legal duty to pay such damages.[6] 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

ii, pp 238–73, 277–87; Accioly, Hag R, 96 (1959), i, pp 395–403; Draft Articles on State Responsibility, pt I, Art 11 and Commentary, paras (25)–(26), YBILC (1975), ii, pp 70, 77–8.

[2] See *Home Frontier and Foreign Missionary Society Case* (1920), RIAA, 6, p 42; *Spanish Zones of Morocco Claims* (1925), RIAA, 2, pp 615, 642–7, and the *Ziat Claim* (1924), *ibid*, p 729; *Youmans Claim* (1926), RIAA, 4, p 110; *Sarropoulos v Etat Bulgare, Recueil TAM*, 7 (1927), p 47; AD, 4 (1927–28), No 162; *Noyes Claim* (1933), RIAA, 6, p 308; *Trochel v State of Tunisia*, ILR, 20 (1953), p 47; *Lestoque v Reich* (1959), ILR, 28, pp 189, 193. See BPIL (1963), p 120, and TS No 34 (1967), concerning damage caused by mob violence to British property in Indonesia. Civil disturbances involving 'social and economic forces beyond the power of the State to control through the exercise of due diligence' constitute *force majeure*, and injuries caused thereby have been held to be 'not attributable to the State for purposes of its responding for damages': *Gould Marketing Inc v Ministry of National Defence of Iran*, AJ, 77 (1983), p 893. See also cases cited at n 11, concerning insurrections and rebellions. Circumstances sometimes blur the distinction between riots and mob violence on the one hand, and a rebellion or insurrection on the other.

[3] As to the consequences of granting an amnesty, see § 164, n 7.

[4] 'A revolution as such does not entitle investors to compensation under international law': *Starrett Housing Corpn v Government of the Islamic Republic of Iran*, ILM, 23 (1984), pp 1090, 1117.

[5] See *Georges Pinson Case* (1928), RIAA, 5, pp 327, 445.

[6] But see Garner in *AS Proceedings* (1927), pp 49–63, who, while substantially agreeing with these views, considered that when mob violence is directed against aliens *as such*, the state should make reparation, whether or not it has shown due diligence. In *Sarropoulos v Bulgarian State* the Graeco-Bulgarian Mixed Arbitral Tribunal held that the state is responsible if the riots were directed against foreigners as such: *Recueil TAM*, 7 (1927), p 47; AD, 4 (1927–28), No 162.

expressly stipulated[7] 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 Tehran*,[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 attack[9] 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 state[10] 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

[7] See, for instance, Martens, NRG, 2nd series, 9, p 474 (Germany and Mexico); 15, p 840 (France and Mexico); 19, p 831 (Germany and Colombia); 22, p 308 (Italy and Colombia). A list of such treaties is given by Arias, AJ, 7 (1913), pp 755, 756, 759, 760, and Borchard, p 244 (n).

[8] ICJ Rep (1980), p 3. See generally Wolf, ZöV, 43 (1983), pp 481–534; and § 494.

[9] The duty of Iran to protect the premises from attack was particularly strict in view of their diplomatic and consular character.

[10] See § 166, n 7.

[11] See generally Borchard, pp 228–45; Eagleton, *The Responsibility of States in International Law* (1928), pp 138–56; Harvard Draft Convention on State Responsibility, AJ, 23 (1929), Special Suppl, pp 193–6; Houghton, Minn Law Rev, 14 (1929–30), pp 251–69; Gross, ZöR, 13 (1933), pp 375–407; Berlia, RG, 44 (1937), pp 51–66; Podestá Costa, *Revista de derecho internacional*, 34 (1938), pp 195–235; Silvanie, *Responsibility of States for Acts of Unsuccessful Insurgent Governments* (1939), and AJ, 33 (1939), pp 78–103; H Lauterpacht, *Recognition in International Law* (1947), pp 247–50, 256–65; Chen, *International Law of Recognition* (1951), pp 327–32; Marek, *Identity and Continuity of States in Public International Law* (1954), pp 71–3; *Harvard Draft (1961)*, Art 18; Akehurst, BY, 43 (1968–69), pp 49–70; Verzijl, *International Law in Historical Perspective* (vol 6, 1973), pp 694–705; Draft Articles on State Responsibility, pt I, Arts 14 and 15, and Commentary, YBILC, 1975, ii, pp 90–106. See also works cited at n 1, concerning responsibility for acts of mobs and rioters, but also including some aspects of responsibility for acts of insurgents. See also § 49 (as to questions of recognition), and § 67 (as to state succession).

Judicial decisions on responsibility arising out of acts of insurgents include the *Sambiaggio Case* (1903), RIAA, 10, pp 499, 512ff; *Guastini Case* (1903), *ibid*, pp 561, 577ff; *Henriquez Case* (1903), *ibid*, p 713; *Fischbach and Friedericy Cases* (1903), *ibid*, pp 388, 390ff; *Padrón Case* (1903), *ibid*, p 741; *Mena Case* (1903), *ibid*, p 748; *Aroa Mines (Limited) Case* (1903), RIAA, 9, pp 402, 439ff; *Bolivar Railway Co Case* (1903), *ibid*, p 445; *Dix Case* (1903), *ibid*, p 119; *French Company of Venezuelan Railroads Case* (1905), RIAA, 10, pp 285, 354; *Georges Pinson Case* (1928), RIAA, 5, pp 327, 419ff; *Mexico City Bombardment Claims* (1930), *ibid*, pp 76, 77–80; *Gill Case* (1931), *ibid*, p 157; *Socony Vacuum Oil Co Claim*, ILR, 21 (1954), p 55; *Standard Vacuum Oil Co Claim* (1959), ILR, 30, p 168.

See also the British view, clearly stated in *Bases of Discussion*, iii, p 109, that the government against which the insurrection is directed is not responsible unless: (*a*) that government were negligent and might have prevented the damage; (*b*) they pay compensation to their own nationals or other foreigners in similar cases; (*c*) the rebellion has been successful and the insurgent party has been installed in power. See also UK Contemporary Practice, ICLQ, 7 (1958), pp 551–2.

impact on the authority of the state, has other consequences. The government of a state is entitled to suppress an insurrection against it, and to use the force necessary to that end: it will accordingly not be responsible for damage caused to foreign nationals in the course of doing so, although if the action was excessive in the circumstances, or otherwise unlawful, the state can be held responsible for such wrongful acts by its armed forces.[12] Similarly, while even in a civil war a state is still obliged to exercise due diligence to safeguard the interests of neutral aliens,[13] the circumstances of an insurrection or civil war will significantly affect the way that requirement is applied. But although a state is not generally responsible for the acts of insurrectional forces it may, even in the case of an unsuccessful insurrection, still be committed by certain governmental acts of insurrectional authorities in the area which was temporarily under their control. Thus its laws may still be regarded as the laws applied in its territory to foreign nationals;[14] and taxes paid to those authorities by foreign nationals may be regarded as properly paid so as not to be claimable again by the lawful government.[15]

A separate question which may arise is whether the rebels are receiving support from another state to such an extent as to make that state responsible for their acts: this was an important issue in the *Military and Paramilitary Activities Case*.[16]

Where an insurrection achieves a sufficient separate identity, including a degree of quasi-governmental organisation and control over a portion of the state's territory, certain special considerations apply. The insurrectional movement ceases to be just a group of private persons but may acquire a limited degree of international personality, with some capacity to act on the international plane,[17] including the capacity to commit and to have responsibility for international wrongs in those areas where their limited personality involves international obligations binding upon them. That responsibility, however, will in practice usually be difficult to enforce during the course of the insurrection,[18] whereas when it is over its enforcement will depend on its success. If it is successful, and

Apart from the question of the state's legal responsibility arising out of an insurrection, compensation may be agreed on an *ex gratia* basis: see eg the Convention of 5 December 1930, between Great Britain and Mexico in which the latter agreed to compensate *ex gratia* British subjects for losses suffered in the course of Mexican revolutions from 1910 to 1920: TS No 11 (1928), and TS No 22 (1931).

[12] See eg the views of the Belgian Government, *Rev Belge*, 8 (1972), 371–3. See also § 165, n 16, and the *Volkmar Case* (1903), RIAA, 9, p 317.

[13] See the *Chiessa*, *Sessarego*, *Sanguinetti*, *Vercelli*, *Queirolo*, *Roggero* and *Miglia Claims*, decided in 1901 in the Italy–Peru Arbitration, RIAA, 15, pp 399, 401, 404, 406, 407, 408 and 411.

[14] See *Treves Case* (1956), RIAA, 14, p 262; *Levi Case* (1956), *ibid*, p 272; *Wollemborg Claim*, ILR, 24 (1957), p 654; *Fubini Case* (1959), RIAA, 14, p 420; *Falco Claim* (1959), ILR, 29, pp 21, 31–2; *Baer Claim* (1959), *ibid*, pp 51, 52.

[15] *Santa Clara Estates Case* (1903), RIAA, 9, p 455; *Guastini* (1903), RIAA, 10, p 561.

[16] ICJ Rep (1986), p 3; see § 159.

[17] See § 49. Accordingly, if the insurrection is subsequently quashed, some aspects of the state's responsibility for acts of the insurgents may involve elements of succession of international persons: see § 67.

[18] But see YBILC (1975), ii, pp 98–9, para (28), for examples of claims presented to the insurrectional authorities (some of which had attained the status of a government recognised *de facto*). See also § 49.

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

[19] See *Bolivar Railway Co Case* (1903), RIAA, 9, p 445; *Dix Case* (1903), *ibid*, p 119; *French Company of Venezuelan Railroads Case* (1905), RIAA, 10, pp 285, 354; *Harvard Draft (1961)*, Art 18; Draft Articles on State Responsibility, pt I, Art 15 and Commentary, YBILC (1975), ii, pp 99–106.

[20] See § 67.

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