PART 1

International law in general

CHAPTER 1

Nature, origins and basis of international law

1. NATURE AND ORIGINS

Definition

International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other,[1] and which includes also:

a. the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and
b. certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community.

This definition goes beyond the traditional definition of international law as a system composed solely of rules governing the relations between states only. Such traditional definition of the subject, with its restriction to the conduct of states inter se, will be found set out in the majority of the older standard works of international law, but in view of developments during the last four decades, it cannot stand as a comprehensive description of all the rules now acknowledged to form part of the subject.

These developments are principally: (i) the establishment of a large number of permanent international institutions or organisations such as, for example the United Nations and the World Health Organisation, regarded as possessing international legal personality, and entering into relations with each other and with states; and (ii) the present movement (sponsored by the United Nations and the Council of Europe) to protect human rights and fundamental freedoms of individuals,[2] the creation of new rules for the punishment of persons committing the international

1. The above definition is an adaptation of the definition of international law by the American authority, Professor Charles Cheney Hyde; see Hyde *International Law* (2nd edn, 1947) Vol I, para 1. The American Law Institute's *Revised Statement of the Foreign Relations Law of the United States* (1986) defines international law as that law concerned with 'the conduct of states and of international organisations, and with their relations *inter se*, as well as some of their relations with persons, whether natural or personal'.
2. See below, pp 362–373.

crime of genocide or race destruction,[3] and the imposition of duties on individuals under the historic judgment in 1946 of the International Military Tribunal of Nuremberg, by which certain acts were declared to be international crimes, namely, crimes against peace, crimes against humanity, and conspiracy to commit these crimes.[4] Both categories of developments have given rise to new rules of international law, and may be expected to influence the growth of new rules in the future. The definition given above is intended to cover such new rules under heads (a)[5] and (b).

Nevertheless, from the practical point of view, it is well to remember that international law is primarily a system regulating the rights and duties of states inter se. So much is hinted at in the very title 'international law', or in another title frequently given to the subject—'the law of nations', although strictly speaking the word 'nation' is only in a crude way a synonym for the word 'state'.[6] Indeed, it is a very good practical working rule to regard international law as mainly composed of principles whereby certain rights belong to, or certain duties are imposed upon states.

Nevertheless, although the principal component of the system is represented by binding rules, imposing duties and conferring rights upon states, international lawyers have now increasingly to concern themselves with desiderata, guidelines, and recommended standards expressed in a non-binding form (eg, as in the Declarations adopted by the United Nations General Assembly, the Recommendations and, even, Resolutions of the International Labour Conference, and the Recommendations of

3. Under the Genocide Convention adopted by the United Nations General Assembly on 9 December 1948, and which entered into force on 12 January 1951.
4. The principles implicit in the judgment of the International Military Tribunal were formulated by the International Law Commission of the United Nations as a Draft Code of Principles Recognized in the Judgment in a Report presented in 1950; note Principle I, formulated in this Report: 'Any *person* who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment'.
5. There is a division of opinion among writers whether international law includes the 'internal' law of international institutions, such as the rules governing the rights and duties of officials of these institutions. For the view that the expression 'international law' in art 38 of the Statute of the International Court of Justice does not cover this 'internal' law, see per Judge Córdova, ICJ 1956, 165–166.
6. 'International law' is the title most frequently adopted by English and American jurists (cf the treatises of Hall, Westlake, Oppenheim, Kent, Wheaton, Hyde, and Fenwick). Twiss and Lorimer elected to use the title 'law of nations', while Hannis Taylor and A. S. Hershey preferred 'international public law'. Other suggested titles have been 'the law between Powers' (eg by Taube), 'inter-state law', and 'the law of the community of states' (eg by Verdross). Judge Jessup in his *Transnational Law* (1956), adopted this latter title to denote 'all law which regulates actions or events that transcend national boundaries'. See now his essay, 'The Present State of Transnational Law', in Bos (ed) *The Present State of International Law and Other Essays* (1973) pp 339–344. The term 'transnational law' has also been used to include national laws governing trans-border transactions.

the periodical Consultative Meetings held under the Antarctic Treaty of 1959), but which many states concerned feel constrained to observe. Further relatively recent examples are those of the standards formulated in the Guidelines adopted by the OECD (Organisation for Economic Co-operation and Development) in 1980 on the Protection of Privacy and Transborder Flows of Personal Data, in the Code of Practice on Safety and Health in the Construction of Fixed Offshore Drilling Installations in the Petroleum Industry adopted by the International Labour Organisation (ILO) in 1981, and the International Code on the Marketing of Breastmilk Substitutes approved by the World Health Organisation (WHO) in the same year. These may indeed eventually evolve into binding legal rules, eg, by general acceptance or approval (cf art IX, para 4 of the Treaty on Antarctica of 1959, under which recommended measures may become 'effective' upon approval by the parties concerned). These guidelines or standards are sometimes characterised as being only of a 'hortatory' effect, and, as well, have been described by certain French writers as 'normes sauvages', a broad translation of which expression is 'quasi-norms'.

There are, apart from these, the so-called 'gentlemen's agreements', ie accepted undertakings governing, eg, the equitable allocation to different regions of the world of the number of Judges of the International Court of Justice that may be elected from the countries of each particular region,[7] or the pattern of the number of members for each region to be elected to the United Nations International Law Commission.[8] It is also possible that treaties, or provisions in treaties, may impose no binding obligations, or be intended not to create legal relations between the parties, but severe simply to formulate moral or political precepts; see the judgement of Gibbs C J of the High Court of Australia in *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1 and O'Connell *International Law* (2nd edn, 1970) Vol 1, p 246, as eg, in the case of certain bilateral treaties of 'friendship' between states.

The main object of international law has been to produce an ordered rather than a just system of international relations, yet in later developments (for example, in the rules as to state responsibility concerning denial of justice,[9] and in the rules and practice as to international arbitration) there has been evidence of some striving to ensure that, objec-

7. The distribution in the case of the International Court of Justice is as follows: Africa, 3; Latin America, 2; Asia, 3; Eastern Europe, 2; and Western Europe and other states, 5: see the handbook *The International Court of Justice* (1976) at p 22.
8. The distribution for this Commission (of 34 members) is as follows: Africa, 8; Latin America, 6; Asia, 7; Eastern Europe, 3; Western Europe and other states, 8; also one national in rotation from African or Eastern European states and one national in rotation from Asian or Latin American states: see (1982) 8 Commonwealth Law Bulletin 769–770.
9. See below, pp 309–310.

tively, justice be done between states. Moreover, apart from seeing that states receive just treatment, the modern law of nations aims at securing justice for human beings. It is significant further that the word 'Justice' appears in the titles respectively of the Permanent Court of International Justice and its successor the International Court of Justice, both being judicial tribunals set up to decide disputes between states and to give advisory opinions according to international law.[10] That justice is a primary purpose of the law of nations emphasises its kinship to state law.

General and regional rules of international law; community law

There is a recognised distinction between *general* and *regional* rules of international law, that is to say between, on the one hand, rules which, practically speaking, are of universal application,[11] and, on the other hand, rules which have developed in a particular region of the world as between the states there located, without becoming rules of a universal character. The best illustration of such regional rules are those which have been commonly followed by the group of Latin American states, for example, the special rules relating to diplomatic asylum. This so-called 'Latin American international law' and the nature of regional rules were discussed by the International Court of Justice in the *Colombian-Peruvian Asylum Case* (1950);[12] according to the judgments in this case:

a. regional rules are not necessarily subordinate to general rules of international law but may be in a sense 'complementary' or 'correlated' thereto, and
b. an international tribunal must, as between states in the particular region concerned, give effect to such regional rules as are duly proved to the satisfaction of the tribunal.

In this connection, there may perhaps be noted also the modern tendency towards regionalism in international organisation, reflected in the fusion of states into regional 'functional' groupings (for example the European Economic Community (Common Market) under the Treaty of Rome of 25 March 1957, establishing this Community), the conclusion of regional security treaties (for example, the North Atlantic Security Pact of 4 April 1949[13]), the creation of regional international organs (for example, the South Pacific Commission established in 1948), and the

10. There are besides the several references to 'justice' in the Charter of the United Nations signed at San Francisco on 26 June 1945; see, eg, the Preamble, art 1, para 1, art 2, para 3, and art 76. Humanitarian considerations are not in themselves sufficient to generate international legal rights and obligations: *South West Africa Cases, 2nd Phase*, ICJ 1966, 6 at 34.
11. McDougal and Lasswell in *Studies in World Public Order* (1960) pp 5–6, rightly query the notion that international law is really and literally universal law.
12. See ICJ, 1950, 266.
13. Stricto sensu, however, this Pact is not a 'regional arrangement' within the meaning of that expression in art 52 and 53 of the United Nations Charter of 26 June 1945.

establishment of regional international tribunals (for example, the Court originally established by arts 31–45 of the Treaty constituting the European Coal and Steel Community of 18 April 1951, and which is now the Court of Justice of this Community, of the European Economic Community (Common Market), and of the European Atomic Energy Community (EURATOM) under the Rome Convention of 25 March 1957, Relating to Certain Institutions common to the European Communities).

The common rules (including the judge-made law of the European Court of Justice) applicable within the legal and administrative framework of the European Communities (of which the United Kingdom became a member in 1972–1973) have developed to such an extent since 1957 as to merit the designation of 'Community Law' (*droit communitaire*).[14] One of the distinctive characteristics of this Community Law may be its direct applicability, in certain cases and under certain conditions, in the systems of national law of each member of the European Communities, with national Courts also ready to give effect to Community Law where its primacy or supremacy ought to be recognised,[15] eg, if the Community rule or norm is clear and precise, and unconditional, without the need for further implementary action. In the United Kingdom, the applicability of Community Law and its legal effect as such are provided for in s 2 (1) of the European Communities Act 1972.[16] The acceptance of the supremacy of Community Law over national domestic law has not been uniform throughout the member states of the Communities, with variations even in the approach of courts of the one member country.[17] Community Law should not be regarded as a form of

14. See generally W. J. G. van der Meersch (ed) *Droit des Communautés Européennes* (1969); Hartley *The Foundations of European Community Law* (1981); and Rudden (ed) *Basic Community Laws* (2nd edn, 1986).
15. See Axline *European Community Law and Organisational Development* (1968); Hay 'Supremacy of Community Law in National Courts' 16 AJCL (1968) 524 at 532–540; and D. Wyatt and A. Dashwood *The Substantive Law of the EEC* (1980) ch 6, 'The Supremacy of Community Law' at pp 53–55, for references, inter alia, to the leading case law on the subject. For decisions, see Case 42/80: *Re Wire-Ropes, Chains and Hooks; EC Commission v Italy* [1981] 2 CMLR 532; Case 91/79: *Re Detergents Directive; EC Commission v Italy* [1981] 1 CMLR 331; and Case 43/75: *Defrenne v Sabena* [1981] 1 All ER 122n (Community Law binds all organs of member states, including the judiciary and legislative bodies), and, more recently, *SpA Granital v Amministrazione Finanziare* (1984) 21 Common Market Law Review 756, and *EC Commission v United Kingdom:* 165/82 [1984] 1 CMLR 44, ECJ (application in the United Kingdom of the Sex Discrimination Directive of 1976).
16. United Kingdom legislation is to be construed so as to give effect to any rights prescribed by the Treaty of Rome of 25 March 1957, establishing the European Economic Community; see *Snoxell v Vauxhall Motors Ltd* [1978] QB 11, [1977] 3 All ER 770.
17. As to some of these variations see S. S. Malawer 'International Law, European Community Law and the Rule of Reason' 8 J World Trade L (1974) 18, passim, and G. Bebr 'How Supreme is Community Law in the National Courts?' (1974) 11 CML Rev 3 at 8 et seq. Cf as to the position in the United Kingdom, *H P Bulmer Ltd v J Bollinger SA*

regional international law, but as sui generis. Community institutions, including the Court itself, recognise in appropriate circumstances the binding effect of general international law, for the Community itself is an institution of international law, being an independent sovereign entity with its own sovereign rights and its own legal system, independent of the member states.

Origins and development of international law

The modern system of international law is a product, roughly speaking, of only the last four hundred years. It grew to some extent out of the usages and practices of modern European states in their intercourse and communications, while it still bears witness to the influence of writers and jurists of the sixteenth, seventeenth, and eighteenth centuries, who first formulated some of its most fundamental tenets. Moreover, it remains tinged with concepts such as national and territorial sovereignty, and the perfect quality and independence of states, that owe their force to political theories underlying the modern European state system, although, curiously enough, some of these concepts have commanded the support of newly emerged non-European states.

But any historical account of the system must begin with earliest times, for even in the period of antiquity rules of conduct to regulate the relations between independent communities were felt necessary and emerged from the usages observed by these communities in their mutual relations. Treaties, the immunities of ambassadors, and certain laws and usages of war are to be found many centuries before the dawn of Christianity, for example in ancient Egypt and India,[18] while there were historical cases of recourse to arbitration and mediation in ancient China and in the early Islamic world, although it would be wrong to regard these early instances as representing any serious contribution towards the evolution of the modern system of international law.

We find, for example, in the period of the Greek City States, small but independent of one another, evidence of an embryonic, although regionally limited, form of international law which one authority—Professor Vinogradoff—aptly described as 'intermunicipal'.[19] This 'intermunicipal' law was composed of customary rules which had crystallised into law from long-standing usages followed by these cities such as, for

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[1974] Ch 401, [1974] 2 All ER 1226, and L. Collins *European Community Law in the United Kingdom* (1975).

18. See A. Nussbaum *A Concise History of the Law of Nations* (revised edn, 1954) pp 1 et seq, S. Korff *Hague Recueil* (1923) Vol I, pp 17–22, H. Chatterjee *International Law and Inter-State Relations in Ancient India* (1958), the article 'The History of the Law of Nations' in the *Encyclopaedia of International Law* Vol 7 (1984), and the Historical Introduction to Henkin, Pugh, Schachter and Smit *International Law: Cases and Materials* (2nd edn, 1987) pp xxxiii–xliii.

19. See Vinogradoff *Bibliotheca Visseriana Dissertationum Jus Internationale Illustrantium* (1923) Vol I, pp 13 et seq.

instance, the rules as to the inviolability of heralds in battle, the need for a prior declaration of war, and the enslavement of prisoners of war. These rules were applied not only in the relations inter se of these sovereign Greek cities, but as between them and neighbouring states. Underlying the rules there were, however, deep religious influences, characteristic of an era in which the distinctions between law, morality, justice and religion were not sharply drawn.

In the period of Rome's dominance of the ancient world, there also emerged rules governing the relations between Rome and the various nations or peoples with which it had contact. One significant aspect of these rules was their legal character, thus contrasting with the religious nature of the customary rules observed by the Greek City States. But Rome's main contribution to the development of international law was less through these rules than through the indirect influence of Roman law generally, inasmuch as when the study of Roman law was revived at a later stage in Europe, it provided analogies and principles capable of ready adaptation to the regulation of relations between modern states.

Actually, the total direct contribution of the Greeks and Romans to the development of international law was relatively meagre. Conditions favourable to the growth of a modern law of nations did not really come into being until the fifteenth century, when in Europe there began to evolve a number of independent civilised states.[20] Before that time Europe had passed through various stages in which either conditions were so chaotic as to make impossible any ordered rules of conduct between nations, or the political circumstances were such that there was no necessity for a code of international law. Thus in the later period of Roman history with the authority of the Roman Empire extending over the whole civilised world, there were no independent states in any sense, and therefore a law of nations was not called for. During the early medieval era, there were two matters particularly which militated against the evolution of a system of international law:

a. the temporal and spiritual unity of the greater part of Europe under the Holy Roman Empire, although to some extent this unity was notional and belied by numerous instances of conflict and disharmony; and
b. the feudal structure of Western Europe, hinging on a hierarchy of authority which not only clogged the emergence of independent states but also prevented the Powers of the time from acquiring the unitary character and authority of modern sovereign states.

Profound alterations occurred in the fifteenth and sixteenth centuries. The discovery of the New World, the Renaissance of learning, and the

20. Nevertheless there is evidence of some development of international law in the thirteenth and fourteenth centuries in the Eastern Empire and in Italy, while the Sovereigns of medieval England observed certain rules and usages in their relations with foreign Sovereigns.

Reformation as a religious revolution disrupted the façade of the political and spiritual unity of Europe, and shook the foundations of medieval Christendom. Theories were evolved to meet the new conditions; intellectually, the secular conceptions of a modern sovereign state and of a modern independent Sovereign found expression in the works of Bodin (1530–1596), a Frenchman, Machiavelli (1469–1527), an Italian, and later in the seventeenth century, Hobbes (1588–1679), an Englishman.

With the growth of a number of independent states there was initiated, as in early Greece, the process of formation of customary rules of international law from the usages and practices followed by such states in their mutual relations. So in Italy with its multitude of small independent states, maintaining diplomatic relations with each other and with the outside world, there developed a number of customary rules relating to diplomatic envoys, for example, their appointment, reception and inviolability.[1]

An important fact also was that by the fifteenth and sixteenth centuries jurists had begun to take into account the evolution of a community of independent sovereign states and to think and write about different problems of the law of nations, realising the necessity for some body of rules to regulate certain aspects of the relations between such states. Where there were no established customary rules, these jurists were obliged to devise and fashion working principles by reasoning or analogy. Not only did they draw on the principles of Roman law which had become the subject of revived study in Europe as from the end of the eleventh century onwards, but they had recourse also to the precedents of ancient history, to theology, to the canon law, and to the semi-theological concept of the 'law of nature'—a concept which for centuries exercised a profound influence on the development of international law.[2] Among the early writers who made important contributions to the infant science of the law of nations were Vittoria (1480–1546), who was Professor of Theology in the University of Salamanca, Belli (1502–1575), an Italian, Brunus (1491–1563), a German, Fernando Vasquez de Menchaca (1512–1569), a Spaniard, Ayala (1548–1584), a jurist of Spanish extraction, Suarez (1548–1617), a great Spanish Jesuit, and Gentilis (1552–1608), an Italian who became Professor of Civil Law at Oxford, and who is frequently regarded as the founder of a systematic law of nations.[3]

1. Cf also the influence of the early codes of mercantile and maritime usage, eg, the Rhodian Laws formulated between the seventh and the ninth centuries, the Laws or Rolls of Oléron collected in France during the twelfth century, and the *Consolato del Mare* as to the customs of the sea followed by Mediterranean countries and apparently collected in Spain in the fourteenth century.
2. See below, pp 22–23.
3. Of particular importance was the contribution of the so-called 'school' of Spanish writers, including Suarez and Ayala, mentioned above. In their works one finds powerfully expressed the concepts of the universal validity of a law of nations, and of the

The writings of these early jurists reveal significantly that one major preoccupation of sixteenth century international law was the law of warfare between states, and in this connection it may be noted that by the fifteenth century the European Powers had begun to maintain standing armies, a practice which naturally caused uniform usages and practices of war to evolve.

By general acknowledgment the greatest of the early writers on international law was the Dutch scholar, jurist, and diplomat, Grotius (1583–1645), whose systematic treatise on the subject *De Jure Belli ac Pacis* (The Law of War and Peace) first appeared in 1625. On account of this treatise, Grotius has sometimes been described as the 'father of the law of nations', although it is maintained by some that such a description is incorrect on the grounds that his debt to the writings of Gentilis is all too evident[4] and that in point of time he followed writers such as Belli, Ayala and others mentioned above. Indeed both Gentilis and Grotius owed much to their precursors.

Nor is it exact to affirm that in *De Jure Belli ac Pacis* will be found all the international law that existed in 1625. It cannot, for example, be maintained that Grotius dealt fully with the law and practice of his day as to treaties, or that his coverage of the rules and usages of warfare was entirely comprehensive.[5] Besides, *De Jure Belli ac Pacis* was not primarily or exclusively a treatise on international law, as it embraced numerous topics of legal science, and touched on problems of theological or philosophic interest. Grotius's historical pre-eminence rests rather on his continued inspirational appeal as the creator of the first adequate comprehensive framework of the modern science of international law.

In his book, as befitted a diplomat of practical experience, and a lawyer who had practised, Grotius dealt repeatedly with the actual customs followed by the states of his day. At the same time Grotius was a theorist who espoused certain doctrines. One central doctrine in his treatise was the acceptance of the 'law of nature' as an independent source of rules of the law of nations, apart from custom and treaties. The Grotian 'law of nature' was to some extent a secularised version, being founded

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subjection of all states to a higher law, which influenced jurists in succeeding centuries. The influence of scholars and writers in Eastern Europe such as Paulus Vladimiri (1371–1435) of the University of Cracow, should also not be overlooked. For discussion of the writings of Vittoria and Suarez, see Bernice Hamilton *Political Thought in Sixteenth Century Spain* (1963).

4. As to the influence of Gentilis on Grotius, see Fujio Ito *Rivista Internationale di Filosofia del Diritto* July–October 1964, pp 621–627. See also Lord McNair 'The Practitioners' Contribution to International Law' (1963) III Ind JIL 271 at 272–273. For a biography of Grotius see Liesje van Someren *Umpire to the Nations* (Dobson Books Ltd, London, 1965). The quatercentenary of his birth was celebrated in 1983.

5. For a modern treatment of the laws and usages of war in the later Middle Ages, see M. H. Keen *The Laws of War in the Late Middle Ages* (1965); this may be usefully read in the light of what Grotius wrote.

primarily on the dictates of reason, on the rational nature of men as social human beings, and in that form it was to become a potent source of inspiration to later jurists.

Grotius has had an abiding influence upon international law and international lawyers, although the extent of this influence has fluctuated at different periods, and his actual impact upon the practice of states was never so considerable as is traditionally represented. While it would be wrong to say that his views were always treated as being of compelling authority—frequently they were the object of criticism—nevertheless his principal work, *De Jure Belli ac Pacis*, was continually relied upon as a work of reference and authority in the decisions of courts, and in the textbooks of later writers of standing. Also several Grotian doctrines have left their mark on, and are implicit in the character of modern international law, namely, the distinction between just and unjust war,[6] the recognition of the rights and freedoms of the individual, the doctrine of qualified neutrality, the idea of peace, and the value of periodic conferences between the rulers of states. Nor should it be forgotten that for over three centuries Grotius was regarded as the historic standard-bearer of the doctrine of the freedom of the seas by reason of his authorship of the work, *Mare Liberum*, published in 1609.

The history of the law of nations during the two centuries after Grotius was marked by the final evolution of the modern state-system in Europe, a process greatly influenced by the Treaty of Westphalia of 1648 marking the end of the Thirty Years' War, and by the development from usage and practice of a substantial body of new customary rules. Even relations and intercourse by treaty or otherwise between European and Asian governments or communities contributed to the formation of these rules. Moreover the science of international law was further enriched by the writings and studies of a number of great jurists. Side by side there proceeded naturally a kind of action and reaction between the customary rules and the works of these great writers; not only did their systematic treatment of the subject provide the best evidence of the rules, but they suggested new rules or principles where none had yet emerged from the practice of states. The influence of these great jurists on the development of international law was considerable, as can be seen from their frequent citation by national courts during the nineteenth century and even up to the present time.

The most outstanding writers of the seventeenth and eighteenth centuries following the appearance of Grotius's treatise were Zouche (1590–1660), Professor of Civil Law at Oxford, as had been Gentilis (see above), and an Admiralty Judge, Pufendorf (1632–1694), Professor at the University of Heidelberg, Bynkershoek (1673–1743), a Dutch jurist, Wolff (1679–1754), a German jurist and philosopher, who constructed an orig-

6. Cf Joan D. Tooke *The Just War in Aquinas and Grotius* (1965).

inal, systematic methodology of international law and the law of nature, Moser (1701–1795), a German Professor of Law, von Martens (1756–1821), also a German Professor of Law, and Vattel (1714–1767), a Swiss jurist and diplomat, who was greatly influenced by the writings of Wolff, and who perhaps of these seven men proved to have the greatest influence, and found the widest acceptance, wider even than that extended to Grotius. In the eighteenth century, there was a growing tendency among jurists to seek the rules of international law mainly in custom and treaties, and to relegate to a minor position the 'law of nature', or reason, as a source of principles. This tendency was extremely marked, for instance, in the case of Bynkershoek's writings and found expression particularly also in the works of Moser, and von Martens. There were, however, jurists who at the same time clung to the traditions of the law of nature, either almost wholly, or coupled with a lesser degree of emphasis upon custom and treaties as components of international law. As contrasted with these adherents to the law of nature, writers such as Bynkershoek who attached primary or major weight to customary and treaty rules were known as 'positivists'.

In the nineteenth century international law further expanded. This was due to a number of factors which fall more properly within the scope of historical studies, for instance, the further rise of powerful new states both within and outside Europe, the expansion of European civilisation overseas, the modernisation of world transport, the greater destructiveness of modern warfare, and the influence of new inventions. All these made it urgent for the international society of states to acquire a system of rules which would regulate in an ordered manner the conduct of international affairs. There was a remarkable development during the century in the law of war and neutrality, and the great increase in adjudications by international arbitral tribunals following the *Alabama Claims Award* of 1872 provided an important new source of rules and principles. Besides, states commenced to acquire the habit of negotiating general treaties in order to regulate affairs of mutual concern. Nor was the nineteenth century without its great writers on international law. The works of jurists belonging to a number of different nations contributed significantly to the scientific treatment of the subject; among them were Kent (American), Wheaton (American), De Martens (Russian), Klüber (German), Phillimore (British), Calvo (Argentinian), Fiore (Italian), Pradier-Fodéré (French), Bluntschli (German), and Hall (British). The general tendency of these writers was to concentrate on existing practice, and to discard the concept of the 'law of nature', although not abandoning recourse to reason and justice where, in the absence of custom or treaty rules, they were called upon to speculate as to what should be the law.

Other important developments have taken place in the twentieth century. The Permanent Court of Arbitration was established by the Hague Conferences of 1899 and 1907. The Permanent Court of Inter-

national Justice was set up in 1921 as an authoritative international judicial tribunal, and was succeeded in 1946 by the present International Court of Justice. Then there has been the creation of permanent international organisations whose functions are in effect those of world government in the interests of peace and human welfare, such as the League of Nations and its present successor—the United Nations, the International Labour Organisation, the International Civil Aviation Organisation, and others referred to in Chapter 20 of this book. And perhaps most remarkable of all has been the widening scope of international law to cover by multilateral treaty or convention not only every kind of economic or social interest affecting states (eg, patents and copyright), but also the fundamental rights and freedoms of individual human beings.

It is characteristic of the latter-day evolution of international law that the influence of writers has tended to decline, and that modern international lawyers have come to pay far more regard to practice and to decisions of tribunals. Yet the spelling out of rules of international law from assumed trends of past and current practice cannot be carried too far. This was shown at the Geneva Conference of 1958 on the Law of the Sea, at the Vienna Conferences of 1961, 1963, and 1968–1969 on, respectively, Diplomatic Relations, Consular Relations, and the Law of Treaties, and in the sessions 1973–1982 of the Third United Nations Conference on the Law of the Sea (UNCLOS), when in a number of instances an apparent weight of practice in favour of a proposed rule of international law did not necessarily result in its general acceptance by the states represented at the Conferences. Nevertheless, 'natural law' writers have ceased to command the same degree of influence as formerly, perhaps because of the emergence of a number of states outside Europe and which did not inherit doctrines of Christian civilisation such as that of 'natural law', or which possessed traditional cultures impelling them towards differing perceptions in respect to law and legal procedure. These new states (in particular the Afro-Asian group) have challenged certain of the basic principles of international law, stemming from its early European evolution in the seventeenth and eighteenth centuries, albeit they have to some extent recognised natural law in regard to certain concepts, eg, self-determination.[7] Moreover, many long-standing rules

7. Reference should be made in this connection to the important activities in the field of study of international law, of the Asian-African Legal Consultative Committee, representing the Afro-Asian group of states. Certain sessions of this Committee have been attended by an observer from the International Law Commission, which has a standing invitation to send an observer. For the impact upon international law of the new Asian and other states, see Syatauw *Some Newly Established Asian States and the Development of International Law* (1961), S. P. Sinha *New Nations and the Law of Nations* (1967), R. P. Anand *New States and International Law* (1972), and F. C. Okoye *International Law and the New African States* (1972).

and concepts of international law have been subjected to severe strains and stresses under the impact of modern developments in technology, of modern economic exigencies, and—not least—the more enlightened sociological views and attitudes which prevail today. Above all, there is the present unprecedented political state of affairs, for which the traditional system of international law was not devised, namely, the division of the world into global and regional blocs, the existence of a 'third world' of numerous newly-emerged states, undeveloped economically and technologically (and sometimes possessing unstable governments), and the numerous groupings and associations into which states have formed themselves. Apart from this, international law is now called upon to find new rules or guidelines to govern the fields of nuclear and thermonuclear energy (indeed of all forms of energy, having regard to events since 1973, and the depletion of oil reserves), and scientific research generally, to provide special régimes for various areas of international trade (eg the international sale and international sea-carriage of goods), to regulate state activities in the upper atmosphere and in the cosmos, to protect and control the environment of man,[8] to control the growth of world population (cf the 'Action Plan' adopted at Bucharest in August 1974, by the United Nations World Population Conference), to deal with the trans-border flow of computer data so as, inter alia, to protect privacy, to develop a general universal system to regulate key aspects of communication and dissemination of information, and to establish a new legal régime for the exploration and exploitation of the resources of the seabed beyond the limits of national sovereignty.

Present-day status of international law

International law, as we know it today, is that indispensable body of rules regulating for the most part the relations between states, without which it would be virtually impossible for them to have steady and frequent intercourse. It is in fact an expression of the necessity of their mutual relationships. In the absence of some system of international law, the international society of states could not enjoy the benefits of trade and commerce, of exchange of ideas, and of normal routine communication.

The present century has witnessed a greater impetus to the development of international law than at any previous stage of its history. This was a natural result of the growing interdependence of states, and of the vastly increased intercourse between them due to all kinds of inventions that overcame the difficulties of time, space, and intellectual communication. New rules had to be found or devised to meet innumerable new situations. Whereas previously the international society of states could rely on the

8. Cf Richard A. Falk 'New Trends in International Law: The Challenges of the Ecological Age' (1980) 61 US Naval War College International Studies 122, especially at pp 128–129.

relatively slow process of custom[9] for the formation of rules of international law, modern exigencies called for a speedier method of law-making. As a result, there came into being the great number of multilateral treaties of the last 80 years laying down rules to be observed by the majority of states—'law-making treaties' or 'international legislation', as they have been called. Apart from these 'law-making treaties' there was a remarkable development in the use of arbitration to settle international disputes, and at the same time the Permanent Court of International Justice came by its decisions to make an important contribution to the growth of international law. The mantle of the Permanent Court then descended upon its successor, the International Court of Justice. Nor should there be forgotten the work of codifying and progressively developing international law at present being sponsored by the United Nations with the expert aid of a body known as the International Law Commission, created in 1947.[10]

It is true that in some quarters there is a tendency to disparage international law, even to the extent of questioning its existence and value. There are two main reasons for this:

a. the generally held view that the rules of international law are designed only to maintain peace; and
b. ignorance of the vast number of rules which, unlike the rules dealing with 'high policy', that is, issues of peace or war, receive little publicity.

Actually, however, a considerable part of international law is not concerned at all with issues of peace or war. In practice, legal advisers to Foreign Offices and practising international lawyers daily apply and

9. Although treaties had nevertheless played an important role in the medieval law of nations and, also, in the relations between European states and nations or entities in Asia during the seventeenth, eighteenth and nineteenth centuries.
10. The Statute of the Commission was adopted by the United Nations General Assembly on 21 November 1947; for text of Statute, see *UN Year Book* 1947–1948 211, or the handbook, *The Work of the International Law Commission* (3rd edn, 1980) pp 103–108. The Commission, consisting originally of 15 members, appointed in their individual capacity as experts, first met in 1949. Subjects dealt with by the Commission since 1949 have included the basic rights and duties of states, offences against the peace and security of mankind (the Nuremberg principles), reservations to conventions, the regime of the high seas, the law of treaties, arbitral procedure, nationality, statelessness, international criminal jurisdiction, the definition of aggression, state responsibility, diplomatic and consular practice, succession of states and governments, relations between states and inter-governmental organisations, the most-favoured-nation clause, jurisdictional immunities of states and state property, and the non-navigational uses of international watercourses. The Commission now consists of 34 members following an enlargement in 1981 of its composition (it had been previously enlarged in 1956 to 21, and then in 1961 to 25). As to the methods and procedures followed by the Commission in discharging its functions of the 'codification' and 'progressive development' of international law, see *The Work of the International Law Commission* (3rd edn, 1980) pp 11–21.

consider *settled* rules of international law dealing with an immense variety of matters. Some of these important matters which arise over and over again in practice are claims for injuries to citizens abroad, the reception or deportation of aliens, extradition, questions of nationality, the extra-territorial operation of certain national legislation, and the interpretation of the numerous complicated treaties or arrangements now entered into by most states with reference to commerce, finance, transport, civil aviation, nuclear energy, and many other subjects.

Breaches of international law resulting in wars or conflicts of aggression and the inability of international law to cope with such endemic problems as disarmament, international terrorism and trafficking in conventional arms tend to receive adverse attention, and from them the public incorrectly deduces the complete breakdown of international law. The answer to this criticism is that even, for example, in time of war or armed conflict there is no absolute breakdown of international law, as many rules affecting the relations of belligerents inter se or with neutrals are of vital importance and to a large extent are strictly observed. Another consideration is worth mentioning, namely that in the case of war or armed conflict, the states involved seek to justify their position by reference to international law. This applies also in 'crisis' situations, short of war; for example, during the Cuban missile crisis of 1962, the United States relied to some extent on the Inter-American Treaty of Reciprocal Assistance of 1947 as a legal basis for its 'selective' blockade or 'quarantine' of Cuba.

It is possible to argue further that in municipal law (that is, state law), breaches, disturbances and crimes take place, but no one denies the existence of law to which all citizens are subject. Similarly, the recurrence of war and armed conflicts between states does not necessarily involve the conclusion that international law is non-existent.

Finally, it is incorrect to regard the maintenance of peace as the entire purpose of international law. As one authority well said half a century ago,[11] its raison d'être is rather to:

> 'form a framework within which international relations can be conducted and to provide a system of rules facilitating international intercourse; and as a matter of practical necessity it has, and will, operate as a legal system even when wars are frequent.'

The same authority went on to say:

> 'It is, of course, true that the ideal of international law must be a perfectly legal system in which war will be entirely eliminated, just as the ideal of municipal law is a Constitution and legal system so perfect, that revolution,

11. The late W. E. (Sir Eric) Beckett in (1939) 55 LQR 265.

revolt, strikes, etc can never take place and every man's rights are speedily, cheaply, and infallibly enforced.'

Lapses from such ideals are as inevitable as the existence of law itself.

2. THEORIES AS TO BASIS OF INTERNATIONAL LAW

Much theoretical controversy has been waged over the nature and basis of international law.

Some discussion of the theories should help to throw light on many important aspects of the subject.

Is international law true law?

One theory which has enjoyed wide acceptance is that international law is not true law, but a code of rules of conduct of moral force only.[12] The English writer on jurisprudence, John Austin (1790–1859), must be regarded as foremost among the protagonists of this theory. Others who have questioned the true legal character of international law have been Hobbes, Pufendorf, and Bentham.

Austin's attitude towards international law was coloured by his theory of law in general. According to the Austinian theory, law stricto sensu was the result of edicts issuing from a determinate sovereign legislative authority. Logically, if the rules concerned did not in ultimate analysis issue from a sovereign authority, which was politically superior, or if there were no sovereign authority, then the rules could not be legal rules, but rules of moral or ethical validity only. Applying this general theory to international law, as there was no visible authority with legislative power or indeed with any determinate power over the society of States, and as in his time the rules of international law were almost exclusively customary, Austin concluded that international law was not true law but 'positive international morality' only, analogous to the rules binding a club or society. He further described it as consisting of 'opinions or sentiments current among nations generally'.[13] This was in accordance with his classification of three categories, divine law, positive law and positive morality.

The reply to Austin's view is as follows:

a. Modern historical jurisprudence has discounted the force of his general theory of law. It has been shown that in many communities without a formal legislative authority, a system of law was in force and being

12. For an excellent authoritative treatment of the problems concerning the legality of international law, see Dennis Lloyd *The Idea of Law* (Penguin revised edn, 1970) pp 37–40, 186–90, 224–5, and 238–9. Cf also passim L. Henkin *How Nations Behave* (2nd edn, 1979) and J. G. Merrills *Anatomy of International Law* (2nd edn, 1981).

13. See *Lectures on Jurisprudence* (4th edn, revised and edited by R. Campbell, 1873) Vol I, pp 187–188, 222, and also now W. L. Morison *John Austin* (1982) pp 64, 73, 78 and 99–100.

observed, and that such law did not differ in its binding operation from the law of any state with a true legislative authority.

b. Austin's views, however right for his time, are not true of present-day international law. In the present century a great mass of 'international legislation' has come into existence as a result of law-making treaties and conventions, and the proportion of customary rules of international law has correspondingly diminished.[14] Even if it be true that there is no determinate sovereign legislative authority in the international field, the procedure for formulating these rules of 'international legislation' by means of international conferences or through existing international organs is practically as settled, if not as efficient, as any state legislative procedure.

c. Questions of international law are always treated as legal questions by those who conduct international business in the various Foreign Offices, or through the various existing international administrative bodies. In other words, the authoritative agencies responsible for the maintenance of international intercourse do not consider international law as merely a moral code. As, nearly a century ago, the late Sir Frederick Pollock well said:

> 'If international law were only a kind of morality, the framers of State papers concerning foreign policy would throw all their strength on moral argument. But, as a matter of fact, this is not what they do. They appeal not to the general feeling of moral rightness, *but to precedents, to treaties, and to opinions of specialists*. They assume the existence among statesmen and publicists of a series of legal as distinguished from moral obligations in the affairs of nations.'[15]

Certain countries indeed in practice expressly treat international law as possessing the same force as the ordinary law binding their citizens. Under the Constitution of the United States of America, for example, treaties are 'the supreme law of the land' (art VI, para 2). Judges of the United States Supreme Court—the highest Court of the land—have repeatedly recognised the constitutional validity of international law. In one case,[16] Marshall CJ declared that an Act of Congress 'ought never to

14. Indeed a significant number of customary rules of international law have now been formulated as rules in multilateral conventions; as, eg, in the case of the three Vienna Conventions of 18 April 1961, on Diplomatic Relations, of 24 April 1963, on Consular Relations, and of 22 May 1969, on the Law of Treaties, codifying respectively the customary rules as to diplomatic and consular privileges and immunities, and as to the law and practice of treaties, and in a number of provisions of the United Nations Convention on the Law of the Sea, opened for signature at Montego Bay, Jamaica, on 10 December 1982.
15. Pollock *Oxford Lectures* (1890) p 18.
16. *The Charming Betsy* (1804) 2 Cranch 64 at 118.

be construed to violate the law of nations if any other possible construction remains'. In another case,[17] Gray J made the following remarks:

> '*International law is part of our law*, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.'

Moreover, the legally binding force of international law has been asserted again and again by the nations of the world in international conference. To take one illustration, the Charter creating the United Nations Organisation, drawn up at San Francisco in 1945, is both explicitly and implicitly based on the true legality of international law. This is also clearly expressed in the terms of the Statute of the International Court of Justice, annexed to the Charter, where the court's function is stated as being 'to decide *in accordance with international law* such disputes as are submitted to it' (see art 38). One of the latest such multipartite manifestations supportive of the legality of international law was the Helsinki Declaration of 1 August 1975, whereby over 30 European states, the Holy See, the United States of America, and Canada subscribed to the following pledges: 'The participating states will fulfil in good faith their obligations under international law [including] those obligations arising from the generally recognized principles and rules of international law.... In exercising their sovereign rights, including the right to determine their laws and regulations, they will conform with their legal obligations under international law.'

In connection with the Austinian theory, it is useful to bear in mind the difference between rules of international law proper, and the rules of 'international comity'. The former are legally binding, while the latter are for the most part rules of goodwill and civility, founded on the moral right of each state to receive courtesy from others. The essence of these usages of 'comity' is thus precisely what Austin attributed to international law proper, namely a purely moral quality.[18] Non-observance of a rule of international law may give rise to a claim by one state against another for some kind of satisfaction, whether it be diplomatic in character or whether it takes the concrete form of indemnity or reparation. Non-observance of a usage of 'comity' on the other hand produces no strict legal consequences as regards the state withholding the courtesy; the state affected by the withdrawal of the concession may reply in the same kind

17. *The Paquete Habana* 175 US 677 (1900) at 700.
18. An illustration of such a usage of courtesy was the privilege accorded, within certain limits, to diplomatic envoys to import, free of customs dues, goods intended for their own private use. This courtesy privilege has now become a matter of legal duty upon the state of accreditation under art 36 (1) (b) of the Vienna Convention on Diplomatic Relations of 18 April 1961.

and retract its own courtesy practices, but beyond this narrow reciprocity, there is no other legal action open to it.[19]

This cumulative evidence against the position taken by Austin and his followers should not blind us to the fact that necessarily international law is *weak law*. Existing international legislative machinery, operating mainly through law-making conventions, is not comparable in efficiency to state legislative machinery. Frequently the rules expressed in such conventions are formulated in such a way as to give wide options or areas of choice to the states parties (see, eg, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965). In spite of the achievement of the United Nations in re-establishing a World Court under the name of the International Court of Justice, there still is no universal compulsory jurisdiction for settling legal disputes between states. Finally, many of the rules of international law can only be formulated with difficulty, and, to say the least, are quite uncertain, being often incapable of presentation except as a collection of inconsistent state practices, while there are, in different areas of the subject, fundamental disagreements as to what the rules should be. In 1960, the second Geneva United Nations Conference on the Law of the Sea, with 87 states participating, failed to agree on a general rule fixing the width of the territorial sea, thus repeating the experience of the Hague Conference of 1930, while the Vienna Conference on the Law of Treaties of 1968–1969 revealed basic differences over the rules as to invalidity of treaties, and over the doctrine of jus cogens[20] (superior principles or norms governing the legality of treaty provisions). Deep-seated differences also emerged throughout the course of the sessions, extending from 1973 to 1982, of the Third United Nations Conference on the Law of the Sea (UNCLOS), and even on the occasion at Montego Bay, Jamaica, on 10 December 1982, when the United Nations Convention on the Law of the Sea, adopted by the Conference, was opened for signature, with a number of states, including the United States of America, declining to sign the Convention (see Chapter 9 below).

19. In this connection, reference should be made to judicial 'comity'. For example, British courts apply 'comity' when giving recognition to the legislative, executive, and judicial acts of other states. See *Foster v Driscoll* [1929] 1 KB 470. This application of judicial 'comity' is illustrated also by the recent trend of British courts to give effect to the principle of *forum non conveniens*, ie abstention from the exercise of local jurisdiction where a foreign court is the more appropriate forum for the relevant proceedings; cf *The Spiliada* [1987] 1 Lloyd's Rep 1, HL. 'Comity', in its general sense, cannot, however, be invoked to prevent the United Kingdom, as a sovereign state, from taking steps to protect its own revenue laws from gross abuse; see decision of House of Lords in *Collco Dealing Ltd v IRC* [1962] AC 1 at 19, [1961] 1 All ER 762 at 765. Likewise, a charge of conspiracy to commit the offence of importing dangerous drugs into the United Kingdom, based on an alleged agreement made outside British jurisdiction, is not in violation of 'international comity' (*DPP v Doot* [1973] AC 807 at 834–835).

20. See pp 55–57 below.

Theories as to 'law of nature'

From earliest times,[1] as we have seen, the concept of the 'law of nature' exercised a signal influence on international law. Several theories of the character and binding force of international law were founded upon it.

At first the 'law of nature' had semi-theological associations, but Grotius to some extent secularised the concept, and as his followers later applied it, it denoted the ideal law founded on the nature of man as a reasonable being, the body of rules which Nature dictates to human reason. On this basic conception, theorists erected various structures, some writers adopting the view that international law derived its binding force from the fact that it was a mere application to particular circumstances of the 'law of nature'. In other words, states submitted to international law because their relations were regulated by the higher law—the 'law of nature', of which international law was but a part. The concept of the 'law of nature' underwent further specialisation in the eighteenth century. The later refinements can be seen in the following passage from Vattel's *Droit des Gens* (1758)[2]:

> 'We use the term necessary Law of Nations for that law which results from applying the natural law to nations. It is necessary, because nations are absolutely bound to observe it. It contains those precepts which the natural law dictates to States, and it is no less binding upon them than it is upon individuals. For States are composed of men, their policies are determined by men, and these men are subject to the natural law under whatever capacity they act. This same law is called by Grotius and his followers the internal Law of Nations, inasmuch as it is binding upon the conscience of nations. Several writers call it the natural Law of Nations.'

Vattel's views in this connection led him to hold that the assumption that one or more states could overview and control the conduct of another state would be contrary to the law of nature.

The general objection to theories based on the 'law of nature' is that each theorist uses it as a metaphor for some more concrete conception such as reason, justice, utility, the general interests of the international community, necessity, or religious dictates. This leads to a great deal of confusion, particularly as these interpretations of the 'law of nature' may differ so widely.

Traces of the 'natural law' theories survive today, albeit in a much less dogmatic form. Kelsen has said:[3] 'The theory of natural law, which was

1. The concept of a 'law of nature' goes back to the Greeks, and its history can be traced through the Roman jurists up to medieval times when it found expression in the philosophy of St Thomas Aquinas (1226–1274). See Barker, Introduction to Gierke *Natural Law and the Theory of Society* (transl 1934) Vol I, xxxiv–xliii.
2. Preliminaries, para 7.
3. See his study, 'The Foundation of the Theory of Natural Law' in *Essays in Legal and Moral Philosophy* (1973) ch VI, 114 at 141; and cf ch II, 'The Idea of Natural Law', ibid, pp 27–60.

dominant throughout the 17th and 18th centuries, after relapsing during the 19th, has again in the 20th re-entered the foreground of social and legal philosophy, in company with religious and metaphysical speculation'. An approach kindred to that of 'natural law' colours the current movement to bind states by international Covenants to observe human rights and fundamental freedoms,[4] while to some extent a 'natural law' philosophy underlies the Draft Declaration on the Rights and Duties of States of 1949 prepared by the International Law Commission of the United Nations.[5] 'Natural law' was invoked also in order to justify the punishment of offenders, guilty of the grosser and more brutal kind of war crimes. Besides, there are the writers who adopt an international sociological standpoint, who treat the conception of 'natural law' as identical with reason and justice applied to the international community, and who look upon it as thereby elucidating the lines of the future development of international law.[6]

Because of its rational and idealistic character, the conception of the 'law of nature' has had a tremendous influence—a beneficent influence—on the development of international law. If it has lacked precision, if it has tended to be a subjective rather than an objective doctrine, it has at least generated respect for international law, and provided, and still provides, moral and ethical foundations that are not to be despised. As against this, its main defect has been its aloofness from the realities of international intercourse shown in the lack of emphasis on the actual practice followed by states in their mutual relations, although the majority of rules of international law originally sprang from this practice.

Positivism

The theory known as 'positivism' commands a wide support, and has been adopted by a number of influential writers. We have already seen that Bynkershoek was an eighteenth-century 'positivist', but the modern 'positivist' theories have refinements and are expressed in generalisations not to be found in Bynkershoek's writings.

The 'positivists' hold that the rules of international law are in final analysis of the same character as 'positive' municipal law (ie state law) inasmuch as they also issue from the will of the state. They believe that international law can *in logic* be reduced to a system of rules depending for their validity only on the fact that states have consented to them.[7]

4. The United Nations General Assembly, on 16 December 1966, unanimously approved a Covenant on Economic, Social and Cultural Rights, and a Covenant on Civil and Political Rights. The two Covenants were opened for signature on 19 December 1966, and came into force in 1976.
5. See below, pp 99–100.
6. Cf Le Fur (1927) 18 Hague Recueil 263–442.
7. This is the more specialised meaning of the term 'positivist'. In its broader sense, the term 'positivist' denotes a writer, such as Bynkershoek and others, who maintains that the practice of states (custom and treaties) constitutes the primary source of international

Positivism begins from certain premises, that the state is a metaphysical reality with a value and significance of its own, and that endowed with such reality the state may also be regarded as having a will. This psychological notion of a state-will is derived from the great German philosopher, Hegel. To the state-will, the positivists attribute complete sovereignty and authority.

Pursuant to their initial assumptions, the positivists regard international law as consisting of those rules which the various state-wills have accepted by a process of voluntary self-restriction (*selbstbeschränkung*).[8] Without such manifestation of consent, international law would not be binding on the society of states. Zorn, one of the most characteristic of the positivists, indeed regarded international law as a branch of state law, as external public law (*äusseres Staatsrecht*), and only for that reason binding on the state.[9]

The positivists concede that the difficulty in the application of their theory relates to customary international law. They admit that sometimes it is impossible to find an express consent in treaties, state papers, public documents, diplomatic notes, or the like, to being bound by particular customary rules. They therefore, consistently with their consensual theory, argue that in such exceptional cases the consent must be regarded as 'tacit' or 'implied'.[10] This reasoning is often carried a stage further by arguing that membership of the society of states involves an implied consent to the binding operation of established customary rules of international law. On the face of it, this is begging the question, as such a general implied consent could only be conditioned by some fundamental rule of international law itself, and it would still be necessary to explain the source and origin of this fundamental rule.

The outstanding positivist has been the Italian jurist Anzilotti (1867–1950), later a judge of the Permanent Court of International Justice from 1921 to 1930. In Anzilotti's view, the binding force of international law can be traced back to one supreme, fundamental principle or norm, the principle that agreements between states are to be respected, or as the principle is better known, pacta sunt servanda. This norm pacta sunt servanda is an absolute postulate of the international legal system, and manifests itself in one way or another in all the rules belonging to

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law. Also, some 'positivists' held that the only true law, 'positive' law, must be the result of some externally recognisable procedure; see Ago 'Positive Law and International Law', 51 AJIL (1957) 691–733.

8. The *selbstbeschränkung* theory was adopted by Jellinek in his work, *Die rechtliche Natur der Staatenverträge* (1880).
9. Another refinement of positivist theory is Triepel's view that the obligatory force of international law stems from the *Vereinbarung*, or agreement of states to become bound by common consent; this agreement is an expression of a 'common will' of states, and states cannot unilaterally withdraw consent.
10. This view has also been adopted by Soviet Russian jurists; see Professor G. I. Tunkin's *Droit International Public: Problèmes Théoriques* (Paris, 1965 tr from Russian) p 80.

international law. Consistently with this theory, Anzilotti holds that just as in the case of treaties, customary rules are based on the consent of states, and there is here an implied agreement. The following passage from his treatise[11] illustrates his views:

> 'Every legal order consists of a complex of norms which derive their obligatory character from a fundamental norm to which they all relate, directly or indirectly. The fundamental norm determines, in this way, which norms compose a given legal order and gives unity to the whole. The international legal order is distinguished by the fact that, in this order, the principle pacta sunt servanda does not depend, as in international law, upon a superior norm; it is itself the supreme norm. The rule according to which "States must respect the agreements concluded between them", thus constitutes the formal criterion which distinguishes the norms of which we speak from other norms and gives unity to the whole; all norms, and only the norms, which depend upon this principle *as the necessary and exclusive source of their obligatory character*, belong to the category of those with which we are concerned here.'

The main defect in this analysis is that the norm pacta sunt servanda is only partially an explanation of the binding force of international law. Anzilotti's view that customary rules are binding on states by virtue of an implied pactum (or treaty) is no more convincing than the 'tacit' consent arguments of other positivists.

The principal objections to positivism as a whole may be formulated as follows:

(1) The notion of the state-will is purely metaphorical, and is used to express the fact that international law is binding on the state. It does not explain the fact. For example, when a treaty has been ratified by, say, Great Britain, we can if we like say that the ratification is an expression of Great Britain's will to become bound by the treaty. This language, however alluring and figurative, merely describes a situation of fact, that the competent British executive organ has ratified a treaty, and that the British people through their representatives have become responsible for the fulfilment of treaty obligations. The state-will is thus a mere *façon de parler*, as the only will or wills which operate are those of the individuals who govern Great Britain.

(2) It is difficult to reconcile the facts with a consensual theory of international law. In the case of customary rules, there are many instances where it is quite impossible to find any consent by states to the binding effect of these rules. Moreover, the consensual theory breaks down in the crucial case of a new state admitted into the family of nations, as, for example, those African states, emerged since 1957 by way of 'decol-

11. *Corso di Diritto Internazionale* (3rd edn, 1928) Vol I, p 43.

onisation'.[12] Such a new state is bound by international law from the date of its emancipation without an express act of consent. The idea that in such an instance there is a 'tacit' or 'implied' consent, merely strains the facts. The reality is that other states look to the new state to comply with the whole body of established international law. This has consistently been the attitude of two influential Great Powers—the United States of America and Great Britain. As to the United States, the authoritative Moore's *Digest of International Law*[13] says:

> 'The Government of the United States has on various occasions announced the principle that international law, as a system, is binding upon nations, not merely as something to which they may be tacitly assumed to have agreed, but also as a fundamental condition of their admission to full and equal participation in the intercourse of civilised States.'

Professor H. A. Smith on an examination of British official legal opinions and state papers relative to questions of international law declared that therein:[14]

> '... It is clearly emphasised that international law as a whole is binding upon all civilised States irrespective of their individual consent, and that no State can by its own act release itself from the obligation either of the general law or of any well established rule.'

(3) It is never necessary in practice when invoking a particular rule of international law against a particular state to show that that state has assented to it diplomatically. The test applied is whether the rule is one generally recognised by the society of states. As Westlake[15] has put it:

> 'It is enough to show that the general *consensus* of opinion within the limits of European civilisation is in favour of the rule.'

(4) There are concrete examples today of treaty rules, particularly those laid down by 'law-making' treaties, having an incidence upon states without any form of consent expressed by or attributable to them. A striking example is paragraph 6 of article 2 of the United Nations Charter, which provides that the United Nations is to ensure that non-member states shall act in accordance with the principles of the Charter so far as may be necessary for the maintenance of international peace and security.

12. See generally, Philip C. Jessup *The Birth of Nations* (1974), on the process of formation of new nations, and also passim the later book by James Crawford *The Creation of States in International Law* (1979).
13. (1906) Vol I, p 2.
14. *Great Britain and the Law of Nations* (1932) Vol I, pp 12–13.
15. *International Law* (1904) Vol I, p 16. Cf *West Rand Central Gold Mining Co v R* [1905] 2 KB 391 at 407.

These objections to positivism are by no means exhaustive,[16] but they sufficiently illustrate the main defect of the theory—the fallacy of the premise that some consensual manifestation is necessary before international law can operate.

In spite of its many weaknesses, positivist theory has had one valuable influence on the science of international law. It has concentrated attention on the actual practice of states by emphasising, perhaps unduly, that only those rules which states do in fact observe can be rules of international law. This has led to a more realistic outlook in works on international law, and to the elimination of much that was academic, sterile, and doctrinal.

Sanctions of observance of international law

A controversial question is the extent to which sanctions, including sanctions by way of external force, are available under international law, to secure observance of its rules. At one extreme there is the view that international law is a system without sanctions. However, it is not quite true that there are no forcible means of compelling a state to comply with international law. The United Nations Security Council may, pursuant to Chapter VII of the United Nations Charter of 26 June 1945, in the event of a threat to the peace, breach of the peace, or act of aggression, institute enforcement action against a particular state to maintain or restore international peace and security, and to the extent that the state concerned is in breach of international law, this is in effect a form of collective sanction to enforce international law. Also, under article 94, paragraph 2 of the Charter, if any state, party to a case before the International Court of Justice, fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the Security Council may upon application by the other state, party to the same case, make recommendations or decide upon measures to be taken to give effect to the judgment. It must be acknowledged, however, that the United Nations Charter does not otherwise allow the use of force, collectively or individually, for the enforcement of international law in general.[17] Under

16. Other criticisms of the positivists are that they rely almost entirely on the state practice, including treaties, of European and American states, inter se, to the neglect of practice and treaties in the relations, prior to the twentieth century, between Western states and Afro-Asian countries, and, as well, that they would exclude any recourse by international tribunals to intangible sources of law, such as equitable principles and persuasive analogies derivable from state domestic laws.

17. See Kunz 'Sanctions in International Law' 54 AJIL (1960) 324–347. United Nations 'peacekeeping' operations cannot, strictly speaking, be regarded as a category of sanctions for the observance of international law, although sometimes serving to prevent the occurrence of breaches of international law. The primary purpose of United Nations peacekeeping forces or peacekeeping missions is to restore or maintain peace, or to mitigate deteriorating situations, or to facilitate a settlement of a dispute likely to constitute a threat to the peace: see pp 655–657 below.

article 2, paragraph 4 of the Charter, member states are to refrain 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. The right of self-defence permitted to member states by article 51 of the Charter is only against an actual armed attack. These provisions have restricted the liberty formerly enjoyed by states to use forcible measures, short of war, such as retorsion and reprisals (see Chapter 17, below), or to go further and resort to war in order to induce other states to fulfil their international obligations. Historically, war used to be, in a sense, the ultimate sanction by which international law was enforced, but upon its strict interpretation the Charter prohibits the unilateral application, without the authority or licence of the Security Council, of sanctions to enforce international law, and permits only sanctions, of the nature of enforcement or preventative action, duly authorised by the Security Council, in order to maintain or restore international peace and security. These may include, not only the actual use of force, but also economic sanctions (eg, the imposition of a collective embargo upon trade with a particular state or entity), as has already occurred in the case of South Africa[18] and of Rhodesia (now the State of Zimbabwe).[19] Moreover, since the critical point is the need for the Security Council's authority, it is semble not required that force be applied collectively by a number of states, for a single individual member of the United Nations may be authorised to take unilateral forcible action, as occurred in 1966 when the United Kingdom was so authorised, for the purpose of preventing the transport of oil to Rhodesia.[20]

If the word 'sanctions' be taken in the larger sense of measures, procedures, and expedients for exerting pressure upon a state to comply with its international legal obligations, then the above-mentioned provisions of the United Nations Charter are not exhaustive of the sanctions which may become operative in different areas of international law. By way of illustration, reference may be made to the following instances:

a. Under the Constitution of the International Labour Organisation (see articles 24–34), a procedure is laid down for dealing with complaints regarding a failure by a member state to secure the effective observance of an International Labour Convention binding it; this can lead to a reference to a Commission of Enquiry, or if necessary to the Inter-

18. See, eg, the Resolutions of the Security Council of 7 August 1963, and 18 June 1964, calling upon all states to cease the sale and shipment to South Africa of arms, ammunition of all types, and military vehicles.
19. See, eg, the Resolution of the Security Council of 20 November 1965, calling upon all states to do their utmost in order to cease all economic relations with Rhodesia, such cessation to include an embargo on oil and petroleum products.
20. See, eg, the Resolution of the Security Council of 9 April 1966, empowering the United Kingdom to take steps, by the use of force if necessary, to prevent ships taking oil to ports from which it could be supplied or distributed to Rhodesia.

national Court of Justice, and in the event of a member state failing to carry out the recommendations in the Commission's report or in the decision of the International Court of Justice, the Governing Body of the Organisation may recommend *'action'* to the International Labour Conference in order to secure compliance with the recommendations.[1]

b. Under the Single Convention on Narcotic Drugs of 30 March 1961 (see article 14), if any country or territory fails to carry out the provisions of the Convention, the aim of which is to limit the quantity of narcotic drugs in use to the amount needed for legitimate purposes, a body known as the International Narcotics Control Board is entitled to call for explanations from the country or territory; should the explanations be unsatisfactory, the Board may call the attention of other competent United Nations organs to the position, and may go to the length of recommending a stoppage of drug imports or exports or both to and from the country or territory in default.

c. The constituent instruments of certain international organisations provide that member states not complying with the basic principles laid down in these instruments may be suspended or expelled, or otherwise denied the benefits and privileges of participation[2] (see eg, article 6 of the United Nations Charter).

d. An international legal obligation is sometimes enforceable through the procedures of domestic legal systems, subject to the appropriate sanctions applying under these systems; for example, under articles 54–55 of the Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, each contracting state is to recognise an arbitral award made pursuant to the Convention as binding, and is to enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court in that state.

e. Acts by a particular state, in breach of international law, may sometimes be treated by other states as invalid and inoperative. In its Advisory Opinion of 21 June 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, the International Court of Justice ruled that South

1. Quaere whether 'action' could include economic sanctions; see Landy *The Effectiveness of International Supervision* (1966) p 178.
2. See Joseph Gold in 66 AJIL (1972) 744–751, as to denials of benefits and declarations of ineligibility in the case of the International Monetary Fund where a member of the Fund fails to comply with its obligations. Note also the compulsory jurisdiction conferred on the European Court of Justice by arts 170 and 173 of the Treaty of Rome of 25 March 1957 (establishing the European Economic Community), enabling the Court to review the legality of acts of member states and of the Council and Commission, where it is alleged that there have been infringements of provisions of the Treaty.

> Africa's continued presence in Namibia (South West Africa) was illegal, and that member states of the United Nations were obliged to recognise the invalidity of South Africa's acts as to Namibia, and to refrain from acts and dealings with South Africa implying acceptance of the legality of its presence in, and administration of Namibia, or lending support or assistance to these.[3]

Notwithstanding the sanctions possible under the United Nations Charter, together with the range of pressures which may be applied to compel a state to comply with international law, it still remains true that the international community does not have available to it a permanent organised force for securing obedience to the law, similar to that which exists in a modern state. The question then is whether this complete absence of an organised external force necessarily derogates from the legal character of international law. In this connection, there is a helpful comparison to be made between international law and the canon law, the law of the Catholic Church. The comparison is the more striking in the early history of the law of nations when the binding force of both systems was founded to some extent upon the concept of the 'law of nature'. The canon law is like international law unsupported by organised external force, although there are certain punishments for breach of its rules, for example, excommunication and the refusal of sacraments. But generally the canon law is obeyed because as a practical matter, the Catholic society is agreeable to abide by its rules. This indicates that international law is not exceptional in its lack of organised external force.

Nor should it be forgotten that there are tangible sanctions for those rules of international law, at least, which impose duties upon individuals. For example, persons who, contrary to international law, commit war crimes, are no less subject to punishment than those who are guilty of criminal offences under municipal law. Another illustration is that of the international law crime of piracy jure gentium; every state is entitled to apprehend, try, and punish (if convicted) persons guilty of this crime (see Geneva Convention on the High Seas of 29 April 1958, arts 19 and 21, the United Nations Convention on the Law of the Sea of 10 December 1982, arts 101–107, and Chapter 9 below). Similarly, under the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft, hijacking and like acts endangering the safety of aircraft, and persons and property on aircraft, are made punishable by contracting States who are entitled to place offenders in custody and take other appropriate measures.[4]

It is clear from the above analysis of theories as to the basis of international law, that a complete explanation of its binding force, embracing all cases and conditions, is hardly practicable. Indeed, there

3. ICJ, 1971, 16 at 54, 56.
4. See below, pp 236–241.

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is something pedantic in the very notion that such a comprehensive explanation is necessary or desirable.

Apart from the sanctions and pressures mentioned above, the main elements reinforcing the obligatory character of the rules of international law are the empirical facts that states will insist on their rights under such rules against states which they consider should observe them, and that states recognise international law as binding upon them.[5] Obviously, if states did not insist on respect for these rules, international law would not exist. The ultimate reasons that impel states to uphold the observance of international law belong to the domain of political science, and cannot be explained by a strictly legal analysis. In other words, to some extent at least, the problem of the binding force of international law ultimately resolves itself into a problem no different from that of the obligatory character of law in general.

5. Cf the late Sir Gerald Fitzmaurice in (1956) 19 MLR 8–9.

CHAPTER 2

The material 'sources' of international law

The material 'sources'[1] of international law may be defined as the actual materials from which an international lawyer determines the rule applicable to a given situation. These materials fall into five principal categories or forms:

1. Custom.
2. Treaties.
3. Decisions of judicial or arbitral tribunals.
4. Juristic works.
5. Decisions or determinations of the organs of international institutions.

From a practical standpoint, we may imagine the legal adviser to a particular Foreign Office called upon for an opinion on international law in regard to some special matter. His task is by no means as straightforward as that of a practising lawyer concerned only with state law. He has no codes, no statute books, and often he is in the realm of uncertainty either because it is not clear whether a customary rule of international law has been established or because there is neither usage nor practice nor opinion to guide him as to the correct solution. At all events, he must quarry for the law among these material 'sources', assisted by his own faculties of logic and reasoning, and his sense of justice.

It will be found that the same practical approach has been adopted by courts which have decided questions of international law. Under article

1. The term 'sources' has been placed in inverted commas in order to mark the fact that, although frequently used as above, it is liable to misconstruction. On the matters covered in the present chapter, see generally Parry *The Sources and Evidences of International Law* (1965). The material sources of international law must be distinguished from its intangible sources, eg, reason and equitable principles, which both can play an important role. For instance, equitable principles have been relied upon by the International Court of Justice in a series of notable decisions since 1969, including the *North Sea Continental Shelf Cases* [1969] ICJ 1969, 3, the *Fisheries Jurisdiction (Merits) Case* [1974] ICJ 1974, 3, the *Continental Shelf (Tunisia/Libya) Case* ICJ 1982, 18, and more recently in the *Gulf of Maine Boundary (United States/Canada) Case* [1984] ICJ 246, the *Continental Shelf (Libya/Malta) Case* ICJ 1985, 13 and the *Burkina Fasco-Republic of Mali Boundary Case* ICJ 1985, 554. See also D.H. Ott *Public International Law in the Modern World* (1987) pp 27–29.

38 paragraph 1 of its present Statute,[2] the International Court of Justice is directed to apply the following:

1. International treaties.[3]
2. International custom, as evidence of a general practice accepted as law.
3. The general principles of law recognised by civilised nations.
4. Judicial decisions and the teachings of the most highly qualified publicists of the various countries as subsidiary means for the determination of rules of law.

The order of the materials in this article is not the same as set out above, nor does it embrace the decisions of arbitral tribunals bearing on legal matters, or the decisions or determinations of the organs of international institutions, while it includes one material, 'the general principles of law recognised by civilised nations', which is not given above as a material 'source'. This latter was inserted in the Court's Statute in order to provide an additional basis for a decision in case the other materials should give no assistance to the Court. These 'general principles' were to be applied by analogy, and would be derived by selecting concepts recognised by all systems of municipal law. Such was clearly the intention originally of the draftsmen of the Statute,[4] confirmed in the context of article 9, under which electors of the judges are to bear in mind that the Court should be representative of 'the main forms of civilisation and of the principal legal systems of the world', and the attempt by certain

2. This provision is similar to the corresponding provision in art 38 of the Statute of the Permanent Court of International Justice, except that it is expressly said in the new provision that the Court's function is 'to decide in accordance with international law such disputes as are submitted to it'. The Manual of the International Court of Justice, published in 1976 under the title, *The International Court of Justice*, lists also 'unilateral acts of international law' (eg state declarations of acceptance of international obligations) as another material which could be used by the Court, although not mentioned in art 38. See as to unilateral acts, the *Nuclear Tests Case (Judgment)* ICJ 1974, 253 at 267–268.
3. These are described as 'international Conventions, whether general or particular, establishing rules expressly recognised by the contesting States'.
4. In the Advisory Committee of Jurists which in 1920 drafted the corresponding article of the Statute of the Court's predecessor, the Permanent Court of International Justice, Lord Phillimore pointed out that the 'general principles' referred to were those accepted by all nations in the municipal sphere, such as certain principles of procedure, the principle of good faith, and the principle of res judicata; Proceedings of the Committee, p 335. In the *Case Concerning the Barcelona Traction, Light and Power Co Ltd (Second Phase)* ICJ 1970, 3, the International Court of Justice had regard to the general rule under municipal legal systems (see paragraph 50 of the Court's judgment) which indicated that an infringement of a company's rights by outsiders did not involve liability towards the shareholders individually; from this the Court reached the conclusion that the national state of the shareholders was not normally entitled to espouse the claim of the shareholders for loss suffered through an international wrong done to the company itself.

writers to give some other interpretation to these words is both artificial and unconvincing.[5] Widely quoted or popularised maxims of law are not of themselves 'general principles', in this sense. The revised American Law Institute Restatement of the Foreign Relations Law of the United States (1986) has categorised these 'general principles' as a 'secondary source of international law' (see § 102).

On several occasions the former Permanent Court of International Justice found it necessary to apply or refer to such 'general principles'. Thus in the *Chorzów Factory (Indemnity) Case*, it applied the principle of res judicata and it referred to the 'general conception of law', that 'any breach of an engagement involves an obligation to make reparation'.[6] In the *Mavrommatis Palestine Concessions Case*, the Court referred to the 'general principle of subrogation',[7] and in the *Case of the Diversion of Water from the Meuse*, Judge Manly O. Hudson expressed the view that the Court might apply Anglo-American equitable doctrines as being 'general principles'.[8] But on at least one occasion, the Court refused to apply an alleged 'general principle'—in the *Serbian Loans Case* where it held that the principle in English law known as 'estoppel' was inapplicable.[9] On the other hand, the private law doctrine of trusts was considered as helpful in order to deal with certain questions relating to the Mandates and Trusteeship systems.[10] 'General principles' include

5. Among the various interpretations given to the words 'general principles of law recognised by civilised nations' there have been the following: (a) General principles of justice; (b) Natural law; (c) Analogies derived from private law; (d) General principles of comparative law; (e) General principles of international law (the view adopted by certain Soviet writers); (f) General theories of law; (g) General legal concepts. See also Rousseau *Principes Généraux du Droit International Public* (1944) Vol 1, pp 889 et seq. According to Professor G. I. Tunkin, the 'general principles' are to be derived only from two sources, treaty and custom; see his *Droit International Public: Problèmes Théoriques* (Paris, 1965, tr from Russian) p 127. The principle of freedom of association for trade union purposes has been considered by some writers (eg Jenks) to have become a general principle of law by a process of 'emancipation' from its original treaty basis, through the impact of persistent action by the International Labour Organisation (ILO), penetrating the world's major legal systems; Alexandrowicz *The Law-Making Functions of the Specialised Agencies of the United Nations* (1973) pp 38, 156.
6. Pub PCIJ (1928), Series A, No 17, p 29.
7. Pub PCIJ (1924), Series A, No 2, p 28.
8. Pub PCIJ (1937), Series A/B, Fasc No 70 pp 76 et seq.
9. Pub PCIJ (1929), Series A, Nos 20–21, pp 38–9. Yet the International Court of Justice applied the principle of estoppel or preclusion in the *Case Concerning the Temple of Preah Vihear* ICJ 1962, 6, and also dealt with that principle in the *Barcelona Traction Case, Preliminary Objections* ICJ 1964, 6, where however the principle was held not to debar Belgium from proceeding. Note also the references to estoppel: (a) in the *North Sea Continental Shelf Cases* ICJ 1969, 3 at 26 in respect to the question whether a non-party had accepted a treaty provision; and (b) in the *Argentina-Chile Boundary Arbitration Award* (HMSO, 1966) pp 66–68, as to alleged estoppels by reason of representations regarding the course of boundary lines.
10. See *Advisory Opinion on the Status of South West Africa* ICJ 1950, 146–150.

procedural[11] and evidentiary principles, as well as principles of substantive law, provided that these do possess some character of generality over and above the context of each particular legal system to which they belong in common. However, these 'general principles' are less a material 'source' of international law than a particular instance of judicial reason and logic which the most authoritative international tribunal of the day is specially enjoined to employ.[12]

From the theoretical standpoint, the provision for applying the 'general principles' has been regarded as 'sounding the death-knell' of positivism, inasmuch as it explicitly rejects the broad positivist view that custom and treaties are to be considered the exclusive sources of international law. It has also been said to resolve the problem of non liquet, ie the powerlessness of an international court to decide a case legally because of inability to find any rules of law that are applicable.[13] Finally, the provision may fairly be considered as not laying down a new rule, but as being merely declaratory of the long-established practice of international courts.[14]

Each of the material 'sources' will now be discussed in turn.

1. CUSTOM[15]

Until recent times, international law consisted for the most part of customary rules. These rules had generally evolved after a long historical process culminating in their recognition by the international community. The preponderance of traditional customary rules was diminished as a result of the large number of 'law-making' treaties concluded since the

11. In the *South West Africa Cases, 2nd Phase* ICJ 1966, 6 at 39, 47, the International Court of Justice applied the 'universal and necessary' principle of procedural law that there was a distinction between: (a) a plaintiff's legal right appertaining to the subject-matter of his claim; and (b) his right to activate a Court and the Court's right to examine the merits; and at the same time, it refused to allow anything like an actio popularis, ie a right in a member of a community to vindicate a point of public interest, albeit such actio was known to certain domestic legal systems.
12. For a discussion of the whole subject of 'general principles', see Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (1953), and Schlesinger 51 AJIL (1957) 734–753.
13. Art 11 of the model Draft Articles on Arbitral Procedure drawn up by the International Law Commission of the United Nations in 1958 provides that an arbitral tribunal is not to bring in a finding of non liquet 'on the ground of the silence or obscurity of the law to be applied'.
14. Cf Guggenheim *Traité de Droit International Public*, Vol I (2nd edn, 1967) pp 299–301. In which connection, note also the *Aramco Concession Award* (1958).
15. See passim Wolfke *Custom in Present International Law* (1964); D'Amato *The Concept of Custom in International Law* (1971); Bin Cheng 'Custom: The Future of General State Practice in a Divided World' in Macdonald and Johnston (eds) *The Structure and Process of International Law* (1983) 513 et seq; M. E. Villiger *Customary International Law and Treaties* (1985).

middle of the last century, and must progressively decline in measure as the work of the International Law Commission[16] in codifying and restating customary rules produces results in treaties such as the Vienna Conventions of 18 April 1961, of 24 April 1963 and of 22 May 1969, on Diplomatic Relations, Consular Relations, and the Law of Treaties respectively. Yet according to views recently expressed by some writers, international custom may still have a significant role to play as a dynamic source of fresh rules of international law where the international community undergoes change in new areas untouched by treaties, judicial decisions or the writings of jurists.

The terms 'custom' and 'usage' are often used interchangeably. Strictly speaking, there is a clear technical distinction between the two. Usage represents the twilight stage of custom. Custom begins where usage ends. Usage is an international habit of action that has not yet received full legal attestation. Usages may be conflicting, custom must be unified and self consistent. *Viner's Abridgement*, referring to custom in English law, has the matter in a nutshell.[17]

> 'A custom, in the intendment of law, is such a usage as hath obtained the force of a law.'

A customary element has, as we have seen, been a feature of the rules of international law from antiquity to modern times. In ancient Greece, the rules of war and peace sprang from the common usages observed by the Greek City States. These customary rules crystallised by a process of generalisation and unification of the various usages separately observed by each city republic. A similar process was observable among the small Italian states of the Middle Ages. When in the sixteenth and seventeenth centuries Europe became a complex of highly nationalised, independent territorial states, the process was translated to a higher and more extensive plane. From the usages developed in the intercourse of modern European states there emerged the earliest rules of international law.

Customary rules crystallise from usages or practices which have evolved in approximately three sets of circumstances:

(a) *Diplomatic relations between states.* Thus acts or declarations by statesmen, opinions of legal advisers to state governments, bilateral treaties,[18] and now press releases or official statements by government spokesmen may all constitute evidence of usages followed by states.

16. See Ch 1, above, at p 16, n 10. In the *Gulf of Maine Boundary (United States/Canada) Case* ICJ 1984, 246, a special chamber of the International Court of Justice distinguished customary international law and treaties, declaring that the former could not be expected to provide equitable criteria and guidelines for practical methods to be followed in the delimitation of maritime boundaries to the same degree as treaty law.
17. Viner *Abridgement* vii, 164, citing *Tanistry Case* (1608) Dav Ir 28.
18. See also below, pp 44–45.

In this regard, both conduct and statements (written and oral) are on the same footing.

(*b*) *Practice of international organs.* The practice of international organs, again whether by conduct or declarations, may lead to the development of customary rules of international law concerning their status, or their powers and responsibilities. Thus in its Advisory Opinion holding that the International Labour Organisation had power to regulate internationally the conditions of labour of persons employed in agriculture, the Permanent Court of International Justice founded its views to a certain extent on the practice of the Organisation.[19] In a noted Advisory Opinion, the International Court of Justice based its opinion that the United Nations had international legal personality, partly on the practice of the United Nations in concluding conventions.[20]

(*c*) *State laws, decisions of state courts, and state military or administrative practices.* A concurrence, although not a mere parallelism, of state laws or of judicial decisions of state courts or of state practices may indicate so wide an adoption of similar rules as to suggest the general recognition of a broad principle of law. This is particularly well illustrated by a decision of the United States Supreme Court, *The Scotia.*[1] The facts were as follows: In 1863 the British Government adopted a series of regulations for preventing collisions at sea. In 1864 the American Congress adopted practically the same regulations, as did within a short time after, the governments of nearly all the maritime countries. Under these circumstances the *Scotia* (British) collided in mid-ocean with the *Berkshire* (American), which was not carrying the lights required by the new regulations. As a result, the *Berkshire* sank. The question was whether the respective rights and duties of the two vessels were determined by the general maritime law before the British regulations of 1863. It was held that these rights and duties must be determined by the new customary rules of international law that had evolved through the widespread adoption of the British regulations, and that therefore the fault lay with the *Berkshire:*

> 'This is not giving to the Statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.'

For evidence of state practices, it may be necessary to refer to official books or documents, such as military, naval, and Air Force manuals, or

19. Pub PCIJ (1922), Series B, No 2, especially at pp 40–41.
20. *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* ICJ 1949, 174 et seq.
1. (1871) 14 Wallace 170 at 188.

the internal regulations of each state's diplomatic and consular services. Comparison of these may indicate the existence of a practice uniformly followed by all states.

A general, although not inflexible, working guide is that before a usage may be considered as amounting to a customary rule of international law, two tests must be satisfied. These tests relate to: (i) the material, and (ii) the psychological aspects involved in the formation of the customary rule.

As regards the material aspect, there must in general be a recurrence or repetition of the acts which give birth to the customary rule. A German court held in the case of *Lübeck v Mecklenburg-Schwerin*[2] that a single act of a state agency or authority could not create any rights of custom in favour of another state which had benefited by the act; conduct to be creative of customary law must be regular and repeated.[3] Material departures from a practice may negative the existence of a customary rule, but minor deviations may not necessarily have this negative consequence.[4] Apart from recurrence, the antiquity of the acts may be also a pertinent consideration. Yet even a short time may be enough where the state practice has been extensive and for all practical purposes uniform (eg, as with evolution of the principle that a coastal state has the rights of exploitation, etc, in respect to its continental shelf; see below, pp 248–249).

The psychological aspect is better known as the *opinio juris sive necessitatis*, or as one authority[5] has termed it 'the mutual conviction that the recurrence ... is the result of a compulsory rule'. This needs further explanation. Recurrence of the usage or practice tends to develop an expectation that, in similar future situations, the same conduct or the abstention therefrom will be repeated. When this expectation evolves further into a general acknowledgment by states that the conduct or the abstention therefrom is a matter both of right and of obligation,[6] the

2. See Annual Digest of Public International Law Cases 1927–8, No 3.
3. There are none the less certain instances of a single act creating a custom; eg, in the practice of international organisations, when a Resolution or decision may suffice to create a precedent for future action. In the *Asylum Case* ICJ 1950, 276–277, the International Court of Justice stressed the necessity for constancy and uniformity of usages or practices, before they can be recognised as custom. See also Kunz in 47 AJIL (1953) 662 et seq.
4. Cf *Anglo-Norwegian Fisheries Case* ICJ 1951, 116 at 138.
5. Judge Negulesco of the Permanent Court of International Justice, Pub PCIJ (1927), Series B, No 14, at p 105. Cf Briggs 45 AJIL (1951) 728–731.
6. The necessity for customary rules to have binding quality was stressed by the International Court of Justice in the *Case Concerning Rights of Nationals of the United States of America in Morocco* ICJ 1952, 199–200. See also dicta of the Court in the *Asylum Case* ICJ 1950, 276–277. In the *North Sea Continental Shelf Cases* ICJ 1969, at 44, the Court stressed that opinio juris involved a feeling by states that they were conforming to what amounted to a legal obligation; habitual action in itself was not enough. In the *Nicaragua v The United States (Merits) Case* ICJ 1986, 14, the Court took the view that the general consent of member states of the United Nations to the

transition from usage to custom may be regarded as consummated. In this process, there is involved, to some extent, an element of acceptance or assent on the part of states generally. This conviction, this opinio juris, is a convenient if not invariable test that a usage or practice has crystallised into custom; there is, for example, an absence of opinio juris when states conform to a usage for motives of comity or courtesy only.[7] At the same time, the opinio juris is not an essential element of custom, but if it is present, it is helpful as distinguishing custom from a course of action followed as a matter of arbitrary choice or for other reasons.[8]

It would follow from the judgments of the Permanent Court of International Justice in the *Lotus Case*[9] that the opinio juris is a matter of inference from all the circumstances, not merely the detailed acts which constitute the material element of the alleged customary rule. One test for the existence of opinio juris is that set out in *West Rand Central Gold Mining Co v R.*[10] There the Court laid down that it must be proved by satisfactory evidence that the alleged rule 'is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it'. This amounts to a test of 'general recognition' by the international society of states.

Such test of 'general recognition' underlies the provision[11] in the Statute of the International Court of Justice, under which the Court is directed to apply international custom 'as evidence of a general practice accepted as law', and is to be found also in art 53 of the Vienna Convention of 1969 on the Law of Treaties providing that a norm of jus cogens must be one 'accepted and recognised by the international community of States *as a whole*'.

The International Court of Justice has held, however, in the *Right of Passage over Indian Territory Case* (Portugal-India),[12] that a *particular* practice between two states only, which is accepted by them as law, may give rise to a binding customary rule inter partes.

Judicial application of custom

Both national and international courts play an important role in the

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adoption of resolutions of the United Nations General Assembly could be enough to serve to establish an *opinio juris* (in this instance the recognition of a customary rule prohibiting the use of force per se).

7. See p 20 above. In this connection, it is relevant to consider the acquiescence of other states, and the matter of protest or absence of protest by such states; cf Oppenheim *International Law* (8th edn, 1955) Vol I, pp 874–875. Bin Cheng, *op cit*, (n 15 above, in this chapter) p 548 takes the view, however, that *opinio juris* is in fact 'the essence' of general international law.
8. See Kelsen *General Theory of Law and State* (1961 edn) p 114.
9. Pub PCIJ (1927), Series A, No 10.
10. [1905] 2 KB 391 at 407.
11. See art 38 of the Statute.
12. ICJ 1960, 6.

application of custom. Often it is claimed by one of the parties before the court that a certain rule of customary international law exists. The court must then investigate whether or not the rule invoked before it is a validly established rule of international custom, and in the course of this inquiry it examines all possible materials, such as treaties, the practice of states, diplomatic correspondence, decisions of state courts, and juristic writings. In certain cases, the court's function may be more than purely declaratory; while not actually creating new customary rules, the court may feel constrained to carry to a final stage the process of evolution of usages so generally recognised as to suggest that by an inevitable course of development they will crystallise into custom. To use Mr Justice Cardozo's words, by its *imprimatur* the Court will attest the 'jural quality' of the custom.[13]

Two instructive cases illustrating the judicial methods in the application of custom are *The Paquete Habana*,[14] a decision of the United States Supreme Court, and the *Lotus Case*,[15] a decision of the Permanent Court of International Justice.[16] In the former case, the Supreme Court, after a detailed investigation of the materials mentioned above, namely state laws and practices, treaties, writings of publicists evidencing usage, and decisions of courts, found that they uniformly proved the existence of a valid customary rule giving immunity to small fishing vessels, honestly pursuing their calling, from belligerent capture in time of war; in the latter case, the Permanent Court, following the same method, decided that there was no customary rule conferring exclusive penal jurisdiction in maritime collision cases (on the high seas) on the country of the ship's flag, as regards all incidents on the ship, because, of the relevant materials considered, state laws were not consistent, decisions of state courts conflicted, no uniform trend could be deduced from treaties, and publicists were divided in their views. Although the same method of detailed

13. See *New Jersey v Delaware* 291 US 361 1934, at 383–384.
14. 175 US 677 1900.
15. Pub PCIJ (1927), Series A, No 10.
16. These two cases should, however, be used with caution, as the customary rule found to exist according to *The Paquete Habana*, viz, the immunity of small fishing vessels from belligerent action in time of war is, semble, now obsolete, while the alleged customary rule of exclusive penal jurisdiction of the flag state in maritime collision cases (on the high seas) negatived in the *Lotus Case*, was adopted by the Geneva Conference of 1958 on the Law of the Sea, and formulated as art 11 para 1 of the Convention on the High Seas of 29 April 1958 (subject to the concurrent jurisdiction of the state of nationality over the persons responsible for the collision, etc), and a similar provision is now contained in art 97 of the United Nations Convention on the Law of the Sea of 10 December 1982. A more recent illustration of judicial investigation of the problem whether the practice of states conclusively reflects the existence of a customary rule of international law is the *North Sea Continental Shelf Cases* ICJ 1969, 3 where the International Court of Justice ruled against the existence of a customary rule that the division of a common continental shelf of adjacent countries must be effected according to the equidistance principle.

consideration of all materials was followed in both cases, weightier proof of the customary rule was required by the Permanent Court than by the Supreme Court, and owing to the absence of such proof the Permanent Court decided against the existence of the rule.

The general approach of the International Court of Justice to the question of judicial recognition of customary rules was described in its Manual of 1976[17] as follows:

> 'The Court's decisions show that a State which relies on an alleged international custom practised by States must, generally speaking, demonstrate to the Court's satisfaction that this custom has become so established as to be binding on the other party. This attitude of judicial caution ... is confirmed by the experience of the International Law Commission and of international legal conferences and is consistent with another trend in the Court's decisions, viz., that the autonomy or sovereignty of a State should be respected unless the Court is duly satisfied that such autonomy or sovereignty is limited by rules that are binding on that State.'

The difficulties involved in extracting a customary rule or principle of international law from the mass of heterogeneous documentation of state practice, state judicial decisions, diplomatic history, etc, are not to be minimised, as the two cases just mentioned, *The Paquete Habana* and *The Lotus*, amply illustrate. Not only, also, is the documentation itself frequently defective or incomplete, but the practice of some states is documented less adequately than that of other states. Moreover, the experience of the International Law Commission, and of the conferences called from 1958 onwards to consider the Commission's drafts, revealing as it did so much disagreement in areas where there were customary rules assumed to be generally recognised, should induce the utmost caution in drawing inferences as to the existence of such general recognition.

By article 24 of its Statute of 21 November 1947, the International Law Commission of the United Nations was specifically directed to 'consider ways and means for making the evidence of customary international law more readily available',[18] and the Commission subsequently reported to the General Assembly of the United Nations on the matter.[19]

17. *The International Court of Justice* (1976) p 66.
18. See Memorandum submitted by the Secretary-General of the United Nations 1949, 'Ways and Means of Making the Evidence of Customary International Law more readily Available'.
19. Among the Commission's recommendations was one that the General Assembly should call the attention of governments to the desirability of their publishing Digests of their diplomatic correspondence. The matter has also occupied the General Assembly at its sessions in 1950 and subsequent years. For the Commission's recommendations, see *Report* on the work of its second session (1950) and also *The Work of the International Law Commission* (3rd edn, 1980) pp 23–24. Since the time when the Commission's recommendations were made, the Secretary-General of the United Nations has been authorised by the General Assembly to issue most of the publications so recommended, as well as certain other publications pertinent to the recommendations. A number of

2. TREATIES

Treaties represent a second important material source of international law.[20] That importance is increasing.

The effect of any treaty in leading to the formation of rules of international law depends on the nature of the treaty concerned. In this connection there is a useful, although not rigid, distinction between:

a. 'law-making' treaties, which lay down rules of universal or general application;
b. 'treaty-contracts' for example, a treaty between two or only a few states,[1] dealing with a special matter concerning these states exclusively. This corresponds to some extent to the distinction made by continental jurists between *Vereinbarungen* and *Verträge*.

a. 'Law-making' treaties

The provisions of a 'law-making' treaty are directly a source of international law. This is not so with the 'treaty-contracts', which simply purport to lay down special obligations between the parties only.

There has been an astonishing development of 'law-making' treaties since the middle of the nineteenth century. One authority[2] enumerated 257 such instruments concluded in the period 1864–1914. This rapid expansion of what has been called 'international legislation' was due to the inadequacy of custom in meeting the urgent demands of the international society of states for the regulation of its common interests. The urgency of these demands arose from the deep-rooted changes which were transforming the whole structure of international life. Industrial and economic developments were bringing states into closer intercourse with each other, and as international communications thus became more intimate, the range of interests springing from the relationships between

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countries have also commenced publishing or working on Digests or *Répertoires* of their practice, materials, etc relating to international law. In 1958 the General Conference of the United Nations Educational Scientific and Cultural Organisation (UNESCO) adopted two conventions with relevance to the subject, viz the Convention concerning the Exchange of Official Publications and Government Documents between States, and the Convention concerning the International Exchange of Publications.

20. There is a fairly consistent trend in Soviet Russian theoretical writings on international law to regard treaties as the primary or fundamental source of international law; see article by Triska and Slusser in 52 AJIL (1958) 699–726, and 51 AJIL (1957) 135–136 and Professor G. I. Tunkin's *Droit International Public: Problèmes Théoriques* (Paris, 1965, tr from Russian) p 92 (see ibid, pp 63–75 as to the extent to which treaties play a role in the formation of international law).

1. In certain cases, a bilateral treaty may have a 'law-making' effect; eg, the now historic Hay-Pauncefote Treaty of 1901 between the United States and Great Britain, providing that the Panama Canal should be free and open to the vessels of all nations on terms of entire equality. See below, pp 291–292, as to the Panama Canal Treaties concluded in 1977, superseding the former treaties.

2. Hudson *International Legislation* (1931) Vol I, pp xix et seq.

states grew in size and complexity. In some regulation of these complex international activities every state had a direct interest which rose superior to considerations of national autonomy and independence.

A rapid glance at the principal 'law-making' treaties and conventions concluded before and after the Second World War amply confirms this trend. These instruments deal, for example, with Red Cross work, weights and measures, the protection of industrial property, the protection of submarine cables, the suppression of the slave trade, aerial navigation, international waterways, the pacific settlement of international disputes, international economic and monetary questions, control of narcotics, and nationality and statelessness, all subjects which called urgently for international statute law, and where to rely on the growth over several years of customary rules would have been impolitic.

A 'law-making' treaty cannot in the nature of things be one containing rules of international law always of universal application. We are forced to admit that 'law-making' treaties may be of two kinds:

a. enunciating rules of universal international law, eg, the United Nations Charter;
b. laying down general or fairly general rules.[3]

Then, even to the extent that a 'law-making' treaty is universal or general, it may be really a 'framework Convention', imposing duties to enact legislation, or offering areas of choice, within the ambit of which states are to apply the principles laid down therein; see, eg, articles 35–37 (provisions for co-operation in the penal repression of the illicit drug traffic) of the Single Narcotic Drugs Convention signed at New York, 30 March 1961. Besides, some multilateral treaties are to a large extent either confirmatory of, or represent a codification of customary rules, as for example the Vienna Convention on Diplomatic Relations of 18 April, 1961.

The use of the term 'law-making' applied to treaties has been criticised by some writers on the ground that these treaties do not so much lay down rules of law as set out the contractual obligations which the states parties are to respect. In making such a criticism these writers overlook the number of conventions and international legislative instruments that are now *adopted* by the organs of international institutions, such as the General Assembly of the United Nations and the Conference of the International Labour Organisation, instead as before of being signed by the plenipotentiaries at diplomatic conferences. True it is that some of these conventions and instruments need to be ratified or accepted by states in order to come into force, but certain of them are not even expressed in the consensual form.

3. Cf distinction made by Quintana *Tratado de Derecho Internacional* (1963) Vol I, p 78. Cf also E. Vitta 'Le Traité Multilatéral, Peut-Il Etre Considéré comme un Acte Législatif?' *Annuaire Français de Droit International* (1960) pp 225–238.

It may be that the designation 'normative treaties' is the more appropriate one. This would be capable of embracing:

1. Treaties operating as general standard-setting instuments, or which states apply either on a de facto or on a provisional basis; eg, the General Agreement on Tariffs and Trade of 30 October 1947, which conditions the trading relations of so many non-party states;
2. Unratified conventions, significant as agreed statements of principles to which a large number of states have subscribed;
3. 'Closed' or 'limited participation' treaties opened for signature by a restricted number of countries;
4. Treaties formulating regional or community rules;
5. Treaties creating an internationally recognised status or régime, operative, to some extent, erga omnes; eg, the Twelve-Power Treaty on Antarctica signed at Washington, 1 December 1959;
6. Instruments such as Final Acts, to which are annexed International Regulations intended to be applied by states parties as general rules inter se; eg, the International Regulations of 1960 for preventing collisions at sea, formulated by the London Conference of the same year on the Safety of Life at Sea, and being an annex to the Conference's Final Act.[4]

Inter-agency agreements, ie those between international organisations, and in addition, even agreements between an international organisation and a state, can also be 'normative' in the sense that they may lay down norms of general application in certain areas.

The mere fact that there are a large number of parties to a multilateral convention does not mean that its provisions are of the nature of international law, binding non-parties. Generally speaking, non-parties must by their conduct distinctly evidence an intention to accept such provisions as general rules of international law. This is shown by the decision of the International Court of Justice in 1969 in the *North Sea Continental Shelf Cases*,[5] holding on the facts that article 6 of the Geneva Convention of 1958 on the Continental Shelf, laying down the equidistance rule for apportionment of a common continental shelf, had not been subsequently accepted by the German Federal Republic—a non-party—in the necessary manifest manner.

b. Treaty-contracts

In contrast to 'law-making' treaties, treaty-contracts are not directly a 'source' of international law. They may, however, as between the parties

4. These Regulations were superseded as a consequence of the effect of a convention adopted in 1972, upon the entry into force of that instrument. This convention was subsequently amended in 1981; see below, pp 288–289.
5. ICJ 1969, 3 at 25–26.

or signatories thereto, constitute particular law; hence the use of the expression 'particular' conventions in article 38, paragraph 1a of the Statute of the International Court of Justice.[6] Such treaties lead also to the formation of international law through the operation of the principles governing the development of customary rules.

There are three cases to be considered:

i. A series or a recurrence of treaties laying down a similar rule may produce a principle of customary international law to the same effect. Such treaties are thus a step in the process whereby a rule of international custom emerges. This function treaties share with, for example, diplomatic acts, state laws, state judicial decisions, and the practice of international organs. An illustration is the series of bilateral extradition treaties concluded during the nineteenth century from which such general rules as those that the nationals of the state demanding extradition and nationals of third states are extraditable, were deduced and were considered by some writers as being of general application. A further illustration is the number of identical provisions concerning consular privileges and immunities to be found in the numerous recent bilateral consular conventions and treaties, and which were used by the International Law Commission in 1960–1961 in drawing up its Draft Articles on Consular Relations,[7] which formed the basis of the later concluded convention of 24 April 1963.

ii. It may happen with a treaty originally concluded between a limited number of parties only that a rule in it be generalised by subsequent independent acceptance or imitation. In this case, the treaty represents the initial stage in the process of recurrence of usage by which customary rules of international law have evolved. Thus, for instance, the rule 'free ships, free goods", ie that enemy goods carried on a neutral vessel are in general immune from belligerent action, first appeared in a treaty of 1650 between Spain and the United Provinces, and became established only at a much later period after a long process of generalisation and recognition.[8] In the *North Sea Continental Shelf Cases*,[9] the International Court of Justice expressed the view that before a treaty provision could generate such a process of evolution into custom, it should potentially be of a norm-creating character so

6. *'Bilateralisation' of multilateral Conventions:* There is also the case of the novel technique of laying down general rules in a multilateral convention, with provision for states parties to enter into bilateral agreements confirming inter se and/or amplifying the rules in the convention; cf arts 21–23 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, adopted 26 April 1966, by the Hague Conference on Private International Law.
7. See *Report* on the work of the Commission's 13th Session (1961) Ch II.
8. See Hall *International Law* (8th edn, 1924) pp 837 et seq, for an account of the development of the rule.
9. ICJ 1969, 3 at 42.

as to be capable of maturing into a general rule of law. Apart from this, a widespread and representative participation in a treaty rule, inclusive of the states whose interests were specially affected, might be sufficient to mark completion of the process.

iii. A treaty may be of considerable *evidentiary* value as to the existence of a rule which has crystallised into law by an independent process of development. Such effect is due to the special authority and solemnity possessed by this type of instrument. One authority[10] has pointed out that it is 'a sound maxim that a principle of international law acquires additional force from having been solemnly acknowledged as such in the provisions of a Public Treaty'. It may also happen that a treaty is so framed as to contain a provision or provisions, that may be expressly or impliedly declaratory of a rule of international law; the evidentiary value of such provision or provisions is then, a fortiori, more compelling. It is of course true that if the treaty concerned provides in absolute or general terms for a right of withdrawal or the making of reservations, or even, in cases, for revision, this may tend to diminish the evidentiary value of the provision or provisions concerned.

3. DECISIONS OF JUDICIAL OR ARBITRAL TRIBUNALS

International judicial decisions

The only existing permanent international judicial tribunal with a general jurisdiction is the International Court of Justice, which in 1946 succeeded the former Permanent Court of International Justice, itself first created in 1921. The International Court of Justice functions under a Statute containing virtually the same organic regulations as the Statute of the former Permanent Court. During the period 1921–1940, the Permanent Court gave a large number of judgments and advisory opinions on matters of international import, thereby contributing, as was intended by the founders of the Court, to the development of international jurisprudence. The work of its successor has been of equal importance.

It would be misleading to say that any decision of the former Permanent Court created a binding rule of international law. Under article 59 of its Statute (now article 59 of the Statute of the new International Court of Justice) the Court's decisions were to have 'no binding force except between the parties and in respect of that particular case'. Pursuant to its Statute, the Permanent Court did not treat its own prior decisions as per

10. Phillimore *Commentaries upon International Law* (2nd edn, 1871) Vol I, p 52. Declarations adopted by international diplomatic conferences may also be of evidentiary value as to rules of international law, although not purporting to state or affirm norms of international law; eg, the Helsinki Declaration adopted on 1 August 1975 by the Conference on Security and Co-operation in Europe. See comment by Harold S. Russell 70 AJIL (1976) 248.

se binding, and such decisions could therefore hardly be regarded by the international society of states as binding legal precedents. The Court, however, did use its prior decisions for guidance as to the law, for example, for purposes of illustrating or distinguishing the application of particular rules; also, it had regard to the principles of international law and to the reasoning on which previous decisions were based, since the expression 'decision' in article 59 connoted only the operative portion of the Court's judgment, as distinct from the grounds given for such judgment; and as a general practice it followed a line or series of its prior decisions and opinions which were consistently of a similar trend, although it did not at any time purport to bind itself by any expressed doctrine of judicial precedent. The present International Court of Justice has in its turn followed a practice consistent with that of its predecessor.[11] Moreover, the International Court has shown that it regards itself as free to 'develop' international law, without being tied by the weight of prior practice and authority, as witness its judgment in 1951 in the *Fisheries Case* (United Kingdom-Norway)[12] upholding the legitimacy of the baselines method for delimiting the territorial sea in certain coastal waters. Clearly, to the extent that a decision by the Court, or a particular principle laid down by it becomes accepted by states generally, as occurred with this baselines method (see now article 4 of the Geneva Convention of 29 April 1958, on the Territorial Sea and the Contiguous Zone, and articles 3–7 of the United Nations Convention on the Law of the Sea of 10 December 1982), the Court would be justified in regarding itself as bound by its former pronouncements.

Quite apart from the attitude of both Courts towards their own prior decisions, the judgments and advisory opinions delivered by them are considered by international lawyers generally as elucidating the law, as being the expression of what the most authoritative international judicial body holds to be the international law on a given point, having regard to a given set of circumstances.

An example of a temporary—as distinct from a permanent—international judicial body contributing substantially towards the development of international law is that of the judgment of the International Military Tribunal at Nuremberg in 1946 which laid down important principles relating to crimes against the peace and security of mankind.[13]

Not to be overlooked in this connection is the contribution to the development of international law in particular areas due to decisions of regional international courts such as, for example, the Court of Justice

11. In the *South West Africa Cases, 2nd Phase* ICJ 1966, 6 at 36–37, the Court ruled that an earlier decision by it upon a preliminary objection could not conclusively bind the Court in deciding a matter appertaining to the merits of the case.
12. See ICJ 1951, 116 and below, pp 249–250.
13. See below, pp 61–63.

of the European Communities (referred to in Chapter 1, above) and the two regional courts concerned with human rights, namely, the European Court of Human Rights and the Inter-American Court of Human Rights (referred to in Chapter 12, below).

State judicial decisions

There are two ways in which the decisions of state courts may lead to the formation of rules of international law:

(a) The decisions may be treated as weighty precedents, or even as binding authorities. According to Marshall CJ of the United States Supreme Court:[14]

> 'The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.'

A notable example is furnished by the decisions of the great British Prize Court judge—Lord Stowell (1745–1836), who presided over the court during the Napoleonic Wars. Lord Stowell's judgments received universal acknowledgment as authoritative declarations of the law, and he became peculiarly identified with the establishment of important doctrines, such as: that blockade to be binding must be effective, that contraband of war is to be determined by probable destination, and the doctrine of continuous voyage. Similarly, both as exponent and as agent for the development of international law, the Supreme Court of the United States has played an important role; for example, its judgments in the *Paquete Habana*[15] and the *Scotia*[16] did much to clarify the nature of international custom.

(b) The decisions of state courts may, under the same principles as dictate the formation of custom, lead directly to the growth of customary rules of international law. Thus, for example, certain rules of extradition law and of state recognition were in the first instance derived from the uniform decisions of state courts. A concurrence of such decisions is usually necessary for this purpose, for if there be no uniformity, a customary rule of international law will not be inferred. Thus, in the *Lotus Case*[17] the Permanent Court of International Justice refused to deduce a customary rule where, to use the Court's expression, state judicial decisions on the point were 'divided'.

Decisions of international arbitral tribunals

Decisions of international arbitral tribunals such as the Permanent Court of Arbitration, the British-American Mixed Claims Tribunal, and others,

14. *Thirty Hogsheads of Sugar, Bentzon v Boyle* (1815) 9 Cranch 191 at 198.
15. See above, pp 40–41.
16. See above, p 37.
17. See above, pp 40–41.

have contributed to the development of international law. In the following branches, arbitral decision has either added to or clarified the law: territorial sovereignty, neutrality, state jurisdiction, state servitudes, and state responsibility. Many notable arbitrations, for example, the *Alabama Claims Arbitration* (1872), the *Behring Sea Fisheries Arbitration* (1893), the *Pious Fund Case* (1902), and the *North Atlantic Fisheries Case* (1910) are regarded as landmarks in the history of international law.

Some writers have refused to acknowledge this contribution on the ground of an alleged fundamental distinction between arbitral and judicial decision. According to these writers, arbitrators have as a general practice tended to act as negotiators or diplomatic agents rather than as judges on questions of fact and law. They insist that arbitrators have been influenced to an unreasonable extent by the necessity of reaching a compromise. There is naturally an element of truth in this conception of arbitral decision, and arbitrators are less strictly bound by necessary technicalities than judges working within the ambit of established rules of procedure, but the distinction from judicial decision is by no means so fundamental as pictured. In the great majority of cases arbitrators have regarded themselves as acting to some extent judicially, rather than as *amiables compositeurs*. Moreover, if arbitral awards were merely quasi-diplomatic compromises, it would be difficult to explain how notable awards like *The Alabama Claims*, the *Behring Sea Fisheries*, and so on, have contributed to the growth of international law.

The 'compromise' element in arbitral adjudications has been unduly exaggerated because under so many treaties arbitrators were authorised to act 'ex æquo et bono', but even in such cases arbitrators commonly acted according to judicial principles. By far the greater majority of arbitral awards have been based on strictly legal considerations in form and substance. Judge J. B. Moore, with unrivalled knowledge of arbitral adjudications, declared:[18]

> 'I have failed to discover support for the supposition that international arbitrators have shown a special tendency to compromise, or that they have failed to apply legal principles or to give weight to legal precedents. Indeed, even in the abridged form in which many of the decisions cited in my *History and Digest of International Arbitrations*, published in 1898, were necessarily given in that work, nothing is more striking than the consistent effort to ascertain and apply principles of law approved by the best authorities, and to follow pertinent prior adjudications where any existed.'

The main distinction between arbitration and judicial decision lies not in the principles which they respectively apply, but in the manner of selection of the judges, their security of tenure, their independence of the parties, and the fact that the judicial tribunal is governed by a fixed body

18. Moore *International Adjudications Ancient and Modern* (1929–1936) Vol I, pp xxxix–xc. See also Wetter *The International Arbitral Process* (1979) Vol I, pp 3–5, 19–26.

of rules of procedure instead of by ad hoc rules for each case. It must also be stressed that while the functions of an international judicial tribunal involve predominantly the adjudication of conduct alleged not to conform with international law, this is not necessarily always the preoccupation of an arbitral tribunal, which may frequently be concerned to make a determination in settlement of a dispute regardless of whether or not the matters in issue involve compliance or non-compliance with international law.

4. JURISTIC WORKS

It is perhaps needless to insist on the important role played by jurists in the development of international law.

Juristic works are not an independent 'source' of law, although some times juristic opinion does lead to the formation of international law. According to the report of one expert body to the League of Nations,[19] juristic opinion is only important as a means of throwing light on the rules of international law and rendering their formation easier. It is of no authority in itself, although it may become so if subsequently embodied in customary rules of international law; this is due to the action of states or other agencies for the formation of custom, and not to any force which juristic opinion possesses.

Article 38 of the Statute of the International Court of Justice directs the Court to apply 'the teachings of the most highly qualified publicists of the various nations, as *subsidiary* means for the determination of rules of law'. This provision emphasises the evidentiary value of juristic works. No doubt the principal function of juristic works is to furnish reliable evidence of the law. Jurists have been largely responsible for deducing customary rules from a coincidence or cumulation of similar usages or practices, and to this extent, they perform an indispensable service. The evidentiary function of juristic works has been well described by Gray J[20] of the United States Supreme Court:

> '... Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations, and as evidence of these, to the works of jurists and commentators who by years of labour, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.'

19. The Sub-Committee on State responsibility of the Committee of Experts for the Progressive Codification of International Law, League of Nations Document, C.196. M.70. 1927. V, p 94.
20. *The Paquete Habana* 175 US 677 1900 at 700.

Although there are several authorities which deny that the opinions or speculations of jurists whether a certain rule ought to be recognised are of any force,[1] it is an undoubted fact that juristic opinion may be evidence not merely of established customary rules, but of customary rules which are bound in course of time to become established. The reaction of juristic opinion may be of great importance in assisting the transition from usage to custom.

In view of this evidentiary function, the passage of time will add weight to the authority of juristic opinion, particularly if generally relied upon, or if no principles contrary to such opinion become established.[2] To this extent, juristic works may acquire a kind of prescriptive authority. However, the labours of the International Law Commission and the various multilateral conventions adopted as a consequence of such labours since its inception have shown how cautious one must be in accepting as conclusive evidence of a generally recognised customary rule, even an established consensus omnium among jurists.

In one exceptional case, juristic opinion does assume importance. Where there are no established customary or treaty rules in regard to a particular matter, recourse may be had to juristic opinion as an independent 'source', in addition to the views expressed in decided cases or in diplomatic exchanges. Thus in the Privy Council case of *Re Piracy Jure Gentium*,[3] the question arose whether actual robbery was an essential element in the crime of piracy at international law.[4] On this point, the Privy Council found itself mainly dependent on juristic opinion, and ruled that it could not only seek a *consensus* of views, but select what appeared to be the better views. It finally decided that robbery was not an essential element in piracy jure gentium, and that a frustrated attempt to commit piratical robbery was equally piracy jure gentium.

5. DECISIONS OR DETERMINATIONS OF THE ORGANS OF INTERNATIONAL INSTITUTIONS, OR OF INTERNATIONAL CONFERENCES

Decisions or determinations of the organs of international institutions, or of international conferences, may lead to the formation of rules of international law in a number of different ways:

1. They may represent intermediate or final steps in the evolution of customary rules, particularly those governing the constitutional functioning of these institutions. The decisive criterion is the extent to which the decision, determination or recommendation has been

1. *West Rand Central Gold Mining Co v R* [1905] 2 KB 391 at 407.
2. Cf Wheaton *International Law* (Dana edn, 1866) pp 23–24.
3. [1934] AC 586 at 588–9.
4. See also below, pp 234–235, 275–278.

adhered to in practice;[5] of itself it is not of normative effect.[6] Thus from the practice of the United Nations Security Council (cf similarly the League of Nations Council), there has developed the rule that an abstention by a member state from voting is not to be deemed a non-concurring vote for the purpose of determining whether a decision on a non-procedural question has been validly taken by the Security Council according to the voting requirements of article 27 of the United Nations Charter.[7] As regards international law in general, the Resolutions since 1952 of the United Nations General Assembly have gone far towards confirming a rule that dependent peoples are entitled to self-determination.[8]

A significant number of such General Assembly Resolutions have been framed in the form of a Declaration or of a Charter (eg, the Charter of Economic Rights and Duties of 1974), and these have contributed in due course to the adoption of conventions on the same subject matter; eg, the Declaration of 1963 on the Elimination of All Forms of Racial Discrimination which paved the way for the Convention of 1965 on the Elimination of All Forms of Racial Discrimination. It is also suggested that these Resolutions in the form of Declarations may be relevant as serving to contain authentic interpretations of the United Nations Charter, or as being declaratory of, or as authentic evidence of, existing customary law.[9] Certain writers have

5. Cf also Professor G. I. Tunkin's *Droit International Public: Problèmes Théoriques* (Paris, 1965, tr from Russian) pp 109–110, and Alexandrowicz *The Law-Making Functions of the Specialised Agencies of the United Nations* (1973) pp 152–161.
6. *Decisions by way of consensus:* Note in this connection the practice of adopting a *consensus*, without formal vote; eg the consensus on hijacking adopted by the United Nations Security Council on 20 June 1972, whereby it called for co-operation by states against hijacking and hijackers, and the consensus adopted in June 1976 by the Special Committee of Twenty-Four of the United Nations on Decolonisation denouncing South Africa's continued administration of Namibia (South-West Africa). A consensus is sometimes referred to as a 'quasi-resolution', and can be a first-step in the evolution of a customary rule of international law. There can, on the other hand, be a consensus, coupled with the declared adoption of a corresponding resolution. In the course of the sessions, 1973–1982, of the Third United Nations Conference on the Law of the Sea, the provisions of the draft text of the Convention eventually opened for signature on 10 December 1982, were adopted by consensus.
7. See below pp 643–645.
8. As to Resolutions of the United Nations General Assembly, see Professor D. Goedhuis in *Netherlands International Law Review* Vol XIII (1966), pp 117 and 119; Asamoah *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966) p v, and passim; Castaneda *Legal Effects of United Nations Resolutions* (1969); Buergenthal and Maier *Public International Law* (1985) pp 44–45; D. H. Ott *Public International Law in the Modern World* (1987) pp 20–22.
9. But cf the arbitral award in *Texaco Overseas Petroleum v Libyan Arab Republic* (1978) 17 International Legal Materials 1–37, where the view was taken that a resolution, not confirming existing law, but purporting to enunciate new precepts should be regarded not as evidence of the law, but as laying down, de lege ferenda, what the law ought to be. According to some writers, certain Resolutions may serve negatively to demonstrate

treated these collective pronouncements, even if not binding in any absolute legal sense, as containing a kind of tertium quid, ie 'soft law', or as some French-speaking writers have put it, *'normes sauvages'* or *'para-droit'*. According to the weight of opinion, the legal value of these Resolutions must vary in the light of their subject-matter and the surrounding circumstances, including the voting pattern in respect to their adoption.

2. A Resolution of the organ of an international institution which validly formulates principles or regulations for the internal working of the institution may have full legal effect as laying down rules which are binding on the members and organs of the institution.
3. Inasmuch as an organ of an international institution has inherent power, in doubtful cases not precisely covered by its Constitution, to determine the limits of its own competence, such decisions by it on questions of its jurisdiction may have a law-making effect.
4. Sometimes, organs of international institutions are authorised to give binding determinations concerning the interpretation of their constituent instruments (for example, the Executive Directors and the Board of Governors of the International Monetary Fund have such power under article XVIII of the Articles of Agreement of the Fund, of 22 July, 1944).[10] These interpretative decisions will form part of the law of the international institution in question.
5. Some organs of international institutions are empowered to give general decisions or directives of quasi-legislative effect, binding on all the members to whom they are addressed; for example, as are the Council and Commission of the European Economic Community (Common Market) under article 189 of the Treaty of Rome of 25 March 1957, establishing the Community.
6. A special case is that of the determinations or opinions of Committees of Jurists, specifically instructed by the organ of an international institution to investigate a legal problem.[11] These necessarily bear some weight and authority.

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the absence of established rules. One argument against the legislative effect of General Assembly Resolutions is that under articles 10 and 13 of the United Nations Charter the General Assembly is empowered only to discuss, initiate studies and make recommendations so that its Resolutions are not intended to have binding force.

10. See Hexner 'Interpretation by Public International Organisations of their Basic Instruments' 53 AJIL (1959) 341–370, and Gold (1954) 3 ICLQ 271–272. Semble, for an analogous reason, a General Assembly Resolution may be of legal significance if it should purport to specify with greater precision the obligations of member states under the United Nations Charter, eg, a duty not to torture an individual under colour of law; see *Filartiga v Pena-Irala* 630 F 2d 876 (1980).
11. See, eg, the opinion of the Committee of Jurists appointed in 1920 by the League of Nations Council to advise on the question of the Aaland Islands. The Committee's view that a Convention of 1856, whereby Russia agreed not to fortify the Aaland Islands, created a special military status, conferring rights on interested adjoining states

Reference should also be made to the discussion in Chapter 20, below, of the legislative and regulatory powers of international institutions.[12]

Order of use of material 'sources'

The final question is in what *order* should these material 'sources'—custom, treaties, arbitral and judicial decisions bearing on legal matters, juristic works, and decisions or determinations of the organs of international institutions—be used for ascertaining the law on a given matter. It will be remembered that the order in which the material 'sources' were set out in paragraph 1 of article 38 of the Statute of the International Court of Justice was:

1. Treaties and conventions.
2. Custom.
3. 'General principles of law recognised by civilised nations'.
4. Judicial decisions and juristic opinion, 'as subsidiary means for the determination of rules of law'.

This order is generally followed in practice. Treaties and conventions, custom, and general principles of law recognised by civilised nations are deemed to prevail over judicial decisions and juristic opinion, which are expressly declared by paragraph 1 of article 38 of the Statute of the International Court of Justice to be 'subsidiary means for the determination of rules of law' So far as the first three categories are concerned, priority would normally be attributed to treaties and conventions expressly recognised by the states concerned provided that the treaty or convention was not in conflict with jus cogens, ie applicable peremptory norms of international law (see below, pp 55–57); if there were no treaties or conventions applicable, preference would be accorded to established customary rules, while if there were no such rules, recourse could be had to general principles of law recognised by civilised nations. If none of these three categories furnished clear rules applicable to the matter, judicial and arbitral decisions, and juristic opinion could be resorted to, with more weight being given usually to decisions of courts than to expressions of opinion by jurists and textbook writers. The weight to be given to a decision or determination of an international institution would depend upon its nature and content, and upon the provisions of the constituent instrument of the organisation. There may also be duplication of applicability, as for example when a convention contains a provision declaratory of customary international law, or when a general principle

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although not parties to the Convention, has been cited with express or implied approval in leading textbooks.

12. See below pp 624–625, and Alexandrowicz *The Law-Making Functions of the Specialised Agencies of the United Nations* (1973) passim.

of law recognised by civilised nations is at the same time confirmatory of a treaty or customary rule.[13]

Peremptory principles or norms of international law; jus cogens

Lastly, mention should be made of the concept of jus cogens,[14] that is to say the body of peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between states to the extent of the inconsistency with any of such principles or norms.[15] According to article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969, it is an additional characteristic of a norm of jus cogens that it 'can be modified only by a subsequent norm of general international law having the same character', although in this article jus cogens is defined merely 'for the purposes' of the Convention. There is undoubtedly some analogy between jus cogens and the principles of public policy which at common law render a contract void if it offends against these, such as the principle that parties cannot by agreement between themselves oust the ordinary courts from their jurisdiction.[16] For example, in the international field, a treaty for the purpose of carrying out operations of piracy jure gentium would be void and would not be enforced by an international tribunal. Assuming that this analogy holds good, one must correspondingly bear in mind some of the metaphors used by harassed common law judges to describe the doctrine of public policy, such as 'a very unruly horse', 'treacherous ground', and 'slippery ground'.[17] Critics of the concept of jus cogens in

13. *'Intertemporal law':* In his arbitral award in the *Island of Palmas Case* (see Wetter *The International Arbitral Process* (1979) Vol I, p 213), Dr Max Huber introduced the concept of 'intertemporal law' by way of dealing with the problem of which rules of international law prevailing at different periods of time are to be applied in a particular case. In certain respects, the expression 'intertemporal law', as such, is objectionable, as also is the distinction drawn by Dr Huber, which may not apply in an absolute manner, between the creation, on the one hand, and the existence or evolution, on the other hand, of rights. The concept of 'intertemporal' international law cannot be regarded as exactly analogous to the concept in English law of ambulatory and non-ambulatory statutory provisions. Semble, the issue normally is not really one of choice of law (as in private international law), but whether or not, in the absence of some question of historical applicability, a right or obligation, operative at a particular point of time, has been eliminated or modified by some subsequently created new rule or rules of international law, coming into effect as the result of the evolution of new customary rules or the general adoption of a new 'law-making' multilateral convention.
14. See generally on the subject, F. Suy and Others *The Concept of Jus Cogens in International Law* (1967); J. Sztucki *Jus Cogens and the Vienna Convention on the Law of Treaties; A Critical Appraisal* (1974); R. Ago (1971) III Hague Recueil des Cours 320 et seq; Buergenthal and Maier, op cit, pp 108–109; Ott, op cit, pp 18–19, 200–201.
15. It may be, of course, that the treaty as a whole must be treated as void, because of the inseverability of its content, or because the treaty's operations is dependent upon a condition precedent which offends against a norm of jus cogens.
16. See *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 at 342.
17. For the various metaphors used, see *Newcastle Diocese Trustees v Ebbeck* (1961) ALR 339 at 350–351.

international law have also urged that it may be resorted to as a means of avoiding onerous treaty obligations, or even to justify interference in matters otherwise falling within the domestic jurisdiction of states.

One major difficulty is related to the identification of norms of jus cogens. First, should this function of identification be performed solely by multilateral law-making conventions, or may a norm of jus cogens evolve through the same process as in the case of customary rules of international law? Article 64 of the Vienna Convention on the Law of Treaties provides that 'if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. The word 'emerges' shows that it was contemplated that a norm of jus cogens could be one of customary international law. Whether a rule of jus cogens can be derived from sources other than treaties or custom is a moot question on which there continues to be a division of opinion. Second, there is a lack of consensus as to what, at the present time, are norms of jus cogens. Two such generally acceptable norms seem to be the prohibition against the threat or use of force in the terms laid down in article 2, paragraph 4 of the United Nations Charter, and the principle of pacta sunt servanda, as defined in article 26 of the Vienna Convention on the Law of Treaties. Other suggested norms, for example the principle of sovereign equality of states, and the principle of peaceful settlement of disputes, while acceptable as propositions of law have not found general favour as being of the nature of jus cogens. According to one learned writer,[18] the rules of jus cogens include:

> 'the *fundamental* rules concerning the safeguarding of peace ... *fundamental* rules of a humanitarian nature (prohibition of genocide, slavery and racial discrimination, protection of essential rights of the human person in time of peace and war), the rules prohibiting any infringement of the independence and sovereign equality of States, the rules which ensure to all the members of the international community the enjoyment of certain common resources (high seas, outer space, etc).'

A general provision as to jus cogens is contained in article 53 (mentioned above) of the Vienna Convention on the Law of Treaties;[19] this reads:

> 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm 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.'

18. Ago, op cit, p 324.
19. As to its drafting history at the Vienna Conference, see R. D. Kearney and R. E. Dalton 64 AJIL (1970) 535–538.

The article reflects the underlying notion in jus cogens that its component norms are conditioned by the interests of the international community *as a whole*. The drafting of the first sentence is open to objection. If it means that the whole of a treaty is void when a single provision offends against jus cogens, this is an untenable proposition, for in many cases the provision may be severable. The sentence would be more acceptable if the word 'provision' were added after the word 'treaty'. Inasmuch as a norm of jus cogens must be one accepted by the international community as a whole, and may only be modified by a subsequently emerging norm of the same character, it follows that a regional association cannot modify or derogate from it in the absence of any decision to that effect by the international community as a whole.

It remains to say that the concept of jus cogens, if applicable to treaties, must also, a fortiori, render inoperative usages or practices conflicting with peremptory norms.

CHAPTER 3

The subjects of international law

International law is primarily concerned with the rights, duties, and interests of *states*. Normally the rules of conduct that it prescribes are rules which states are to observe, and in the same way treaties may impose obligations which the signatory states alone agree to perform. But this does not necessarily imply that no other entities or persons, whether natural or legal, can come within the dominion or bounty of international law.[1]

However, certain authorities assert that states are the only subjects[2] with which international law is concerned. A natural stumbling block for so wide a theory has always been the case of slaves and pirates. As a result of general treaties,[3] certain rights of protection, etc, have been bestowed on slaves by the society of states. Also under customary rules of international law, individuals who commit the offence of piracy jure gentium on the high seas are liable as enemies of mankind to punishment by any apprehending state.[4] These two apparent exceptions to the general rule have been reconciled by treating slaves and pirates jure gentium as

1. See Oppenheim *International Law* Vol I (8th edn, 1955) pp 19–22; W. Paul Gormley *The Procedural Status of the Individual before International and Supranational Tribunals* (1966); Nørgaard *The Position of the Individual in International Law* (1962); Rousseau *Droit International Public* Vol II (1974), *Les Sujets de Droit;* H. Mosler 'Subjects of International Law' in *Encyclopaedia of Public International Law* Vol 7 (1984) pp 442–459; D. H. Ott *Public International Law in the Modern World* (1987) pp 81–83.
2. The term 'subject of international law' is capable of meaning: (a) an incumbent of rights and duties under international law; (b) the holder of a procedural privilege of prosecuting a claim before an international tribunal; (c) the possessor of interests for which provision is made by international law and (d) the capacity to conclude treaties with states and international organisations. These four meanings are not always kept distinct in the literature on the question whether individuals and non-state entities may be subjects of international law.
3. See, eg, art 13 of the Geneva Convention on the High Seas of 29 April 1958, providing that any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free, and see now the similar provision in art 99 of the United Nations Convention on the Law of the Sea of 10 December 1982. See also below at p 275. Another case of individuals possessing rights under international law is, semble, that of astronauts under the provisions of the Agreement of 1968 on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space; see below, pp 185–186.
4. See below, pp 234–235, 275–278.

objects, and in no sense as subjects of international law. Moreover it has been said by the same authorities that on a proper analysis, it would be found that the so-called rights or duties of slaves and pirates jure gentium are technically those of states and states only. Thus, in the case of slaves, it is argued, the international conventions under which slaves enjoy protection really cast duties on the states parties; without such duties on the states to recognise and protect their interests, slaves would not possess any rights at international law.

As against this theory that individuals are only incumbents of rights and duties at international law insofar as they are objects and not subjects, there is a theory which goes to the limit in the opposite direction. This theory which is held by the noted jurist Kelsen (1881–1973) and his followers maintains that in the ultimate analysis, individuals alone are the subjects of international law. A faint version of this theory had already appeared in the following passage in Westlake:[5]

> 'The duties and rights of States are only the duties and rights of the men who compose them.'

Kelsen analyses the notion of a state, and affirms that it is purely a technical legal concept serving to embrace the totality of legal rules applying to a group of persons within a defined territorial area; the state and the law may almost be described as synonymous. The concept of the state is used to express in technical language legal situations in which individuals alone are bound to do certain acts or receive certain benefits in the name of the collectivity of human beings to which they belong.[6] For instance, when we say that Great Britain is responsible at international law for some wrong committed against another state by one of its officials or a member of its armed forces, this is only a technical method of expressing the fact that the British people as a whole, ie the individuals subject to British law, are bound through the persons who constitute its government to give redress for the wrong imputed to Great Britain as a state. The duties resting on a state at international law are thus ultimately duties binding on individuals.

In this respect, according to Kelsen, there is no real distinction between state law and international law. Both systems bind individuals, although international law as a matter of technique does so only *mediately* and through the concept of the state.

From the purely theoretical standpoint, and in logic, Kelsen's views are undoubtedly correct. But as a matter of practice, international lawyers and the statesmen they advise, work on the realistic basis that their primary concern is with the rights and duties of states. It is true that from time to time treaties do provide that individuals may have rights, a

5. *Collected Papers* (1914) Vol I, p 78. To much the same effect is a passage in Professor Scelle's study in Lipsky (ed) *Law and Politics in the World Community* (1953) p 56.
6. See Kelsen (1926) 14 Hague Recueil 231 at pp 239 et seq.

remarkable illustration of this being the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, enabling private foreign investors to have access to international machinery for the settlement of their disputes with investment-receiving states.[7] But otherwise it will generally be found that treaty provisions are couched in the form of rules of conduct binding upon, or conferring rights on states. This is also consistent with the long-standing British practice of treaty negotiation. The Crown when negotiating treaties does not do so as trustee or agent for private citizens. As Lord Atkin said in an important judgment:[8]

> 'When the Crown is negotiating with another sovereign a treaty, it is inconsistent with its sovereign position that it should be acting as agent for the nationals of the sovereign State, unless indeed the Crown chooses expressly to declare that it is acting as agent.'

At the same time, it serves no purpose to gloss over the exceptions to the general working rule. There are cases where international law binds individuals *immediately* and not merely mediately in Kelsen's sense. It is a pure play on words to say that slaves and pirates jure gentium are not subjects, but objects of international law. For example, the rule of international law by which states are authorised to attack, seize, and punish pirates jure gentium, is a rule 'imposing a legal duty directly upon individuals and establishing individual responsibility'.[9] It would be straining the facts to interpret the rule as casting a duty not on individuals but on states, for no state is bound to punish pirates if it chooses to abstain from doing so, while the power to apprehend pirates is scarcely a right in its proper connotation.

It is maintained by the protagonists of the traditional theory that, in any event, such alleged exceptional cases are only in fact apparent exceptions, for in essence the liability to punishment of pirates jure gentium and the right of slaves to their freedom derives from municipal law, and not from international law. They claim that generally no rule of international law can operate directly or indirectly upon individuals without some municipal legislative implementation of the rule.[10] However, as to pirates jure gentium Kelsen cogently says:[11]

> 'The fact that the specification of the punishment is left to national law, and the trial of the pirate to national Courts, does not deprive the delict and the sanction of their international character.'

7. Note also that art 7 of the Geneva Prisoners of War Convention of 1949 provides that prisoners of war may in no circumstances renounce 'the rights' secured to them by the Convention.
8. *Civilian War Claimants Association Ltd v R* [1932] AC 14 at 26–27.
9. Kelsen *Peace Through Law* (1944) p 76.
10. See generally as to this question below, pp 76–77.
11. Kelsen, op cit, p 76.

That is a consideration applicable to all the exceptional cases.

Irrespective of municipal legislative implementation of the rules therein contained, there is no question that, however exceptionally, many modern treaties do bestow rights or impose duties upon individuals. It was authoritatively decided by the Permanent Court of International Justice in the *Danzig Railway Officials' Case* that if by a particular treaty the parties intended to confer rights on individuals, then these rights should receive recognition and effect at international law, that is to say from an international court.[12] In that case, Poland contended that the agreement between herself and Danzig fixing the conditions of employment of Danzig railway officials, whom she had taken over, conferred no right of action on these officials. She maintained that the agreement being an international treaty, and not having been incorporated into Polish law, created rights and obligations only between the contracting parties, and that failure to carry out such obligations would involve her in responsibility only to Danzig and not to private individuals. While the Permanent Court was ready to admit this as a general rule, it declared that in the particular case the intention of the parties was to create rights enforceable by private citizens, and therefore the Danzig officials had their cause of action against the Polish administration as under the agreement. It may well be said that insofar as it purports to confer rights upon individuals, the Geneva Prisoners of War Convention of 1949 (as supplemented by the two Protocols, I and II, adopted in 1977 by the Geneva Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts[13]) is such a treaty, within the meaning of the Permanent Court's decision.

This controversy as to whether international law binds individuals is by no means of theoretical significance only. Towards the end of the Second World War when the Allies were concerting measures to prosecute war criminals, there was some hesitation whether international law could indeed reach out to punish heads of state, ministers, and high military and administrative functionaries responsible for initiating the war and authorising the perpetration of atrocities. In the event, the theoretical objections to such a course were disregarded, and pursuant to agreements to this effect which were without precedent in international law,[14] international trial tribunals were set up at Nuremberg and Tokyo. Among the

12. See *Advisory Opinion on the Jurisdiction of the Courts of Danzig*, Pub PCIJ (1928), Series B, No 15.
13. See pp 567–571 below.
14. The Agreement for setting up the Nuremberg Tribunal, dated 8 August 1945, between Great Britain, the United States, France, and Russia provided in art 7 of the Charter annexed thereto that: '... The official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'. Cf the Charter of 19 January 1946, concerning the constitution of the Tokyo Tribunal.

offences for which charges were laid were crimes against peace (for example, beginning a war of aggression or in violation of treaties), crimes against humanity (for example, murder or persecution of racial or religious groups), crimes under the laws of war, and the conspiracy to commit these crimes. The judgment of the Nuremberg International Tribunal in 1946 (followed later by the judgment in 1948 of the Tokyo International Tribunal) establishing the guilt of certain of the defendants in respect of these charges, and affirming their individual responsibility under international law, is of historic significance. The principles of international law recognised in the Agreement or Charter setting up the Tribunal of 8 August 1945,[15] and in the Tribunal's judgment were subsequently formulated by the International Law Commission of the United Nations as a Draft Code of Principles Recognized in the Tribunal's judgment (see *Report* concerning the work of its second session presented to the General Assembly in 1950). In these principles, as formulated, the references are to 'persons' as being guilty of crimes against the peace and security of mankind. In the light of these principles, too, one point has been clarified, namely that international law can reach over and beyond traditional technicalities, and prevent guilty individuals sheltering behind the abstract concept of the state.[16] According to the Nuremberg Tribunal:[17]

> 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'

This trend of international law towards attaching direct responsibility to individuals was reaffirmed in the Genocide Convention adopted by the United Nations General Assembly on 9 December 1948, which is somewhat in advance of the Nuremberg principles.[18] Under the Convention,

15. Some writers questioned the validity and propriety of the Tribunal, as well as the legality of conferring upon it by Agreement of the Four Powers (ie Great Britain, the United States, France, and Russia), jurisdiction to deal with certain offences against the law of nations, formulated for the first time in such Agreement, eg, crimes against the peace, and crimes against humanity. Cf Kelsen (1947) I ILQ 153.
16. The Nuremberg Tribunal rejected the argument urged on behalf of the defendants that they were being prosecuted for international crimes under rules of law ex post facto inasmuch as prior to 1939–40, such crimes as crimes against the peace had not been defined or made punishable under existing international law. It pointed out that the defendants must have known that their actions were illegal and wrong, and in defiance of international law (see Official Record of Trials, Vol I, *Official Documents*, at p 219). This ruling has been widely criticised; for typical criticism and discussion, see Finch 41 AJIL (1947) 33.
17. See Official Record, Vol I, *Official Documents*, at p 223. The Tribunal also pointed out that it had long been recognised that 'international law imposes duties and liabilities upon individuals as well as upon States'.
18. Note that in respect of the crimes against humanity as charged before the Nuremberg Tribunal, the Tribunal limited its jurisdiction over these to such as were committed in connection with or in execution of crimes against peace, or war crimes proper. See as

the states parties agreed that genocide (ie acts committed with intent to destroy in whole or in part national, ethnical, racial, or religious groups) and the conspiracy or incitement to commit genocide, attempts, and complicity therein, should be punishable on trial by national courts or by an international criminal tribunal. Article IV of the Convention emphasised the aspect of individual responsibility by providing that *persons* committing the acts should be punished 'whether they are constitutionally responsible rulers, public officials or private individuals'.

These developments lay in the direction of imposing duties on individuals under international law.

But parallel thereto, there has been also a movement for conferring rights on individuals, even as against states of which such individuals are nationals or citizens. This is implicit in the Nuremberg judgment of 1946, inasmuch as it recognises that the victims of crimes against humanity committed even by their own governments, are entitled to the protection of international criminal law. So also does the Genocide Convention of 1948 purport to protect the very right of human groups to exist as groups. In this connection reference must be made to the movement to protect human rights and fundamental freedoms sponsored by the United Nations under the powers given in article 1 and other provisions of the United Nations Charter, a subject which is discussed in a later chapter.[19] In Europe the human rights movement has been advanced as a result of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.[20] Under the Convention, there were established a European Commission of Human Rights with administrative power to investigate and report on violations of human rights, and a European Court of Human Rights, which commenced to function in 1959, and in numerous cases already,[1] both the Commission and the Court have inquired into a violation of human rights alleged by an individual against his own government.

In regard to individuals in general, it should be noted that there is a widely recognised rule of international practice that before an international tribunal, the rights of, or the obligations binding individuals at international law, are respectively enforceable at the instance of or against those states only whose nationality such individuals possess.[2] In other

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to the Genocide Convention, L. J. Le Blanc 'The Intent to Destroy Groups in the Genocide Convention' (1984) 78 AJIL 369.

19. See below, pp 362–373.
20. See below, pp 364–368.
1. See pp 366–368.
2. See per Judge Hackworth in ICJ Reports, 1949, at pp 202 et seq. Note also art 34 of the Statute of the International Court of Justice, providing that 'only States may be parties in cases before the Court'. In regard to United Nations Officials, making complaints to the United Nations Administrative Tribunal against the employing international organisation for non-observance of the terms of their employment, the International Court of Justice may have power however in its advisory jurisdiction, on

words an individual cannot generally assert his own rights against a state before an international tribunal or be answerable to a state in the same jurisdiction for failing in his obligations, but only through the state of which he is a national.

The European Court of Human Rights does not represent an exception to the rule, as the parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Commission of Human Rights have alone the right to bring a case before the Court. Individuals cannot of their own motive invoke the Court's jurisdiction

Certain points require emphasis in this connection. In the first place, the rule precluding an individual from approaching an international tribunal is one of a general nature only, and already certain exceptions to it have appeared. Thus, by treaties concluded after the First World War (see articles 297 and 304 of the Treaty of Versailles 1919, and the Polish-German Convention of 15 May 1922, relating to Upper Silesia[3]) individual claimants were allowed access to the various Mixed Arbitral Tribunals set up pursuant to the provisions of these instruments, although as it turned out governments intervened in some of the more important cases in support of their nationals. Again, under the Treaty creating the European Coal and Steel Community of 18 April 1951, under the Treaty establishing the European Economic Community (Common Market) of 25 March 1957, and under the Treaty establishing the European Atomic Energy Community (EURATOM) of 25 March 1957, individuals, private enterprises, and corporate entities have been given certain rights of direct appeal to the Court of Justice of the Communities against decisions of organs of the Communities.[4] Mention may also be made of the right of United Nations officials to take proceedings before the United Nations

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an application to review the Tribunal's award, to deal with a claim by an aggrieved individual, who may be, *in substance*, if not in form, the litigating party; see, inter alia, *Advisory Opinion on Review of Judgment No 158 of the United Nations Administrative Tribunal* (*Fasla Case*) ICJ 1973, 166; *Advisory Opinion on Review of Judgment No 273 of the United Nations Administrative Tribunal* (the *Mortished Case*) ICJ 1982, 325; and *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal, Advisory Opinion* ICJ 1987, 18.

3. Under this Convention, the independent procedural capacity of individuals as claimants before an international tribunal was recognised even as against the state of which they were nationals; see *Steiner and Gross v Polish State* (1928) Annual Digest of Public International Law Cases, 1927–1928, Case No 188.

4. Cf the decision of the Court of Justice of the European Communities in 1974, holding that the provisions concerning freedom of movement in art 48 of the Treaty of Rome of 1957 creating the European Economic Community (EEC), and art 3 of an EEC Directive as to the movement and residence of foreign nationals, conferred rights directly on individuals which they could enforce in the courts of member States of the EEC; Case 41/74: *Van Duyn v Home Office* (*No 2*) [1975] Ch 358, [1975] 3 All ER 190. For the authorities generally on this subject, see D. Wyatt and A. Dashwood *The Substantive Law of the EEC* (1980) pp 26 et seq.

Administrative Tribunal for alleged non-observance of their contracts of employment or the terms of their appointment. Moreover, the opinion of many international lawyers is that, in certain limited cases, access by individuals or corporations to international tribunals is necessary and should be allowed, and it may be expected that in the future changes in this direction will come about.[5] Second, the fact that individuals have such procedural incapacities before international tribunals is not necessarily inconsistent with their status as subjects of international law. There are similar instances of persons with procedural incapacities before municipal courts (for example, infants, who under English law can only bring an action by a next friend or defend it by a guardian ad litem), who are nevertheless regarded as subjects of municipal law.[6] Third, the International Court of Justice has held that an international institution, as distinct from a state, is entitled to espouse the claim of one of its officials against a state for damage or injury suffered, thus recognising that, at all events, this function of protection does not belong exclusively to states.[7]

International practice has in recent years extended the range of subjects far beyond that of states only:[8]

a. International institutions and organs, such as the United Nations and the International Labour Organisation (ILO) were established under international conventions containing constitutional provisions regulating their duties and functions, for example, the United Nations Charter 1945, and the Constitution of the International Labour Organisation.

5. An early precedent also is that of the Central American Court of Justice (1908–1918), which did have jurisdiction to deal with disputes between states and private individuals, although no significant conclusions can be drawn from its meagre record of activity over a period of ten years, when only five cases were brought by individuals, but in each instance without success.
6. But note in this connection the decision of the High Court of Australia in *Ingram v Commonwealth of Australia and Peacock* (1980) 54 ALJR 395, affd on appeal in (1980) 55 ALJR 58, holding that an individual had no locus standi to seek a declaration by the court that the defendants by their continuing support for the 1979 SALT II Treaty between the Soviet Union and the United States were acting in breach of the relevant applicable rules of international law.
7. See *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ, at 182 et seq.
8. A special illustration of such a non-state entity is the Bank for International Settlements (BIS), which has its seat at Basle, Switzerland. In 1980, the BIS celebrated its 50th anniversary, and the BIS handbook, *The Bank for International Settlement and the Basle Meetings* (1980), published for the occasion, contained the following passage (pp 103–104): 'Founded as a result of State treaties, endowed with significant immunities, exempt from the legislation of the country in which it has its seat, the BIS is clearly an international organisation in the true sense of the term. *It is a subject of international law*'. Two other instances of non-state entities that, as subjects of international law, play a significant part in the actitivities of the international community, may be mentioned; namely, the Intergovernmental Oceanographic Commission, and the South Pacific Forum, comprising the Heads of Government of the independent and self-governing territories of the South Pacific.

In its Advisory Opinion just mentioned the International Court of Justice expressly held, in terms which are applicable to other international organisations, that the United Nations is, under international law, an international person. According to the Court:[9]

> 'That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State ... What it does mean is that it is a *subject of international law* and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.'

Moreover within the United Nations and the International Labour Organisation, for example, are other organs, and even individuals,[10] whose activities are regulated by rules set out in these constitutional instruments.

Even regional international organisations and communities may by the terms of their constituent instruments be endowed with international personality, as, for example, the North Atlantic Treaty Organisation (NATO), which possesses 'juridical personality' under article 4 of the Agreement of 20 September 1951 on the Status of the North Atlantic Treaty Organisation, National Representatives, and International Staff. Perhaps the most outstanding current example is that of the European Community (or Communities) which has become in the fullest sense an international entity with all the rights, duties and capabilities of a subject of international law—a position reinforced in a formal manner by the *Single European Act* (which entered into force in 1987) for amending the Treaty of Rome of 25 March 1957. In particular, the European Community commonly participates in international conferences, enters into conventions or agreements with other states and conducts diplomatic relations with them through permanent missions.

It should be mentioned, however, that some positivist writers oppose the attribution of international personality to international institutions, and maintain what is known as a theory of 'common organs'. Under this theory international organisations are regarded as domestic institutions common to the participating states, and whose activities are in essence the activities of these states, and not as true international agencies. It is difficult to reconcile such a conception of the status of international institutions with all the facts, and in the *South West Africa Cases, 2nd Phase* (1966),[11] the International Court of Justice, dealing with the League of Nations, ruled that individual member states had, with reference to

9. See *Advisory Opinion*, op cit, p 179.
10. Eg, the Secretary-General of the United Nations. See Schwebel *The Secretary-General of the United Nations: His Political Powers and Practice* (1952), and E. McWhinney *United Nations Law Making* (1984) pp 145–150.
11. ICJ 1966, 6 at 29, 63.

mandates, no separate, self-contained right they could assert before a court, over and above the League's collective, institutional activity.

b. Several 'law-making' conventions have been concluded in regard to matters of international criminal law, for example, the Geneva Conventions dealing with the Suppression of Counterfeiting Currency (1929), and with the Suppression of the International Drug Traffic (1936), the Single Narcotic Drugs Convention adopted at New York in 1961, the Tokyo Convention on Offences and Other Acts Committed on board Aircraft (1963), the Hague Convention for the Suppression of the Unlawful Seizure of Aircraft (1970), and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971). At the date of writing preparations are being made for the conclusion of another convention to contain special provisions as to narcotic drugs trafficking and the extradition of alleged traffickers. Under these conventions, states have concerted or may concert their action for the punishment of certain international offences or crimes in which individuals alone were concerned. Thereby, delinquents such as international drug traffickers and counterfeiters, and persons 'hijacking' an aircraft, have become subjects of conventional rules of international criminal law in much the same way as, although not to the same extent as pirates jure gentium under customary rules.

c. Under treaties concerning national minorities, individuals, as already mentioned, were given the right of securing redress by application to an international Court (see, for example, articles 297 and 304 of the Treaty of Versailles 1919).

d. Subdivisions of states,[12] dependencies, protectorates, and territories were brought within the scope of several 'law-making' conventions, in order better to secure the working of the provisions of these conventions which required application by all administrative units throughout the world, whether states, colonies, protectorates, or territories. An appropriate example is the provision in article 8 of the Constitution of the World Health Organisation of 1946 that territories or groups of territories 'not responsible for the conduct of their international relations' may be admitted as associate members of that Organisation.

e. Insurgents as a group may be granted belligerent rights in a contest with the legitimate government, although not in any sense organised as a state.[13]

12. Under the Convention of 18 March 1965, on the Settlement of Investment Disputes between States and Nationals of other States, a constituent subdivision of a state party (eg, a province or state of a federation) may, with the approval of that state, go to arbitration or conciliation with an investor of another state party (see art 8).

13. Another instance is the status of the Holy See as a subject of international law from 1871 to 1929, before the Lateran Treaties; as to which see Kunz 'The Status of the Holy

A further significant point, often lost sight of, is the fact that international law is not solely concerned with advancing the political interests of states, but to a large extent also with the interests and needs of individuals and non-state entities. So it is that a primary aim of many notable 'law-making' Conventions of the past eighty years, including such instruments as the Geneva Prisoners of War Convention of 1949 and the Geneva Convention of 1949 for the Protection of Civilian Persons in Time of War (as supplemented by the two Protocols, I and II, adopted in 1977 by the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts[14]), and the large number of conventions adopted by the Conferences of the International Labour Organisation, has been the welfare and health of the individual. Moreover, a number of international organisations are specifically devoted to advancing and ensuring respect for the rights and interests of individuals, in effect taking over, to some extent, internationally, the functions of diplomatic protection formerly performed by states. It would not therefore be a very revolutionary step if one further step were to be taken, and international law were to confer rights on individuals directly and ex proprio vigore without necessarily operating for this purpose through the medium and under the cover of the state. So far, it is only in exceptional cases that such an advance has been made.

Then there is the fact that a considerable weight of contemporary opinion, represented particularly by the newly emerged states, favours the view that *peoples as such*[15] have certain inalienable rights under international law, among which are the right to self-determination, the

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See in International Law' (1952) 46 AJIL 308–314, and Graham *Vatican Diplomacy* (1959) pp 28–30, 344–346. For the special case of governments in exile, as during the Second World War, see F. E. Oppenheim 'Governments and Authorities in Exile' 36 AJIL (1942) 568 et seq. Note also the decision of the Rome Tribunal that the Sovereign Order of Malta is a subject of international law; see *Cartolari v Sovereign Order of Malta, Annali di Diritto Internazionale* (1951) Vol IX, p 153. A further case of a non-state entity, which is possibly a subject of international law, is that of the International Committee of the Red Cross (ICRC); see Kunz 53 AJIL (1959) 132. More controversial is the case of national liberation movements, which have participated in, or been granted observer status in recent conferences, or meetings of bodies of the United Nations or of the United Nations 'family' organisations.

14. See pp 567–571 below.

15. It may even be claimed that ethnic, religious and linguistic groups have rights under international law; cf art 27 of the International Covenant on Civil and Political Rights of 1966: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. See Y. Dinstein 'Collective Human Rights of Peoples and Minorities' (1976) 25 ICLQ 102–120; E. Fischer *Minorities and Minority Problems* (1980); and G. Nettheim 'Justice and Indigenous Minorities: a New Province for International and National Law' in Blackshield (ed) *Legal Change* (1983) pp 251–263.

right freely to choose their political, economic and social systems, the right to dispose of the natural wealth and resources of the territory occupied by them, the right to development, the right to peace and security and the right to protection of their physical and social environment. In 1984–1985 the United Nations Educational, Scientific and Cultural Organisation (UNESCO) sponsored studies and discussions designed, inter alia, to clarify the nature and scope of peoples' rights, and the precise coverage of the term 'people'. This involved examination of the extent of the rights of indigenous minority peoples and tribes in countries and territories the subject of settlement by Europeans. Obviously this conception of the inalienable rights of peoples as such conflicts with the traditional doctrine that states are the exclusive subjects of international law. These rights of peoples as such were recognised in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, where the Declaration elaborates in detail the principle of equal rights and self-determination of peoples, and, as well, in the Universal Declaration of the Rights of Peoples, adopted at Algiers in July 1976. In its Advisory Opinion of 21 June 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in South West Africa (Namibia)*, the International Court of Justice treated the people of the Mandated Territory of South West Africa as having, in effect, rights at international law, including a right of progress towards independence, which had been violated by South Africa's failure as Mandatory Power to comply with its obligations to submit to the supervision of United Nations organs (see ICJ 1971, 16 at 56 where the Court referred to the people of the Territory as a 'jural entity' and as an 'injured entity'[16]).

Finally, reference may be made to two categories of non-state entities, in respect to which it is controversial whether they should be regarded as subjects of international law, namely: (a) intergovernmental or quasi-intergovernmental associations concerned with the production and price stability of particular kinds of commodities, irrespective of whether these have been established by an international treaty or otherwise formed, eg, the International Tin Council (ITC) and the Organisation of Petroleum Exporting Countries (OPEC); (b) the many regional or international corporations, formed under national law, but operating in practice largely on an intergovernmental basis, eg, certain multipartite transport corporations. One tenable solution is to characterise these entities as subjects of transnational law, that is to say, a legal order of the nature of a tertium

16. Cf in addition the International Court's *Advisory Opinion on Western Sahara* ICJ 1975, 12 at 31–35. The Helsinki Accord of 1975 also contained in Principle VIII a reference to 'the principle of equal rights and self-determination of *peoples*'.

quid intermediate between international law, on the one hand, and domestic national law, on the other.

To sum up, it may be said:

a. That under modern practice, the number of exceptional instances of individuals or non-state entities enjoying rights or becoming subject to duties directly under international law, has grown.
b. That the doctrinaire rigidity of the procedural convention precluding an individual from prosecuting a claim under international law except through the state of which he is a national, has been to some extent tempered.
c. That the interests of individuals, their fundamental rights and freedoms, etc, have become a primary concern of international law.

These and other developments of recent years[17] appear to show that the theory that states are the exclusive subjects of international law cannot be accepted today as accurate in all respects, although it may be a good working generalisation for the practical international lawyer. The use of the state as a medium and screen for the application of international law cannot now do justice to all the far-reaching aims of the modern system.

Yet it is as wrong to minimise this traditional theory as artificially to explain away the developments that have subjected the theory to such strain. The bulk of international law consists of rules which bind states, and it is only in the minority of cases, although it is a substantial minority, that lawyers have to concern themselves with individuals and non-state entities or associations as subjects of international law.

17. One interesting development was the conclusion in February and November 1965 of educational and cultural agreements between France and the Canadian Province of Quebec, with provision for a supervisory France-Quebec Co-operation Commission. True, this was with the concurrence of the Canadian Government, but in the result a component of a federation was brought within the range of international law. See Fitzgerald 60 AJIL (1966) 529–531 and T. A. Levy 'Provincial International Status Revisited' 3 Dalhousie LJ (1976) 70 at 99–103. A later development was the conclusion in September 1969 of a Quebec-Louisiana Cultural Co-operation Agreement, ie between subdivisions of different federations. Further instances of agreements made by Canadian provinces with states are referred to in Marzo 'The Legal Status of Agreements Concluded by Component Units of Federal States with Foreign Entities', *Canadian Yearbook of International Law* (1978) p 197 at 206 et seq. These have been described as 'transnational agreements' (ibid, at 222). As to the extent to which the Soviet Union Republics are subjects of international law, see *Soviet Year Book of International Law* (1963) pp 105 et seq.

CHAPTER 4

The relation between international law and state law

1. GENERAL

Nothing is more essential to a proper grasp of the subject of international law than a clear understanding of its relation to state law. A thorough acquaintance with this topic is of the utmost practical importance. Particularly is it of value in clarifying the law of treaties—perhaps the most important branch of international law, and one which impinges so frequently on the domain of state law.

Although this book aims only at stating the fundamentals of modern international law, it is desirable to give more than a merely elementary account of the relation between international law and state law. For this purpose, it is necessary to include some treatment of the theoretical aspects before dealing briefly with the practice observed by states at the present time. The importance of such theoretical analysis cannot be overrated, for numerous are the questions which come for opinion before an international lawyer, involving a nice consideration of the limits between international law and state law. Apart from the aspect of theory, there is the important practical problem of more immediate concern to municipal courts, namely, to what extent may such courts give effect within the municipal sphere to rules of international law, both where such rules are, and where they are not in conflict with municipal law. It is this problem which requires a consideration of the practice of states. Besides, in the international sphere, international tribunals may be called upon to determine the precise status and effect of a rule of municipal law, which is relied upon by one party to a case.

2. THEORIES AS TO THE RELATION BETWEEN INTERNATIONAL LAW AND STATE LAW[1]

The two principal theories are known as *monism* and *dualism*. According to monism, international law and state law are concomitant aspects of

1. See generally on the subject, Kelsen *Principles of International Law* (2nd edn, 1966, revised and edited by R.W. Tucker) pp 553–588, and D.H.M. Meuwissen, 'The Relationship Between International Law and Municipal Law and Fundamental Rights' (1977) 24 *Netherlands International Law Review* 192 esp at 197 et seq.

the one system—law in general; according to dualism, they represent two entirely distinct legal systems, international law having an *intrinsically* different character from that of state law. Because a large number of domestic legal systems are involved, the dualist theory is sometimes known as the 'pluralistic' theory, but it is believed that the term 'dualism' is more exact and less confusing.

Dualism

Probably it is true to say that it would not have occurred to the earliest writers on international law (for example, Suarez) to doubt that a monistic construction of the two legal systems was alone correct, believing as they did that natural law conditioned the law of nations and the very existence of states. But in the nineteenth and twentieth centuries, partly as a result of philosophic doctrines (for example, of Hegel) emphasising the sovereignty of the state-will, and partly as a result of the rise in modern states of legislatures with complete internal legal sovereignty, there developed a strong trend towards the dualist view.

The chief exponents of dualism have been the positivist writers, Triepel[2] and Anzilotti.[3] For the positivists, with their consensual conception of international law, it was natural to regard state law as a distinct system. Thus, according to Triepel, there were two fundamental differences between the two systems:

a. The subjects of state law are individuals, while the subjects of international law are states solely and exclusively.
b. Their juridical origins are different; the source of state law is the will of the state itself, the source of international law is the common will (*Gemeinwille*) of states.

As to point a, we have already shown in Chapter 3 above that it is now far from correct, and that international law binds individuals and entities other than states. As to b, the statement is somehow misleading; it begs the question to say that the alleged *Gemeinwille* is a source of international law, because the really important question is under what circumstances an expression of the *Gemeinwille* can become decisive. The natural inference is that over and above the *Gemeinwille* there are fundamental principles of international law, superior to it and indeed regulating its exercise or expression.

Anzilotti adopted a different approach; he distinguished international law and state law according to the fundamental principles by which each system is conditioned. In his view, state law is conditioned by the fundamental principle or norm that state legislation is to be obeyed, while international law is conditioned by the principle pacta sunt servanda, ie

2. See his *Völkerrecht und Landesrecht* (1899).
3. See his *Corso di Diritto Internazionale* (3rd edn, 1928) Vol I, pp 43 et seq. See also above, pp 24–25.

agreements between states are to be respected. Thus the two systems are entirely separate, and Anzilotti maintained further that they are so distinct that no conflicts between them are possible; there may be references (*renvois*) from one to the other, but nothing more. As to Anzilotti's theory, it is enough to say that for reasons already given,[4] it is incorrect to regard pacta sunt servanda as the underlying norm of international law; it is a partial illustration of a much wider principle lying at the root of international law.

Apart from the positivist writers, the theory of dualism has received support from certain non-positivist writers and jurists, and implicitly too from a number of judges of municipal courts.[5] The reasoning of this class of dualists differs from that of the positivist writers, since they look primarily to the empirical differences in the formal sources of the two systems, namely, that on the one hand, international law consists for the most part of customary and treaty rules, whereas municipal law, on the other hand, consists mainly of judge-made law and of statutes passed by municipal legislatures. In recent writings on international law another ground relied upon in support of dualism is the difference reflected in the fact that since 1980 international law has expanded to so great an extent into many different areas, while domestic national laws have continued to be concerned with a more limited range of subject matters.

Monism

Modern writers who favour the monistic construction endeavour for the most part to found their views upon a strictly scientific analysis of the internal structure of legal systems as such.

By contrast with the writers adopting dualism, such followers of monism regard all law as a single unity composed of binding legal rules, whether those rules are obligatory on states, on individuals, or on entities other than states. In their view, the science of law is a unified field of knowledge, and the decisive point is therefore whether or not international law is true law. Once it be accepted as a hypothesis that international law is a system of rules of a truly legal character, it was impossible according to Kelsen (1881–1973)[6] and other monist writers to deny that the two systems constitute part of that unity corresponding to the unity of legal science. Thus any construction other than monism, and in particular

4. See above, p 25.
5. See, eg, the passage in *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271 at 295.
6. Kelsen's monistic theory is founded on a philosophic approach towards knowledge in general. According to Kelsen, the unity of the science of law is a necessary deduction from human cognition and its unity. Cf Luigi 'International Law and Municipal Law: the Complementarity of Legal Systems' in Macdonald and Johnston (eds) *The Structure and Process of International Law* (1983) 715, and Rubanov 'International Law and the Co-existence of National Legal Systems' in *Soviet Law and Government* Vol 24 (1986) 52.

dualism, is bound to amount to a denial of the true legal character of international law. There cannot in the view of the monist writers be any escape from the position that the two systems, because they are both systems of legal rules, are interrelated parts of the one legal structure.

There are, however, other writers who have favoured monism for less abstract reasons, and who maintain, as a matter purely of practical appraisal, that international law and state law are both part of a universal body of legal rules binding all human beings collectively or singly. In other words, it is the individual who really lies at the root of the unity of all law.

Question of primacy

Where does primacy reside, in international law or in state law? It is apparent from the attachment of dualistic theory to the sovereignty of the state-will that it ascribes primacy to state law.

On this point, the protagonists of monism are somewhat divided. Kelsen's answer, for instance, was to make a structural analysis of international law and state law. Here he applied his well-known 'hierarchical' doctrine according to which legal rules are conditioned by other rules or principles from which they derive their validity and binding force; thus the rule laid down in regulations or statutory orders is conditioned by the superior rule laid down in a statute, and it in its turn by the rule laid down in the constitution, and so on.

> 'Law has the peculiarity of governing its own creation; a rule of law determines how another rule will be laid down; in this sense the latter depends on the former; it is this bond of dependence which links together the different elements of the legal order, which constitutes its principle of unity.'

From principle to principle, and from rule to rule, legal analysis eventually reaches one supreme fundamental norm[7] which is the source and foundation of all law. Beyond this fundamental postulate, one which may be taken as conditioning both the validity and content of norms of lower degree in the hierarchy, the analytical jurist cannot venture, as the ultimate origins of law are determined by non-legal considerations.

Peculiarly enough, Kelsen took the view that this fundamental postulate might belong either to international law or to state law. According to him, the thesis of the primacy of state law was perfectly legitimate, and he adopted this attitude for the reason that in his opinion the choice between either system could not be decided, as in the natural sciences, in a strictly scientific way. In his own words:[8]

7. As to which, see Kelsen, op cit, pp 557–559, and his *Reine Rechtslehre* (1960) pp 9 et seq, and 80 et seq.
8. Kelsen in *Hague Recueil* (1926), Vol 14, pp 313–14. Kelsen reaffirmed his position on this point in *The Principles of International Law* (1952) pp 446–447, and in 1958, in *Makarov Festgabe. Abhandlungen zum Völkerrecht* pp 234–248. Cf also his *Reine Rechtslehre* (1960) pp 328–343.

> 'It cannot be asserted, as in the natural sciences, that the preferable hypothesis is the one which embraces the greatest number of given facts. For, here, we are not dealing with materials, with perceptible realities, but with rules of law—data uncertain by their very nature.'

It was objected against Kelsen's view of such an option between international law and state law that his attitude was rooted in too sceptical a philosophic approach[9] and that there were also fundamental difficulties which this view failed to resolve. For instance, there was the point that if international law were not the higher legal order, primacy would have to be attributed to over one hundred and more different and separate systems of state law, which would virtually amount to an affirmation of international anarchy. Moreover, the thesis of the ultimate primacy of state law was claimed to break down in two crucial cases:

a. If international law drew its validity only from a state constitution, it would necessarily cease to be in force once the constitution on which its authority rested, disappeared. But nothing is more certain than that the valid operation of international law is independent of change or abolition of constitutions, or of revolutions. This was so declared by the London Conference of 1831 which decided that Belgium should be an independent and neutralised state. The Conference expressly upheld the fundamental principle that 'treaties do not lose their force despite internal constitutional changes'.
b. The entry of new states into the international society. It is well established that international law binds the new state without its consent, and such consent if expressed is merely declaratory of the true legal position.[10] Besides, there is a duty on every state to bring not only its laws, but also its constitution, into harmony with international law.

It may be argued in favour of state primacy that states have the very widest liberties and exercise almost complete sovereignty. The answer to this argument is that state sovereignty represents no more than the competence, however wide, which states enjoy within the limits of international law. Here the analogy of a federal state is useful. The individual member states of a federation may enjoy a very wide measure of independence, but legal primacy none the less resides in the federal constitution.

This analogy of federal states is important for one further reason. Accepting the view that primacy belongs to international law, the question arises: does this reside in international law as a whole, or only in a particular group of its rules and principles? The latter is the better view, and on the analogy of federal constitutions we are entitled to deduce that

9. See Kunz *Transactions of the Grotius Society* (1924) Vol 10, pp 115 et seq.
10. See also above, pp 25–26.

there is in a sense an international constitutional law which conditions both state law, and the remaining body of international law much in the same way as a constitutional instrument in a federal state conditions both provincial law and the law under federal statutes and regulations made pursuant to the constitutional powers.

'Transformation' and 'specific adoption' theories

The above discussion would be incomplete without briefly referring to certain theories concerning the application of international law within the municipal sphere.

On the one hand, the positivists have put forward the view that the rules of international law cannot directly and ex proprio vigore be applied within the municipal sphere by state courts or otherwise; in order to be so applied such rules must undergo a process of *specific adoption* by, or specific incorporation into, municipal law. Since, according to positivist theory, international law and state law constitute two strictly separate and structurally different systems, the former cannot impinge upon state law unless the latter, a logically complete system, allows its constitutional machinery to be used for that purpose. In the case of treaty rules, it is claimed that there must be a *transformation* of the treaty, and this transformation of the treaty into state law,[11] which is not merely a formal but a *substantive* requirement, *alone* validates the extension to individuals of the rules laid down in treaties.

These theories rest on the supposed consensual character of international law as contrasted with the non-consensual nature of state law. In particular, the *transformation* theory is based on an alleged difference between treaties on the one hand, and state laws or regulations on the other; according to the theory, there is a difference between treaties which are of the nature of *promises*, and municipal statutes which are of the nature of *commands*. It follows from this basic difference that a transformation from one type to the other is *formally* and *substantively* indispensable. Critics of the transformation theory have objected that this point is somewhat artificial. They maintain that if due regard be paid to the real function of provisions in treaties or in statutes it will be seen that the one no more 'promises' than the other 'commands'. The real object of treaties and of statutes—indeed their common ground—is to stipulate that certain situations of fact will involve certain determinate legal consequences. The distinction between promise and command is relevant to *form* and *procedure* but not to the true legal character of these instruments. It is therefore incorrect to consider that the transformation from one to the other is *materially* essential.

In answer to the transformation theory, the critics have put forward a theory of their own—*the delegation theory*. According to this theory

11. Eg, by legislation approving the treaty, or implementing its provisions.

there is *delegated* to each state constitution by constitutional rules of international law, the right to determine when the provisions of a treaty or convention are to come into force and the manner in which they are to be embodied in state law. The procedure and methods to be adopted for this purpose by the state are a continuation of the process begun with the conclusion of the treaty or convention. There is no transformation, there is no fresh creation of rules or municipal law, but merely a prolongation of one single act of creation. The constitutional requirements of state law are thus merely part of a unitary mechanism for the creation of law.

Whatever be the ultimate merits of this theoretical controversy over the alleged necessity for a transformation or specific adoption of international law by municipal law, the actual practice of states concerning the application of international law within the municipal sphere must remain of critical importance. It is therefore proposed to pass to a consideration of such state practice, and then to derive therefrom any necessary conclusions relative to the matter.

3. STATE PRACTICE AS TO OPERATION OF INTERNATIONAL LAW WITHIN MUNICIPAL SPHERE

The object of the present discussion is to ascertain in what manner and to what extent municipal courts do apply a rule of international law. How far do they give effect to it automatically, and how far is some specific municipal measure of statutory or judicial incorporation required before that rule can be recognised as binding within the municipal sphere? A further question is, how far a rule of international law will be applied by a municipal court if it actually conflicts with a rule of municipal law judge-made or statutory rule. The answers to these questions will be found to require distinctions to be made, on the one hand, between customary and treaty rules of international law; and on the other between statutory and judge-made municipal law.

British practice

British practice draws a distinction between: (i) customary rules of international law; (ii) rules laid down by treaties.

(i) The rule as to customary international law according to the current of modern judicial authority is that customary rules of international law are deemed to be part of the law of the land, and will be applied as such by British municipal courts, subject to two important qualifications:

a. That such rules are not inconsistent with British statutes,[12] whether the statute be earlier or later in date than the particular customary rule concerned.
b. That once the scope of such customary rules has been determined by British courts of final authority, all British courts are thereafter bound by that determination, even though a divergent customary rule of international law later develops.[13]

These qualifications must be respected by British municipal courts, notwithstanding that the result may be to override a rule of international law; the breach of such a rule is not a matter for the courts, but concerns the executive in the domain of its relations with foreign Powers.[14]

The rule as stated above is somewhat narrower than that which was formerly applicable. In the eighteenth century, by a doctrine known sometimes as the 'Blackstonian' doctrine (because so affirmed by Sir William Blackstone (1723–1780)) but more generally as the 'incorporation' doctrine, customary international law was deemed automatically to be part of the common law, and the two above-mentioned qualifications were not expressly formulated.[15] Thus Blackstone's statement of the doctrine was in these terms:[16]

> 'The law of nations, wherever any question arises which is properly the object of its jurisdiction is here adopted in its full extent by the common law, *and it is held to be a part of the law of the land.*'

This doctrine was favoured not only by Blackstone but also by Lord Mansfield and other judges in the eighteenth century.[17]

During the nineteenth century it was reaffirmed in a succession of decisions by distinguished common law and equity Judges; in *Dolder v Huntingfield* (1805) by Lord Eldon,[18] in *Wolff v Oxholm* (1817) by Lord Ellenborough,[19] in *Novello v Toogood* (1823) by Abbott CJ,[20] in *De Wutz*

12. See *Mortensen v Peters* (1906) decision of the High Court of Justiciary of Scotland, 8 F 93, and *Polites v The Commonwealth* (1945) decision of the High Court of Australia, 70 CLR 60.
13. See *Chung Chi Cheung v R* [1939] AC 160 at 168, noting, however, *The Berlin* [1914] P 265 at 272. This principle was not however accepted by Lord Denning MR in *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529, [1977] 1 All ER 881.
14. See *Polites v The Commonwealth* note 12 above.
15. These qualifications emerged presumably because of two nineteenth century developments: a. The crystallisation after 1830 of a rigid doctrine of the binding character of British judicial precedents. b. The growth of the modern doctrine of parliamentary sovereignty in Great Britain.
16. *Commentaries* Vol IV, p 55.
17. For eighteenth century cases supporting the doctrine, see *Barbuit's Case* (1737) Cas temp Talb 281; *Triquet v Bath* (1764) 3 Burr 1478, and *Heathfield v Chilton* (1767) 4 Burr 2015.
18. 11 Ves 283.
19. 6 M & S 92 at 100–106.
20. 1 B & C 554.

v Hendricks (1824) by Best CJ,[1] and in *Emperor of Austria v Day and Kossith* (1861) by Stuart V-C.[2] In terms the courts of law and equity stated that they would give effect to settled rules of international law as part of English law. This did not mean, however, that they would enforce international law if it conflicted with an English statute or judicial decision.

In 1876, in *R v Keyn* (*The Franconia*),[3] the Court for Crown Cases Reserved held by a majority that English courts had no jurisdiction over crimes committed by foreigners within the maritime belt extending to three miles from the English coast, although it was claimed that such jurisdiction belonged to them under international law. This decision was nullified by Parliament passing the Territorial Waters Jurisdiction Act of 1878 to give English courts jurisdiction in such circumstances, but the judicial opinions expressed in the case seemed to throw doubts on the scope of the incorporation doctrine. According to these, an English court could not give any effect to rules of international law unless such rules were proved to have been adopted by Great Britain, in common with other nations, in a positive manner. Moreover, if such rules conflicted with established principles of the English common law, an English court was bound not to apply them. But in 1905, in the decision of *West Rand Central Gold Mining Co v R*,[4] there was a partial return to the traditional 'incorporation' doctrine, albeit the Court of Appeal in that case reaffirmed it in none too positive terms.

In a number of later pronouncements, the doctrine again received recognition, though in somewhat hesitant language, and with certain qualifications. Thus Lord Atkin declared in *Chung Chi Cheung v R*:[5]

> 'The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, *so far as it is not inconsistent with rules enacted by Statutes or finally declared by their tribunals*.'

In addition to the qualifications stated by Lord Atkin, that a customary rule must not be inconsistent with statutes or prior judicial decisions of final authority, it is also a condition precedent that the rule is one generally accepted by the international community.

> 'It is a recognised prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position

1. 2 Bing 314.
2. 30 LJ Ch 690 at 700.
3. 2 Ex D 63 at 202 et seq and 270.
4. [1905] 2 KB 391.
5. [1939] AC 160 at 168. Cf however the dicta of Lord Denning MR in *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529 at 554–557, [1977] 1 All ER 881 at 889–890. See also on the binding operation of statutes, even if in contravention of international law, *Croft v Dunphy* [1933] AC 156 at 163–4.

> of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice, and judicial decisions."[6]

Moreover, it is now clear that, contrary to certain dicta in *R v Keyn* (*The Franconia*),[7] an English court can in a proper case, if there are no established rules on a particular point, apply the unanimous opinion of jurists.[8] At the same time, many other judicial utterances still reflect an attitude rather hostile to the incorporation doctrine.

On one extreme view, which is reflected in certain judicial utterances in *R v Keyn* (*The Franconia*), above, customary rules of international law could never be applied by British municipal courts unless they had been embodied in a British statute, but so far-reaching an opinion is contradicted by the whole current of recent authority. A more moderate view is that international law is not a part of British domestic law, but may be a 'source' of rules applied by a British court;[9] if, however, this meant that a British judge were free to reject a generally recognised customary rule of international law, it would be contrary to authority.

Apart from the two qualifications to the rule as stated above, there are two important exceptions to the automatic applicability of customary international law by British municipal courts:

1. Acts of state by the executive, for example a declaration of war, or an annexation of territory, may not be questioned by British municipal courts, notwithstanding that a breach of international law may have been involved.[10]
2. British municipal courts regard themselves as bound by a certificate or authoritative statement on behalf of the executive (that is to say, the Crown) in regard to certain matters falling peculiarly within the Crown's prerogative powers, such as the de jure or de facto recognition of states, the sovereign nature of governments, and the diplomatic status of persons claiming jurisdictional immunity on the grounds of diplomatic privilege, although such certificate or statement may be difficult to reconcile with existing rules of international law.[11]

6. *Compania Naviera Vascongado v Cristina SS* [1938] AC 485 at 497 per Lord MacMillan.
7. See p 79 above.
8. *Re Piracy Jure Gentium* [1934] AC 586.
9. See *Chow Hung Ching v R* (1949) 77 CLR 449 at 477.
10. See *Cook v Sprigg* [1899] AC 572, and W. Harrison Moore *Act of State in English Law* (1906) pp 78, 82, and pp 132 et seq.
11. See, eg, *The Arantzazu Mendi* [1939] AC 256, and *Engelke v Musmann* [1928] AC 433. See also pp 148–150 below. Section 21 of the United Kingdom State Immunity Act 1978 renders conclusive a certificate by or on behalf of the Secretary of State as to a number of material questions for the purposes of the privileges and immunities conferred by the first Part of the Act, namely, whether a country is a state, whether any territory is a constituent part of a federal state and whether a person or persons may be regarded as the head of a government or of a state.

Notwithstanding judicial doubts as to its scope, the incorporation doctrine has left its definite mark in two established rules recognised by British courts:

a. *A rule of construction.* Acts of Parliament and statutory instruments are to be interpreted so as not to conflict with international law. There is indeed a presumption that Parliament did not intend to commit a breach of international law.[12] But this rule of construction does not apply if the statute is otherwise clear and unambiguous,[13] in which case it must be applied, although there is nothing to debar the court from expressly ruling that the statute is in breach of customary rules of international law.[14]

b. *A rule of evidence.* International law need not, like foreign law, be proved as a fact by expert evidence or otherwise. The British courts will take judicial notice of its rules, and may of their own volition refer to textbooks and other sources for evidence thereof.[15]

In the matter of giving effect to international law, the position of British Prize Courts is different from that of the courts of common law and equity. Prize Courts are specifically appointed to apply international law, and according to the leading case of *The Zamora*[16] are not bound by an executive Order-in-Council which contravenes or purports to alter a rule of international law, although presumably they would be obliged to follow an Act of Parliament in breach of international law.

(ii). The British practice as to treaties, as distinct from customary international law, is conditioned primarily by the constitutional principles governing the relations between the executive (that is to say, the Crown) and Parliament. The negotiation, signature, and ratification of treaties

12. *The Le Louis* (1817) 2 Dods 210 at 251 and 254; *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616, [1969] 1 All ER 82; *R v Chief Immigration Officer, Heathrow Airport, ex p Bibi* [1976] 3 All ER 843 at 847; and cf more recently *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141; *Fothergill v Monarch Airlines Ltd* [1981] AC 251; *Vervaeke v Smith* [1981] Fam 77, [1981] 1 All ER 55; and *The Alastor* [1981] 1 Lloyd's Rep 581.

13. See decision of House of Lords in *Collco Dealings Ltd v IRC* [1962] AC 1 at 19, [1961] 1 All ER 762 at 765; decision of High Court of Australia in *Polites v Commonwealth* (1945) 70 CLR 60; and the judgments of the Court of Appeal in *Salomon v Customs and Excise Comrs* [1967] 2 QB 116, [1966] 3 All ER 871. The court may look at the relevant multilateral convention implemented by the statute in order to resolve ambiguities in the statute, even though the statute does not mention the convention, or does not exactly correspond with the convention in wording or in effect, or even if the statute is enacted before the ratification of the convention; see *The Banco* [1971] P 137 at 145, 151, 157 and *D and R Henderson (MFG) Pty Ltd v Collector of Customs (NSW)* (1974) 48 ALJR 132 at 135. Cf also *Mohammad Mohy-ud-Din v King Emperor* (India) (1946) 8 FCR 94; *Theophile v Solicitor-General* [1950] AC 186 at 195; and *Cheney v Conn (Inspector of Taxes)* [1968] 1 All ER 779 at 781A.

14. *Polites v Commonwealth*, above.

15. *Re Piracy Jure Gentium* [1934] AC 586.

16. [1916] 2 AC 77 at 91–94.

are matters belonging to the prerogative powers of the Crown. If, however, the provisions of a treaty made by the Crown were to become operative within Great Britain automatically and without any specific act of incorporation, this might lead to the result that the Crown could alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliament's approval.

Hence it has become established that:[17]

a. Treaties which: (1) affect the private rights of British subjects, or (2) involve any modification of the common or statute law[18] by virtue of their provisions or otherwise,[19] or (3) require the vesting of additional powers in the Crown, or (4) impose additional financial obligations, direct or contingent, upon the government of Great Britain, must receive parliamentary assent through an enabling Act of Parliament, and, if necessary, any legislation to effect the requisite changes in the law must be passed.[20]
b. Treaties made expressly subject to the approval of Parliament require its approval, which is usually given in the form of a statute, though sometimes by Resolution.
c. Treaties involving the cession of British territory require the approval of Parliament given by a statute.
d. No legislation is required for certain specific classes of treaties, namely, treaties modifying the belligerent rights of the Crown when engaged in maritime warfare[1] (presumably because such treaties involve no

17. Note the constitutional convention known as the 'Ponsonby Rule', whereby treaties, subject to ratification, are tabled in both Houses of Parliament for a period of 21 days before the government proceeds to ratification.
18. Exceptions to (1) and (2) are:
    a. An agreement to admit a foreign armed force, conceding certain immunities from local jurisdiction to the members of that force; see *Chow Hung Ching v R* (1949) 77 CLR 449, and below, pp 228–232.
    b. A treaty of peace to which the United Kingdom is a party, terminating a war; this will, semble, put an end to the situation under which persons voluntarily resident in, or carrying on business in, enemy territory, are treated as enemy aliens, who are not entitled to bring proceedings in the courts without the licence of the Crown (cf *Porter v Freudenberg* [1915] 1 KB 857).
    c. A treaty conceding special immunities and privileges to the diplomatic and consular officers of a particular state and a treaty regulating the conduct of war (cf McNair *The Law of Treaties* (1961) pp 89–91).
19. Eg, a treaty or convention signed by Great Britain binding it to pass certain legislation.
20. See *Walker v Baird* [1892] AC 491 at 497; *The Parlement Belge* (1879) 4 PD 129; *A-G for Canada v A-G for Ontario* [1937] AC 326 at 347; *Blackburn v A-G* [1971] 2 All ER 1380; *Laker Airways Ltd v Department of Trade* [1977] QB 643; *Simsek v McPhee* (1982) 56 ALJR 277 at 280; and, most recently, *Maclaine Watson & Co Ltd v International Tin Council* (1988 Times, 4 May; inapplicability of 6th International Tin Agreement which entered into force in July 1982). Cf *Francis v R* (1956) 3 DLR (2d) 641, and Mann *Studies in International Law* (1973) p 328.
1. But not treaties increasing the rights of the Crown in that connection; cf *The Zamora* [1916] 2 AC 77.

major intrusion on the legislative domain of Parliament), and administrative agreements of an informal character needing only signature, but not ratification, provided they do not involve any alteration of municipal law.

Where under the above-mentioned rules, a British treaty is required to be implemented by legislation, a mere general or vague allusion to the treaty in a statute is not sufficient to constitute the necessary legislative implementation.[2]

It follows also that, where a statute contains provisions which are unambiguously[3] inconsistent with those of an earlier treaty, a British municipal court must apply the statute in preference to the treaty. Semble, however, where the statute is ambiguous, and its provisions have been conditioned by a previously concluded treaty, the court may look at the treaty for the purpose of interpreting the ambiguous statutory language, notwithstanding that the statute does not specifically incorporate or refer to the treaty.[4]

According to the decision of the House of Lords in *Ostime v Australian Mutual Provident Society*[5], where a treaty has been duly implemented by legislation, this enactment will prevail over conflicting earlier 'unilateral' legislation.

The above-mentioned rules concerning the British practice as to the applicability of treaties are subject to the special exception of the European Convention of 1950 on Human Rights and Fundamental Freedoms (binding on British courts; see *Malone v United Kingdom* (1984) ECHR Series A No 82) and, as well, to the special exception of the European Communities Treaties (binding on British courts under s. 2(1) of the European Communities Act 1972).

American practice

In the matter of customary rules of international law, the American practice is very similar to the British practice. Such rules are administered as part of the law of the land,[6] and Acts of the United States Congress

2. See *Republic of Italy v Hambros Bank Ltd* [1950] Ch 314. See also, as to the necessity for *specific* legislative implementation, the Australian case, *Bradley v Commonwealth of Australia* (1973) 128 CLR 447 (United Nations Charter not specifically implemented by any appropriate legislation).
3. See decision of House of Lords in *Collco Dealings Ltd v IRC* [1962] AC 1, [1961] 1 All ER 762, and *The Banco* [1971] P 137 at 145, 151, 157.
4. *Salomon v Customs and Excise Comrs* [1967] 2 QB 116, [1966] 3 All ER 871.
5. [1960] AC 459 at 476, [1959] 3 All ER 245 at 248.
6. *The Paquete Habana* 175 US 677 (1900) at 700, and *United States v Melekh* 190 F Supp 67 (1960). However, in *Pauling v McElroy* 164 F Supp 390 (1958), a federal court refused to give effect to the principle of the freedom of the high seas in a suit brought by individuals to restrain the government from detonating nuclear weapons in the Marshall Islands. Moreover, customary rules of international law not accepted or disputed by the United States, will not be applied in American courts; see Buergenthal and Maier *Public International Law* (1985) p 204.

are construed so as not to conflict therewith,[7] although a later clear statute will prevail over earlier customary international law.[8] Also, an American court is entitled to ascertain the rules of international law on a particular point by referring to textbooks, state practice, and other sources.[9] Deference is, however, paid to the views of the executive, as in the case of British courts, to the extent that American courts normally regard themselves as bound by the certificates or 'suggestions' of the executive regarding such matters as the recognition of foreign states, the territorial limits of a foreign country, and the immunity of governments, persons, corporations, or vessels from jurisdiction.[10]

But so far as treaties are concerned, there is a radical difference from the British practice. The American practice does not depend like the British practice upon any reconciliation between the prerogative powers of the executive and the legislative domain of Parliament, but upon the provisions of the United States Constitution stipulating that 'all Treaties made, or which shall be made under the Authority of the United States', shall be 'the supreme Law of the Land' (see article VI, para 2), and upon a distinction drawn by American courts between 'self-executing' and 'non-self-executing' treaties.[11] A self-executing treaty is one which does not in the view of American courts expressly or by its nature require legislation to make it operative within the municipal field, and that is to be determined by regard to the intention of the signatory parties and to the surrounding circumstances.[12] If a treaty is within the terms of the

7. *The Charming Betsy* (1804) 2 Cranch 64 at 118.
8. *The Over the Top* 5 F (2d) at 842 (1925). An American federal statute will not be treated as superseded by customary international law; see *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) at 423. A fortiori the courts will not give effect to a rule of international law which conflicts with the United States Constitution; see *Tag v Rogers* 267 F (2d) 664 (1959).
9. *The Paquete Habana*, note 6 above.
10. In *Spacil v Crowe* 489 F 2d 614 (1974) at 619–20, a Circuit Court of Appeals declined to treat, as open to judicial review, a Department of State 'suggestion' allowing the immunity of a Cuban vessel from arrest or attachment, and held that the judiciary was bound by the executive's decision. The executive may also appear as *amicus curiae*.
11. See *Foster v Neilson* (1829) 2 Peters 253 at 314, and cf *Dreyfus v Von Finck* 534 F (2d) 24 (1976).
12. *Sei Fujii v The State of California* 38 Cal (2d) 718 (1952) (Cal Sup Ct). In this case, the question was to what extent certain provisions of the United Nations Charter were self-executing. It was held that the human rights provisions of the Charter (arts 55–56) were not self-executing, but that, semble, the provisions relative to the privileges and immunities of the United Nations (arts 104–5) were. Note also *Pauling v McElroy* 164 F Supp 390 (1958), where it was held that the Charter, and the Trusteeship Agreement for the Trust Territory of the Pacific Islands were not self-executing treaties. But see *People of Saipan ex rel Guerrero v United States Department of Interior* 502 F (2d) 90 (1974) where, on the one hand, Judge Goodwin held that the Trusteeship Agreement created judicially enforceable rights, for which relief could be obtained in the Trust Territory local Court, while, on the other hand, Judge Trask was of opinion that the Agreement was not self-executing, but had been sufficiently implemented by legislation (and see note in (1975) Texas ILJ 138–149).

Constitution, and it is self-executing within the meaning just referred to, then under the Constitution it is deemed to be operative as part of the law of the United States, and will prevail, also, over a customary rule of international law.[13] On the other hand, treaties which are not self-executing, but require legislation, are not binding upon American courts until the necessary legislation is enacted.[14] Moreover, if the relevant treaty purports to deal with a particular subject matter in respect of which the United States Congress has exclusive legislative powers, the treaty will be considered as prima facie non-self-executing irrespective of what the intention of the parties is claimed to be. The distinction between the two kinds of treaties involves some anomalies, and in 1952, Senator Bricker's proposed amendment to the Constitution included a provision to make all treaties, in effect, non-self-executing.

Self-executing treaties or conventions ratified by the United States, are binding on American courts, even if in conflict with previous American statutes,[15] provided that there is no conflict with the United States Constitution.[16] But a statute passed by Congress overrules previous treaties that have become the law of the land,[17] although there is a presumption that Congress did not intend to overrule such treaties, and unless the purpose of Congress to overrule international law has been clearly expressed, such abrogation or modification will not be deemed to have been carried out.[18]

Practice of states other than Great Britain and the United States

The practice of states other than Great Britain and the United States reveals wide variations both in the requirements of constitutional law,

13. See *Tag v Rogers* 267 F (2d) 664 (1959), and Reiff 'The Enforcement of Multipartite Administrative Treaties in the United States' 34 AJIL (1940) 661–679. A self-executing treaty will prevail also over the contrary law of an American state: *Clark v Allen* 331 US 503 (1947).
14. Note also the constitutional distinction between 'treaties' and 'executive agreements' made by the President of the United States, the latter instruments not being subject to the requirement under art II, s 2 of the Constitution, of concurrence of two-thirds of the Senate; see the United Nations publications, *Laws and Practices concerning the Conclusion of Treaties* (1953) pp 129–130, Buergenthal and Maier *Public International Law* (1985) pp 199–200, and cf the Opinion (delivered by Mr Justice Sutherland) of the United States Supreme Court in *United States v Belmont* 301 US 324 (1937).
15. *Whitney v Robertson* 124 US 190 (1888) at 194. Cf also *Iannone v Radory Construction Corpn* 141 NYS (2d) 311 (1955). This rule does not apply to 'executive agreements', which are invalid if they conflict with a substantive federal enactment: see *Seery v U. ited States* 127 F Supp 601 (1955). See, however, *Territory v HO* (1957) 41 Hawaii Reports 565. As to the constitutional validity of legislation giving effect to an executive agreement, note *Kinsella v Krueger* 354 US 1 (1957). A treaty will prevail over an earlier statute only if it contains a substantive inconsistency with the statute; see *Bank Voor Handel en Scheepvaart NV v Kennedy* 288 F (2d) 375 (1961).
16. *Cherokee Tobacco Co v United States* 11 Wall 616 (1870).
17. See *Tag v Rogers* 267 F (2d) 664 (1959), and *Mercado v Feliciano* 260 F (2d) 500 (1958).
18. *Cook v United States* 288 US 102 (1933) at 120.

and in the attitudes of municipal courts concerning the application therein of customary international law and of treaties.

So far as one can sum up this practice, and despite the hazard of generalisation on so complex a matter, the following propositions may be ventured:

1. In a large number of states, customary rules of international law are applied as part of internal law by municipal courts, without the necessity for any specific act of incorporation, provided that there is no conflict with existing municipal law.
2. Only a minority[19] of states follow a practice whereby, without the necessity for any specific act of incorporation, their municipal courts apply customary rules of international law to the extent of allowing these to prevail in case of conflict with a municipal statute or municipal judge-made law.
3. There is no uniform practice concerning the application of treaties within the municipal sphere. Each country has its own particularities as regards promulgation or publication of treaties, legislative approval of treaty provisions, and so on.[20] Moreover, certain treaties, such as informal administrative arrangements, are never submitted to the legislature. Also the courts in some countries, for example the German Federal Republic, will, like American courts, give effect to self-executing treaties, that is to say, those capable of application without the necessity of legislative implementation. In other countries, for example, Belgium, legislative enactment or legislative approval is necessary for almost all treaties, particularly those which affect the status of private citizens.[1] As to conflicts between the provisions of treaties and earlier or later statutes, it is only in relatively few countries that the superiority of the treaty in this regard is established. France is a case in point, for if a treaty has been duly ratified in accordance with law, French tribunals, both judicial and administrative, will give effect to it, notwithstanding a conflict with internal legislation. But in most countries, for example, Norway, treaties do not per se operate to supersede state legislation or judge-made law. Exceptionally, however, there are some countries the courts of which go so far as to give full force to treaties, even if contrary to the provisions of the constitution of the country concerned.
4. In general, there is discernible a considerable weight of state practice requiring that in a municipal court, primary regard be paid to munici-

19. Albeit, the minority is steadily growing.
20. Note the curious case of Austria; treaties automatically bind the Administration without publication, but need to be gazetted in order to affect rights of the public in general. At the same time, purely departmental and administrative agreements are not usually published.
1. See as to India, decision in *Biswambhar v State of Orissa* A 1957, Orissa 247, and Basu *Commentaries on the Constitution of India* (1962) Vol II, p 323.

pal law, irrespective of the applicability of rules of international law, and hence relegating the question of any breach of international law to the diplomatic domain.

Reference should be made in this connection to certain modern constitutions, containing far-reaching provisions to the effect that international law shall be treated as an integral part of municipal law. A current example is article 25 of the Basic Law for the Federal Republic of Germany (the West German Republic) which lays down that the general rules of public international law shall form part of federal law, and shall take precedence over the laws of and create rights and duties directly for the inhabitants of the federal territory.[2] It has been claimed that this and similar constitutional provisions reflect a growing tendency among states to acknowledge the supremacy of international law within the municipal sphere. Be that as it may, it is none the less curious that these constitutional provisions appear to support the positivist thesis that before international law can be applicable by municipal courts some specific adoption by municipal law is required, since it is only in virtue of these provisions of municipal constitutional law that the rules of international law are valid and applicable within the municipal sphere. This reasoning may well be carried a stage further; even the Anglo-American judge-made doctrine that customary international law, subject to certain qualifications, forms part of the law of the land,[3] appears to be a doctrine of municipal law on the same plane as express municipal constitutional provisions of similar effect and to support the view that a specific municipal adoption of international law is required. Yet, admitting this, it must still be added that it is unlikely that when the British 'incorporation' doctrine was first enunciated by British courts in the eighteenth century, such courts were purporting to declare a principle of municipal constitutional law rather than to acknowledge the validity as such of the law of nations.

In regard, however, to the application of treaties within the municipal sphere, the above survey of state practice does not support the thesis that some municipal *transformation* is required in every case before treaties become operative in the municipal field. The necessity for some formal municipal change appears to depend upon two matters principally:

1. The nature and provisions of the particular treaty concerned. Thus

2. Cf art 4 of the German Republican Constitution of 1919, which provided that 'the universally recognised rules of international law are valid as binding constituent parts of German Federal law'. Art 25 of the Basic Law does not operate to confer supremacy on treaties concluded by the Federal Republic over municipal law, or to enable international law to prevail over fundamental provisions of the Basic Law; cf Case 11/70: *Internationale Handelsgesellschaft v Commission* [1972] CMLR 255, and Ulrich Scheuner 'Fundamental Rights in European Community Law and in National Constitutional Law' (1975) 12 CML Rev 171 at 177 et seq.

3. See above, pp 77–81 and 83–84 in this chapter.

some treaties are self-operating or self-executing,[4] and do not require any legislative implementation, as appears from the state practice considered above.

2. The constitutional or administrative practice of each particular state (see above). Also, it frequently happens that certain states (an outstanding illustration is Austria) allow the execution of a treaty to proceed by administrative practice alone without enacting laws or issuing regulations. In such a case, there is no structural transformation of the rules laid down in the treaty.

4. INTERNATIONAL TRIBUNALS AND THE OPERATION OF MUNICIPAL LAW

The fact that municipal courts must pay primary regard to municipal law in the event of a conflict with international law, in no way affects the obligations of the state concerned to perform its international obligations. A municipal court which defers to municipal law, notwithstanding an inconsistent rule of international law, itself acts in breach of international law, and will, as an organ of the state, engage the international responsibility of that state. Hence, before an international tribunal, a respondent state cannot plead that its municipal law (not even its constitution[5]) contains rules which conflict with international law, nor can it plead the *absence* of any legislative provision or of a rule of internal law as a defence to a charge that it has broken international law. This point was well put in the course of proceedings in the *Finnish Ships Arbitration*:[6]

> 'As to the manner in which its municipal law is framed, the State has under international law, a complete liberty of action, and its municipal law is a domestic matter in which no other State is entitled to concern itself, *provided that the municipal law is such as to give effect to all the international obligations of the State.*'

4. The Court of Justice of the European Communities held in *International Fruit Co NV v Productschap Voor Groenten en Fruit* 67 AJIL (1972) 559–563 that art XI of the General Agreement on Tariffs and Trade (GATT) of 30 October 1947, prohibiting, subject to qualifications and restrictions, quantitative restrictions was not, in effect, self-executing in countries within the framework of the European Economic Community.
5. See *Advisory Opinion on the Treatment of Polish Nationals in Danzig*, Pub PCIJ (1932), Series A/B, No 44 at 24, and also *Case of the Free Zones of Upper Savoy and Gex*, Pub PCIJ (1932), Series A/B No 46 at 167. Art 7 of the Constitution of El Salvador of 1950, laying down that the territory of the Republic included the adjacent waters to a distance of two hundred sea-miles from low water-line, was alleged by the United States in 1950 to be in breach of international law.
6. See *United Nations Reports of International Arbitral Awards* Vol 3, p 1484. Art 13 of the Draft Declaration of Rights and Duties of States adopted by the International Law Commission in 1949 also provides: 'Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in *its constitution or its laws* as an excuse for failure to perform this duty'.

This may even import a duty upon a state, in an appropriate case, to pass the necessary legislation to fulfil its international obligations.[7] To this extent, the primacy of international law is preserved.

The same rule applies with regard to treaties. A state cannot plead that its domestic law exonerated it from performing obligations imposed by an international treaty, unless in giving its consent to the treaty, a fundamental rule of municipal law concerning constitutional competence to conclude the treaty concerned was broken, and this breach of municipal constitutional law was manifest.[8]

This overriding regard for international law before international tribunals does not mean that the rules of municipal law are irrelevant in cases before international tribunals. Frequently, on the threshold of the determination of some international claim, it is necessary for an international tribunal to ascertain or interpret or apply municipal law, for example, where it is claimed that a denial of justice by a municipal tribunal has taken place, or where a treaty provision, calling for interpretation, refers to municipal law,[9] or sometimes merely for the purpose of elucidating the facts. Again, international tribunals are often constrained to consider the municipal laws of states generally, to ascertain whether cumulatively they lead to the inference that a customary rule of international law has evolved.[10] Or it may be that for the purpose of assisting in the determination of a difficult point of international law, an international tribunal will have regard to municipal law or to the special characteristics of municipal legal institutions,[11] or in an appropriate case may have recourse to analogies drawn from municipal law.

In this connection, a close study of the pleadings and arguments in the cases decided by the Permanent Court of International Justice and its present successor, the International Court of Justice, shows how important a role municipal law played in each instance. Indeed, few were the cases in which these courts reached a solution without the most minute

7. *Advisory Opinion on the Exchange of Greek and Turkish Populations* (1925) Pub PCIJ Series B, No 10 p 20.
8. Vienna Convention of 23 May 1969 on the Law of Treaties, arts 27 and 46; and cf *Advisory Opinion on the Jurisdiction of the Courts of Danzig*, Pub (1928) PCIJ Series B, No 15, pp 26–27.
9. The so-called 'reference without reception' to municipal law.
10. As in the *Lotus Case* (1927) Pub PCIJ Series A, No 10.
11. See *Case Concerning the Barcelona Traction, Light and Power Co Ltd (Second Phase)* [1970] ICJ 3, where the International Court of Justice, in reaching the conclusion that, as a general rule, the national state of shareholders of a company was not entitled to espouse their claim for loss suffered as a result of an international wrong done to the company itself, had regard to the general position at municipal law that an infringement of a company's rights by outsiders did not involve liability towards the shareholders. See para 50 of the judgment, where the Court said: 'If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort.'

examination of the municipal law relevant to the questions calling for determination, while one of the most striking aspects of the process by which both courts arrived at their decisions was the manner in which, almost spontaneously, the issues of international law emerged and became disengaged from the mass of municipal legal material relied upon by the parties in the pleadings and in the oral proceedings.

5. CONCEPT OF OPPOSABILITY

The concept of opposability (French, *opposabilité*), which has come into current use in the field of international law,[12] is of some value where the relationship between international law and municipal law is concerned.

In a dispute before an international tribunal between two states, A and B, where state A relies upon some ground in support of its claim, state B may seek to invoke as against, ie 'oppose' to state A some rule, institution, or régime under state B's domestic law in order to defeat the ground of claim set up by state A. As a general principle, if the domestic rule, institution, or régime is in accordance with international law, this may be legitimately 'opposed' to state A in order to negate its ground of claim,[13] but if not in accordance with international law, the domestic rule, institution, or régime may not be so 'opposed'.[14]

The convenience of the concept of opposability lies in the fact that if a rule of domestic law is held to be non-opposable, this does not necessarily mean that the rule ceases to be valid in the domestic domain; and, in any event, as Kelsen has pointed out,[15] international law provides no procedure of invalidation, within the domestic framework, of a rule of municipal law. If the position be that the rule of domestic law, held to be non-opposable, is itself invalid by reference to the provisions of domestic constitutional law, then the rule is not opposable also to states

12. See *North Sea Continental Shelf Cases, Pleadings, Oral Arguments, Documents* ICJ 1968, 1, Counter-Memorial of Denmark, pp 176–177, and judgment of the International Court of Justice in the same Cases, ICJ 1969, 3 at 41 and cf Bin Cheng *Year Book of World Affairs* (1966) p 247.
13. Eg the baselines method of delimitation of the territorial sea was successfully opposed by Norway to the United Kingdom's claim of free fishery rights in the waters concerned, in the *Fisheries Case* ICJ 1951, 116, and see pp 249, 262 below.
14. Eg in the *Nottebohm Case (second phase)* ICJ 1955, 4, Liechtenstein's grant of nationality to one, Nottebohm, was in effect deemed non-opposable to Guatemala, where Guatemala claimed that Liechtenstein was not entitled to espouse Nottebohm's complaint. Also in 1974 in the *Fisheries Jurisdiction Cases (United Kingdom and Federal German Republic v Iceland)* ICJ 1974, 3, 175, the International Court of Justice held that the Icelandic Regulations of 14 July 1972, representing a unilateral extension of the Iceland coastal fisheries limit to 50 miles, were not 'opposable' either to the United Kingdom or to the Federal Republic of Germany.
15. Kelsen *Pure Theory of Law* (2nd edn, translated by Max Knight, 1967) p 331.

other than the claimant state, unless perhaps such other states have expressly waived the constitutional invalidity of the rule.

Of course, a treaty rule may be opposable by one state to another state, in respect to the latter's ground of claim, in the same way as with a rule of domestic law, and similarly if the treaty rule is deemed to be non-opposable, it may none the less be validly opposable to certain states other than the claimant state.[16]

According to the Advisory Opinion of 21 June 1971, of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in South West Africa (Namibia)*,[17] even a determination of the United Nations Security Council, which correctly declares that a certain situation is illegal, may be opposable to all states, whether members or non-members, that may seek to rely upon the legality of the situation. Thus, in the Court's opinion, the termination of South Africa's mandate over South West Africa, by reason of its refusal to submit to the supervision of United Nations organs, and the consequence that its presence in the territory was illegal, according to the terms of a Security Council Resolution of 1970, were opposable to all states in the sense of barring erga omnes the legality of South Africa's continued administration of the mandate.

A final illustration is the recent decision of the High Court of Australia in the *'Spycatcher' Case*, namely, *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd*,[18] where the Court held in effect that the rule of international law entitling the courts of a state not to give effect to or to enforce the 'governmental' interests of another state, at the instance of that state, however friendly, was opposable to the rule of municipal or internal law that as a matter of 'comity' an Australian court should recognise and give effect to the laws and judicial decisions of another friendly state.

16. Eg in the *North Sea Continental Shelf Cases* ICJ 1969, 3, art 6 of the Geneva Convention on the Continental Shelf of 29 April 1958, containing the equidistance rule for the delimitation of a continental shelf common to adjacent countries, was held not opposable to the German Federal Republic (ibid at 41), which had not ratified the Convention, but in the event of a subsequent case involving a state which had ratified the Convention without reservation as to art 6, this article would be opposable to such a state.
17. ICJ 1971, 16 at 56.
18. Decision given on 2 June 1988; reported in (1988) 62 AIJR 344.

PART 2

States as subjects of international law

CHAPTER 5

States in general

1. NATURE OF A STATE AT INTERNATIONAL LAW

As we have seen, states are the principal subjects of international law. Of the term 'state' no exact definition is possible, but so far as modern conditions go, the essential characteristics of a state are well settled.

Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States (signed by the United States and certain Latin American countries) enumerates these characteristics:

> 'The State as a person of international law should possess the following qualifications:—(a) a permanent population; (b) a defined territory; (c) a Government;[1] and (d) a capacity to enter into relations with other States.'

As to (b), a fixed territory is not essential to the existence of a state provided that there is an acceptable degree of what is characterised as 'consistency' in the nature of the territory in question and of its population,[2] although in fact all modern states are contained within territorial limits. Accordingly, alterations, whether by increase or decrease, in the extent of a particular state's territory, do not of themselves change the identity of that state.[3] Nor need the territory possess geo-

1. Ie a government to which the population renders habitual obedience. The temporary exile of the government while an aggressor state is in military occupation does not result in the disappearance of the state; cf the cases of governments-in-exile (eg Norway) during the Second World War 1939–45, which issued decrees, took part in international conferences, and signed agreements on behalf of their states; see *Netherlands v Federal Reserve Bank of New York* 201 F (2d) 455 (1953).
2. Thus, Israel was admitted as a member state of the United Nations in May 1949, notwithstanding that its boundaries were not then defined with precision, pending negotiations regarding demarcation. Professor Jessup (later a judge of the International Court of Justice), speaking as United States representative on the Security Council, said on 2 December 1948, with regard to Israel's qualifications to be admitted to the United Nations: 'The formulae in the classic treatises somewhat vary, one from the other, but both reason and history demonstrate that the concept of territory [of a state] does not necessarily include precise delimitation of the boundaries of that territory'.
3. A current continuing problem is whether: (a) the former German State has disappeared as a result of the present condition of partition of Germany, with two separate governments; (b) the German Federal Republic (West Germany) is identical with that former state. For books on the subject of the identity and continuity of states in general, see K. Marek *Identity and Continuity of States in Public International Law* (1954), and Crawford *The Creation of States in International Law* (1979).

graphical unity; it may consist of territorial areas, lacking connection, or distant from each other.

So far as international law is concerned, the qualification (d) is the most important. A state must have recognised capacity to maintain external relations with other states. This distinguishes states proper from lesser units such as members of a federation, or protectorates, which do not manage their own foreign affairs, and are not recognised by other states as fully-fledged members of the international community.

The state is by no means necessarily identical with a particular race or nation, although such identity may exist.[4]

As we have already pointed out,[5] Kelsen's conception of the state emphasises that it is purely a technical notion expressing the fact that a certain body of legal rules binds a certain group of individuals living within a defined territorial area; in other words, the state and the law are synonymous terms.[6] On closer analysis, it will be seen that this theory is a condensation of the four characteristics of a state, set out above, and, in particular, the existence of a legal system is involved in the very requirement of a government as a component of statehood, for as Locke said:

> 'a government without laws is ... a mystery in politics, inconceivable to human capacity and inconsistent with human society.'[7]

Kelsen's conception has not found favour with a number of more recent writers, particularly in Germany, who maintain that Kelsen, in stressing the identity of the state and the law, failed to do justice to the aspects of political power and sociological consequences involved in the establishment and continuance in being of a state. However, it is not to be denied that the existence of a legal system is a primal condition of statehood.

In this connection, an important point is whether the statehood of an entity depends upon that entity being itself legal, and as well possessing a legal system which is juridically valid. Is an illegal state a contradiction in terms? In *Madzimbamuto v Lardner-Burke*,[8] the Judicial Committee of the Privy Council ruled that the Rhodesian régime created as a result of the unilateral declaration of independence of 11 November 1965, and of subsequent Rhodesian legislation, was illegal, and that, not-

4. Nor is the term 'state' necessarily or always equivalent to the expression 'country', more particularly where the latter expression is used in the constituent instrument of an international non-governmental association; see *Reel v Holder* [1981] 3 All ER 321 at 325, 326.
5. See above, p 59.
6. See Kelsen 55 Harv LR (1942) 65, where he trenchantly criticised the traditional notion of the 'dualism' of the state and the law.
7. Quoted by Lord Wilberforce in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 at 954, [1966] 2 All ER 536 at 577.
8. [1969] 1 AC 645 at 722–728.

withstanding the de facto authority exercised by the régime, the laws of that régime were illegal and void by virtue of nullifying legislation in the United Kingdom.[9] This raises the question whether an entity, such as Rhodesia after the above-mentioned unilateral declaration of independence, whose legal system was deemed to be void and inoperative, fails in effect to fulfil the third requirement of statehood, specified above, of possession of an effective government. In fact in a Resolution adopted on 17 November 1970, the United Nations Security Council expressly urged all states 'not to grant any form of recognition to the illegal régime in Southern Rhodesia'.[10]

'Micro-states'

A 'micro-state' was defined by the Secretary-General of the United Nations in his Introduction to his Annual Report of the work of the Organisation 1966–1967[11] as an entity, 'exceptionally small in area, population and human and economic resources', but which has emerged as an independent state.[12] The corresponding term in the pre-war days of the League of Nations was a 'Lilliputian state' (another term used currently is 'mini-state'). As the Secretary-General pointed out, even the smallest territories are entitled through the exercise of the right of self-determination to attain independence. However, there is necessarily a difference between independence, on the one hand, and the right of full membership of international organisations, such as the United Nations, on the other. The obligations of membership of the United Nations

9. See, however, the dissenting judgment of Lord Pearce at 731–745. The Appellate Division of the High Court of Rhodesia also decided contra in *R v Ndhlovu* 1968 (4) SA 515 at 532–535, holding, inter alia, that the government in Rhodesia was the only lawful government, and that effect should be given to the laws and constitution adopted in Rhodesia, pursuant to which that government was functioning.
10. Cf also the Resolution adopted by the United Nations General Assembly on 17 November 1966, implicitly upholding a duty upon member states to recognise the former status of Rhodesia, and not to recognise the régime which had come into being after the unilateral declaration of independence. Another related problem is whether a grant of formal independence by a parent state to a territory is under some circumstances to be considered as spurious. In 1976 the United Nations General Assembly adopted a Resolution which, in respect to South Africa's declaration that the territory of Transkei was a 'sovereign and independent State', referred to it as 'a sham' and declared it invalid.
11. See Report, p 20. See also, passim, *Small States and Territories: Status and Problems* (United Nations Institute for Training and Research, UNITAR, 1971), and Crawford *The Creation of States in International Law* (1979) pp 139–141.
12. An illustration is Nauru, which attained independence on 31 January 1968; the area of the island is 8·25 square miles, and the indigenous population about 3,000 persons. For a valuable, insightful book on micro-states, with particular reference to the Pacific area, see S. A. de Smith *Microstates and Micronesia* (1970), and for a general monograph on the subject, see Dieter Ehrhardt *Der Begriff des Mikrostaats im Völkerrecht und in der Internationalen Ordnung* (Aalen, West Germany, 1970).

may be too onerous for micro-states with their limited resources and population, while this might also weaken the United Nations itself.

There can be forms of association with the United Nations, short of full membership, conferring certain benefits without the burdens, and in the interests both of micro-states and of full member states, such as:

a. a right of access to the International Court of Justice;
b. participation in an appropriate United Nations regional economic commission;
c. participation in certain of the specialised agencies, and in diplomatic conferences summoned to adopt international conventions.

Nor is there any valid objection to a micro-state maintaining a permanent observer mission to the United Nations, as distinct from a permanent mission proper. This does not exhaust the possibilities of involvement in the work of the United Nations and its specialised agencies, open to micro-states.[13] It has been proposed (by the United States, among others) that micro-states should be catered for by a special form of 'associate membership' of the United Nations as such, not merely in relation to particular organs; semble, this would require an amendment of article 4 of the Charter, and related provisions.

Apart from the relationship of micro-states to international organisations, it seems that they may legitimately join with other states in forming regional groupings or associations, or in the establishment of a 'Community' of a functional nature.

Is a micro-state none the less a state within the meaning of the definition considered at the beginning of the present chapter? In principle, minuteness of territory and population, imposing practical limitations upon capacity to conduct external relations, do not constitute a bar to statehood.[14] The non-participation of a micro-state in the United Nations as a full member is conditioned by the express terms of article 4 of the Charter, under which one requirement of admission is ability to carry out the obligations contained in the Charter, and inability for other reasons to meet this condition might be an obstacle to the admission of a state of normal magnitude.

13. As to these possibilities of participation, see S. A. de Smith, op cit, pp 10–14. Note also the status accorded to Nauru in 1968 of 'special member' of the Commonwealth, giving it a right of participation in functional activities, and attendance at ministerial or official meetings on educational, health, and technical questions, but not Heads of Government Conferences. Another example of this kind of participation is the fact that over twenty small *independent* island territories, each having less than one million people, are members of the International Monetary Fund (IMF); see *Finance and Development* June 1984 pp 42–43.
14. See Alain Coret 'L'Indépendence de l'Ile Nauru', *Annuaire Francais de Droit International* (1968) pp 178–188.

Doctrine of basic rights and duties of states

Numerous writers have purported to formulate lists of so-called 'basic' or 'fundamental' rights and duties of states. Such formulations have also been a persistent preoccupation of international Conferences or international bodies; among them may be mentioned those of the American Institute of International Law in 1916, the Montevideo Convention of 1933 on the Rights and Duties of States, and the Draft Declaration on the Rights and Duties of States drawn up by the International Law Commission of the United Nations in 1949.[15] This latter draft Declaration still remains a draft under study by governments, and has failed to command general adoption.

The doctrine of basic rights and duties was favoured by certain of the naturalist writers,[16] being derived by them from the notion of the state as a creature of natural law; twentieth century formulations of the doctrine, especially those made in the Latin-American states, appear on the other hand to be directed towards the establishment of universal standards of law and justice in international relations, and this indeed seems to be the object of the Draft Declaration of 1949 (above).

The basic *rights* most frequently stressed have been those of the independence and equality of states, of territorial jurisdiction, and of self-defence or self-preservation. The basic *duties* emphasised have been, among others, those of not resorting to war, of carrying out in good faith treaty obligations, and of not intervening in the affairs of other states.[17]

There are grounds for scepticism as to the utility of the doctrine. Certain of the rights and duties declared to be 'basic' seem no more fundamental than other rights and duties not so formulated, or to be no more than restatements of truisms or axioms of international law (for example, the alleged basic duty to observe international law itself), or to be too sweepingly general to be accurate. Yet sometimes international tribunals have invoked a certain basic right or duty in determining the rules governing the case before them,[18] a recent illustration being the decision in 1986 of the International Court of Justice in *Nicaragua v United States*, where the Court expressly upheld the freedom of every state to choose which political, social, economic or cultural system it

15. The rights listed by the Commission in the Draft Declaration included the rights of states to independence, to territorial jurisdiction, to equality in law with other states, and to self-defence against armed attack. The duties included those of not intervening in the affairs of other states, of not fomenting civil strife in other states, of observing human rights, of settling disputes peacefully, of not resorting to war as an instrument of national policy, and of carrying out in good faith obligations under treaties.
16. See above, pp 13, 22–23.
17. For a treatment of the question of basic rights and duties by a distinguished Russian jurist, see V. M. Koretsky *Soviet Year Book of International Law* (1958) pp 74–92.
18. See, eg, the *Advisory Opinion relating to the Status of Eastern Carelia* (1923) Pub PCIJ Series B, No 5, p 27, where the Permanent Court of International Justice relied on the basic rights of states to independence and equality.

should adopt, and declared, inter alia, that the adherence by a particular state to any special political doctrine did not constitute a violation of any rule of customary international law.[19]

Sovereignty and independence of states

Normally a state is deemed to possess independence and 'sovereignty' over its subjects and its affairs, and within its territorial limits. 'Sovereignty' has a much more restricted meaning today than in the eighteenth and nineteenth centuries when, with the emergence of powerful highly nationalised states, few limits on state autonomy were acknowledged. At the present time there is hardly a state which, in the interests of the international community, has not accepted restrictions on its liberty of action. Thus most states are members of the United Nations and the International Labour Organisation (ILO), in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a state means the *residuum* of power which it possesses within the confines laid down by international law. It is of interest to note that this conception resembles the doctrine of early writers on international law, who treated the state as subordinate to the law of nations, then identified as part of the wider 'law of nature'.

In a practical sense, sovereignty is also largely a matter of degree. Some states enjoy more power and independence than other states. This leads to the familiar distinction between independent or sovereign states, and non-independent or non-sovereign states or entities, for example, protectorates and dependent territories. Even here it is difficult to draw the line, for although a state may have accepted important restrictions on its liberty of action, in other respects it may enjoy the widest possible freedom. 'Sovereignty' is therefore a term of art rather than a legal expression capable of precise definition.

When we say that a particular state is independent, in a concrete way we attribute to that state a number of rights, powers, and privileges at international law. Correlative to these rights, etc, there are duties and obligations binding other states who enter into relations with it. These rights, etc, and the correlative duties are the very substance of state independence.

Examples of the rights, etc, associated with a state's independence are:

a. the power exclusively to control its own domestic affairs;
b. the power to admit and expel aliens;
c. the privileges of its diplomatic envoys in other countries;
d. the sole jurisdiction over crimes committed within its territory.

Examples of the correlative duties or obligations binding states are:

19. [1986] ICJ 1986, 14 at 133. For general critical discussion of the Draft Declaration of 1949, above, see Kelsen 44 AJIL (1950) 259–276. As to jus cogens, see above, pp 55–57.

i. the duty not to perform acts of sovereignty on the territory of another state;
ii. the duty to abstain and prevent agents and subjects from committing acts constituting a violation of another state's independence or territorial supremacy;
iii. the duty not to intervene in the affairs of another state.

As to (i), it is, for instance, a breach of international law for a state to send its agents to the territory of another state to apprehend there persons accused of criminal offences against its laws. The same principle has been considered to apply even if the person irregularly arrested is charged with crimes against international law, such as crimes against the peace or crimes against humanity. Thus in June 1960 the United Nations Security Council adopted the view that the clandestine abduction from Argentina to Israel of Adolf Eichmann, a Nazi war criminal, to be tried by Israeli courts, was an infringement of Argentina's sovereignty, and requested Israel to proceed to more adequate reparation.[20] In the case of the affair of the sinking in July 1986 of the Greenpeace vessel, the *Rainbow Warrior*, in New Zealand internal waters as a result of the acts of French agents (an affair known in France as 'l'Affaire Greenpeace'), it was accepted that the French Government, by authorising such acts, had committed a breach of international law, and that apart from the responsibility of France itself, the individual agents could not be exonerated by the so-called 'immunity of attribution' doctrine as committing state-like acts, these acts having been committed in time of peace. In the event, the persons responsible were duly tried and convicted, and received sentences imposed by a New Zealand court.

It is not clear whether international law goes so far as to impose a duty on states to refrain from exercising jurisdiction over persons apprehended in violation of the territorial sovereignty of another state, or in breach of international law. State practice is conflicting in this regard, but in the *Savarkar Case* (1911),[1] the Permanent Court of Arbitration held that a country irregularly receiving back a fugitive is under no obligation to return the prisoner to the country where he had been apprehended. In the *Eichmann Case* (1961), the Jerusalem District Court held, in a decision affirmed on appeal, that it had jurisdiction to try Eichmann (see above) for

20. By a subsequent settlement, the two countries regarded the incident as closed.
1. See Scott *The Hague Court Reports* (1916) p 275. For examples of American decisions, see *United States v Insull* 8 F Supp 310 (1934), *Frisbie v Collins* 342 US 519 (1952), and *United States v Sobell* 244 F (2d) 520 (1957), while for a recent English ruling that the illegality of the apprehension does not preclude the exercise of jurisdiction, see *R v Plymouth Justices, ex p Driver* [1986] QB 95. Cf the case of the persons who seized the cruise-vessel, the *Achille Lauro*, and who were illegally transported to Italy; this was not treated as excluding the exercise of jurisdiction in Italy. The most recent decision on the subject is *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546.

crimes against humanity and other crimes, notwithstanding his irregular abduction to Israel from Argentina.[2]

The principle of respect for a state's territorial sovereignty is illustrated by the decision of the International Court of Justice in the *Corfu Channel Case* (*Merits*) (1949).[3] There the Court held that the British protective minesweeping operations in Albanian territorial waters in the Corfu Channel in November 1946, three weeks after the damage to British destroyers and loss of life through mines in the Channel, were a violation of Albanian sovereignty, notwithstanding Albania's negligence or dilatoriness subsequent to the explosions.

An illustration of (ii) is the duty on a state to prevent within its borders political terrorist activities directed against foreign states. Such a duty was expressed in article 4 of the Draft Declaration on the Rights and Duties of States, prepared by the International Law Commission in 1949, and in wider and more general terms in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, in Accordance with the United Nations Charter, adopted by the General Assembly in 1970. On 2 February 1971, the duty was affirmed in article 8 of the Convention to Prevent and Punish Acts of Terrorism approved by the General Assembly of the Organisation of American States (OAS), and in s VI of the Helsinki Declaration adopted on 1 August 1975, by 30 European states, the Holy See, the United States, and Canada, the declaring states pledged themselves to 'refrain from direct or indirect assistance to terrorist activities'. The subject had been raised as long ago as the year 1934 in connection with the assassination at Marseilles by certain terrorists of the Yugoslav monarch—King Alexander. Yugoslavia formally accused the Hungarian Government before the League of Nations of tacitly conniving in the assassination inasmuch as it had knowingly allowed the major preparations for the deed to be carried out on Hungarian territory. In the course of the settlement of this dispute between the two nations, the League of Nations Council affirmed that two duties rested on every state:

1. neither to encourage nor to tolerate on its territory any terrorist activity with a political purpose;
2. to do all in its power to prevent and repress terrorist acts of a political character, and for this purpose to lend its assistance to governments which request it.[4]

2. For a discussion of the decisions of the French courts in the *Argoud Case* (1963–4), where an alleged irregular seizure was held not to preclude jurisdiction, see A. Cocatre-Zilgien *L'Affaire Argoud: Considérations sur les Arrestations internationalement irrégulières* (1965).
3. ICJ 1949, 4 et seq.
4. Arising out of this dispute, the League ultimately promoted the conclusion in November 1937, of a Convention for the Repression of International Terrorism. This Convention did not, however, come into force. Cf also in a similar connection the convention

The duty not to intervene in the affairs[5] of another state (see (iii), above) requires some comment. International law generally forbids such intervention, which in this particular connection means something more than mere interference and much stronger than mediation or diplomatic suggestion. To fall within the terms of the prohibition, it must generally speaking be in opposition to the will of the particular state affected, and almost always, as Hyde points out and as has now been made clear by the International Court of Justice in 1986 in *Nicaragua v United States of America*,[6] serving by design or implication to impair the political independence of that state. According to the International Court of

adopted in July 1936, under League auspices, concerning the Use of Broadcasting in the Cause of Peace, under which the parties undertook to prohibit radio transmissions calculated to provoke the commission of acts affecting public safety in the territory of other states parties. The subject of measures to prevent international terrorism came before the United Nations General Assembly in December 1972, when an Ad Hoc 35-member committee on terrorism was established by the Assembly. This Committee considered various drafts and proposals, and the subject has since come before the General Assembly which in December 1985 condemned as criminal 'all acts, methods, and practices of terrorism'. One major difficulty, inter alia, concerns the search for a formula or formulae to define or describe the concept of 'terrorism'. See T. M. Franck and B. B. Lockwood Jr 'Preliminary Thoughts towards an International Convention on Terrorism' 68 AJIL (1974) 69–90, and Sofaer in *Dialogue* (US Information Service) No 2 of 1987 at 1 et seq. The Council of Europe opened for signature in January 1977 a European Convention on the Suppression of Terrorism, and in January 1982 the Council of Ministers adopted a recommendation concerning International Co-operation in the Prosecution and Punishment of Terrorism. Cf also the International Convention against the Taking of Hostages adopted by the United Nations General Assembly in December 1979, and the Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, below, pp 426–428. Recent moves within the International Civil Aviation Organisation (ICAO) and the International Maritime Organisation (IMO) to extend anti-terrorist measures to situations not previously dealt with have led, inter alia, to the adoption at Montreal in 1988 of a text in respect of acts of violence at airports.

5. The duty extends both to internal and external affairs. This is recognised in arts 1 and 3 of the Draft Declaration on the Rights and Duties of States adopted in 1949 by the United Nations International Law Commission, and by the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the United Nations Charter, adopted by the United Nations General Assembly in 1970, which proclaims certain principles as to non-intervention. This Declaration also treats as intervention an interference with a state's 'inalienable right to choose its political, economic, social and cultural systems'. Cf the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, and the Protection of their Independence and Sovereignty, adopted by the UN General Assembly, 21 December 1965.
6. Hyde *International Law* (2nd edn, 1947) Vol I, para 69 and ICJ 1986, 14. It follows logically that where a state consents by treaty to another state exercising a right to intervene, this is not inconsistent with international law, as a general rule, but see p 106 below. So far as concerns the claim that intervention is permissible in order to protect human rights, see generally *Nicaragua v United States* above, and N Ronzitti *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985) Ch 4.

Justice, an intervention is prohibited by international law if: (a) it impinges on matters as to which each state is permitted to make decisions by itself freely (eg, choice of its own political or economic system or adoption of its own foreign policy); and (b) it involves interference in regard to this freedom by methods of coercion, especially force (eg, provision of indirect forms of support for subversive activities against the state subject of the alleged intervention). Anything which falls short of this is strictly speaking not intervention within the meaning of the prohibition under international law. A notable historical example of dictatorial intervention—for which there was ostensible justification—was the joint *démarche* in 1895 by Russia, France and Germany, to force Japan to return to China the territory of Liaotung which she had extorted from the Chinese by the Treaty of Shimonoseki. As a result of this intervention, Japan was obliged to retrocede Liaotung to China, a fateful step which led ultimately to the Russo-Japanese War of 1904–5.

The imperious type of diplomatic intervention just described differs fundamentally from other more active kinds of interference in the internal or external affairs of another state, which are commonly grouped under the expression 'intervention', and which may go so far as to include military measures. It is possible to distinguish[7] three kinds of active, material intervention, which unlike the type first mentioned, do not have the character of a diplomatic *démarche*:

1. '*Internal*' *Intervention.* An example is state A interfering between the disputing sections of state B, in favour either of the legitimate government or of the insurgents.
2. '*External*' *Intervention.* An example is state A interfering in the relations—generally the hostile relations—of other states, as when Italy entered the Second World War on the side of Germany, and against Great Britain.
3. '*Punitive*' *Intervention.* This is the case of a reprisal, short of war, for an injury suffered at the hands of another state; for example, a pacific blockade instituted against this state in retaliation for a gross breach of treaty.

The term 'intervention' has also been used by some writers in the expression 'subversive intervention', to denote propaganda or other activity by one state with the intention of fomenting, for its own purposes, revolt or civil strife in another state. International law prohibits such subversive intervention.[8]

7. Winfield *The Foundations and the Future of International Law* (1941) pp 32–33.
8. See the Resolutions of the United Nations General Assembly on this subject, of 3 November 1947, of 1 December 1949, and of 17 November 1950, and note art 2 (5) of the International Law Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind, condemning 'organised activities calculated to foment civil strife in another State'. The Declaration on Principles of International Law Concerning

The following are, broadly expressed, the principal exceptional cases in which it is claimed that a state has at international law a legitimate right of intervention:

a. collective intervention[9] pursuant to the Charter of the United Nations;
b. to protect the rights and interests, and the personal safety of its citizens abroad, being one of the grounds relied upon by the United States Government as justifying the landing of a multinational force on the island of Grenada in October 1983;
c. self-defence,[10] if intervention is necessary to meet a danger of an actual armed attack;
d. in the affairs of a protectorate under its dominion;
e. if the state subject of the intervention has been guilty of a gross breach of international law in regard to the intervening state, for example, if it has itself unlawfully intervened.

States must subordinate the exercise of any such exceptional rights of intervention to their primary obligations under the United Nations Charter, so that except where the Charter permits it, intervention must not go so far as the threat or use of force against the territorial integrity or political independence of any state (see article 2 paragraph 4).

Before the Spanish Civil War of 1936–1938, the principle was generally approved that revolution or civil war or other grave emergency in another state might be cause for intervention if the safety of the state desiring to intervene were affected by the conflict, or emergency, or if there were serious interference with the exercise by it of some rights which should be respected.[11]

How far this principle remains valid today, particularly in the light of a state's obligations under the United Nations Charter, is open to question. In 1936, the European Great Powers departed from the principle by agreeing not to intervene in the Spanish Civil War under any circumstances (even by certain kinds of trading with the contestants).

Friendly Relations and Co-operation among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, proclaims that 'no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State'.

9. This would be by enforcement action under the authority of the United Nations Security Council, pursuant to Chapter VII of the Charter, or any action sanctioned by the General Assembly under the Uniting for Peace Resolution of 3 November 1950 (see below, p 639). Otherwise, the United Nations is prevented by art 2, para 7, of the Charter from intervening in matters 'essentially within the domestic jurisdiction' of any state. Semble, the mere discussion by a United Nations organ of a matter on its agenda affecting the internal jurisdiction of any state is not an 'intervention' in breach of this article.
10. As to which, see below, pp 539–540. This would include collective self-defence by the parties to a mutual security treaty such as the North Atlantic Pacific of 4 April 1949.
11. Hyde, op cit, paras 69 et seq.

Twenty years later, when in October–November 1956 Great Britain and France did jointly intervene by force against Egypt in the Suez Canal zone, ostensibly in the Israeli–Egyptian conflict, under claim of a threat to their vital interests, the preponderant reaction of the rest of the world, as expressed in the United Nations General Assembly, was to condemn this action as, inter alia, a breach of the United Nations Charter. It was maintained that, as Egypt had not been guilty of any actual armed attack within the meaning of article 51 of the Charter, recourse to an alleged right of collective self-defence was not justified. For similar reason, namely, the absence of any actual armed attack, it has been claimed that the United States action in landing forces in Beirut in July 1958, on the invitation of the President of Lebanon, to assist that country against an alleged threat of insurrection stimulated and assisted from outside, and to protect American lives and property, was not stricto sensu a measure of self-defence authorised by article 51.[12]

The Beirut landing was, however, justified not only as an act of self-defence, but also on the ground that the legitimate government of Lebanon had consented to the intervention. The general rule in this connection is that, in the case of strife, which is primarily internal, and particularly where the outcome is uncertain, the mere invitation by either faction to an outside state to intervene does not legalise an otherwise improper intervention. Inasmuch as it is claimed that subsequent events showed that the strife in Lebanon was purely of an internal character, the legality of the American intervention in Lebanon has been doubted.[13] An issue of a like nature arose in connection with the extensive United States military assistance given to South Vietnam in the period 1961–1972, on the basis that the latter requested it, the justification among others being that South Vietnam was confronted with an insurrection directed and assisted from outside. There was controversy over this justification, and, besides, the Vietnam problem was clouded over with some contentious questions turning on the true interpretation and application of the Geneva Agreements of 20 July 1954, which terminated the hostilities in Indo-China between France and the Viet Minh, and on the applicability of the South-East Asia Collective Defence Treaty (SEATO), signed at Manila on 8 September 1954. Another point was whether the United States and other countries that were involved in assistance to South Vietnam were acting by way of collective self-defence under article 51 of the United Nations Charter; there was difficulty in seeing how this article could apply.

The Vietnam conflict, and the closely related affair in April–May 1970

12. For reasons similar to those alleged in the case of Lebanon, British troops were landed in Jordan upon the invitation of the government of that country shortly after the Beirut landing.
13. Moreover, the reports of the United Nations Observation Group in Lebanon did not support any theory of outside intervention on a large scale.

of the incursion of American forces into Cambodia (now Kampuchea) for the proclaimed purpose of destroying North Vietnamese and Vietcong military sanctuaries, served to bring into focus some of the uncertainties in the existing rules of international law as to intervention, and as to civil war itself. A root difficulty lies in the word 'intervention' itself which, irrespective of whether the case be one of a purely internal strife staked upon gaining control over a whole people, or be, on the other hand, an insurrection guided and supported from outside, is inapt to describe military collaboration between an external power and the legitimate government at the express invitation of, or with the implied consent of that government. The word 'involvement' seems more appropriate for such collaboration, and ideally there should be revised rules, dispensing with the term 'intervention' and setting the limits within which involvement is permissible, if at all. But in the absence of a revision of the relevant rules of the United Nations Charter, such a reformulation of the law of intervention is a remote possibility, and in 1986 the International Court of Justice in *Nicaragua v United States of America*, above, appeared to favour adherence to the traditional principles regarding the prohibition of intervention as against the recent practice of certain countries directed to providing support for insurgent opposition to governments actually in power.

Monroe Doctrine

The history of the American Monroe Doctrine throws some light on the political, as distinct from the legal aspects of intervention. As originally announced by President Monroe in a Message to Congress in 1823, it contained three branches:

1. a declaration that the American continent would no longer be a subject for future colonisation by a European Power;
2. a declaration of absence of interest in European wars or European affairs;
3. a declaration that any attempt by the European Powers 'to extend their system' to any portion of the American continent would be regarded as 'dangerous' to the 'peace and safety' of the United States.[14]

The third branch was the most important, and by a paradoxical development it came by the end of the nineteenth century to attract a claim by the United States, enforced on several occasions, to intervene in any part of the American continent subject to a threat of interference from a European Power, or wherever in such continent vital interests of the

14. Branch (1) of the Monroe Doctrine arose out of the fact that Russia had obtained territory in the North-West of the American continent and laid claims to the Pacific Coast. Branch (3) was directed against any intervention on the part of the principal European Powers (the Triple Alliance) to restore the authority of Spain over the rebellious colonies in Latin America which had secured independence and recognition by the United States.

United States were endangered. Thus a doctrine originally directed against intervention was converted into a theory justifying intervention by the state which had first sponsored the doctrine. After the First World War, however, America's 'good neighbour' policy towards other American states brought the Monroe Doctrine closer to its former objectives of 1823. And now by reason of recent inter-American regional security arrangements, it might seem as if the Monroe Doctrine regarded as an affirmation of the solidarity of the American continent, has been transformed from a unilateral declaration[15] into a collective understanding of the American Powers.[16] Possibly, to this extent, the League of Nations Covenant in article 21 may now be regarded as correct in referring to the doctrine as a 'regional understanding'. But the Monroe Doctrine has not been completely multilateralised. To some extent, it still retains its unilateral significance for the United States Government, as indicated by the American 'quarantine' or 'selective' blockade of Cuba in October 1962, in order to forestall the further construction of, or reinforcement of missile bases on Cuban territory, and by the landing of United States units in the Dominican Republic in April 1965 to protect American lives and to ensure that no communist government was established in the Republic.

Sometimes by treaty, a state expressly excludes itself from intervention; cf article 4 of the Treaty of 1929 between Italy and the Holy See:

> 'The sovereignty and exclusive jurisdiction over the Vatican City which Italy recognises as appertaining to the Holy See precludes any intervention therein on the part of the Italian Government . . .'

Doctrine of the equality of states

The doctrine of the equality of states was espoused early in the modern history of international law by those writers who attached importance to a relationship between the law of nations and the law of nature. This is reflected in the following passage, for example, from Christian Wolff's major work:[17]

> 'By nature all nations are equal the one to the other. For nations are considered as individual free persons living in a state of nature. Therefore, since by nature all men are equal, all nations too are by nature equal the one to the other.'

15. In 1923, Secretary of State Hughes referred to the Monroe Doctrine as being 'distinctively the policy of the United States', and of which the United States 'reserves to itself its definition, interpretation, and application'.
16. This development can be traced through the Act of Chapultepec 1945, the Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro 1947, and the Bogotá Charter of the Organisation of American States 1948, under which, inter alia, a threat to the independence and security of any one American state is regarded as a threat against all.
17. *Jus gentium methodo scientifica pertractatum* (1749) Prolegomena, para 16.

That the doctrine of equality subsists today with added strength, but with some change of emphasis is shown by its reaffirmation and definition under the heading, 'The principle of sovereign equality of States', in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970. The Declaration proclaimed the following principle: '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 the Charter of the United Nations, drawn up at San Francisco in 1945, there is of course express recognition of the doctrine. Article 1 speaks of 'respect for the principle of equal rights', and article 2 says that the Organisation 'is based on the principle of the sovereign equality of all its Members'. The 'sovereign equality' of states was also reaffirmed in the General Assembly Declaration of 1974 on the Establishment of a New Economic Order (see paragraph 4(a) of the Declaration). From the doctrine of equality, stems the duty upon states, expressed in certain treaties,[18] and found in the law concerning resident aliens, not to discriminate in favour of their own citizens as against the citizens of another state.

The doctrine imports not merely equality at law, but also the capacity for equal legal rights and equal duties. The results of the doctrine are seen particularly in the law and practice as to multilateral treaties where generally the rule has prevailed that unanimity is necessary for the adoption of these instruments by states in Conference. This necessity for unanimity rather hampered the progress of international legislation. Frequently small states were able to hold up important advances in international affairs by selfish obstruction under the shelter of the unanimity rule. To quote one authority:[19]

> 'The unanimity rule, conceived as the safeguard of the minority, has, through exaggerating the doctrine of equality, become an instrument of tyranny against the majority.'

But the recent trend is towards decisions and voting by a majority, instead of unanimously. This is particularly reflected in voting procedures in the United Nations, the International Labour Organisation, and other bodies.[20]

Another alleged consequence of the principle of equality is that, in the absence of a treaty, no state can claim jurisdiction over, or in respect of

18. See, eg, art 7, para 2 (c) of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, of 29 April 1958, and the provision of a similar nature in art 119, para 3 of the United Nations Convention on the Law of the Sea of 10 December 1982.
19. Politis *Les Nouvelles Tendances du Droit International* (1927).
20. See below, pp 619 and 643–645.

another sovereign state.[1] A more far-reaching proposition is that the courts of one state cannot question the validity or legality of the acts of state of another sovereign country or of its agents, and that such questioning must be done, if at all, through the diplomatic channel; this is the so-called 'Act of State' doctrine,[2] but it cannot as yet be said to be part of international law. There has so far been no conclusive decision by any international tribunal that a failure to apply the 'Act of State' doctrine constitutes a breach of an international obligation. The courts of particular countries may apply an 'Act of State' doctrine under their own municipal law system, or on grounds of domestic law or practice (eg, the consideration that the executive should not be embarrassed in the diplomatic sphere) refrain from ruling that an act of state of a recognised foreign sovereign country is invalid,[3] but this is not because of any

1. Semble, this is rather an illustration of the sovereignty and autonomy of states than of the principle of equality; see Kelsen *General Theory of Law and State* (1961 edn) p 000. It involves the collateral rule that the servants or agents of one state cannot be tried in another state for acts done in their official capacity (sometimes characterised as the 'immunity of attribution' rule); semble an exception to this collateral rule is that *in peacetime* the courts of a state are not prohibited from trying foreign agents of another state if the impugned act was committed in the territory of the state claiming jurisdiction. Thus it was lawful for a New Zealand court to try the French agents involved in the sinking in October 1986 in New Zealand internal waters of the Greenpeace vessel, the *Rainbow Warrior*.
2. The classic statement of the 'Act of State' doctrine is that by Chief Justice Fuller in the decision of the United States Supreme Court in *Underhill v Hernandez* 168 US 250 (1897) at 252. This statement was referred to, with approval, by the High Court of Australia in 1988 in the *'Spycatcher' Case, A-G for the United Kingdom v Heinemann Publishers Pty Ltd* (1988) 62 ALJR 344 at 347.
3. See, eg, decision of the US Supreme Court in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) (validity of Cuban sugar expropriation decrees, alleged to be in violation of international law, could not be questioned). The effect of the decision was restricted by the Hickenlooper Amendment (Foreign Assistance Act of 1965, re-enacting with amendments the Foreign Assistance Act of 1964). Subsequently, the amendment was construed narrowly by a Circuit Court of Appeals as applying only to cases in which property was nationalised abroad, contrary to international law, and the property or its traceable proceeds came to the United States; see *Banco Nacional de Cuba v First National City Bank of New York* 431 F (2d) 394 (1970), following and applying *Sabbatino's Case*. However, the judgment in this decision was set aside by the United States Supreme Court in the light of a letter from the Department of State intimating that American foreign policy would not be adversely affected by the court considering the merits; see 400 US 1019 (1971). Upon the Court of Appeals then adhering to its previous decision, the Supreme Court reversed it, holding that the Act of State doctrine was inapplicable; see 406 US 759 (1972), and ultimately the Court of Appeals applied international law. Cf *French v Banco Nacional de Cuba* 295 NYS (2d) 433 (1968) (although a stringent Cuban currency control order constituted an act of state, its effect was outside the Amendment, which Amendment was said to be confined to claims of title in respect to specific property expropriated abroad). However, in *Alfred Dunhill of London Inc v Republic of Cuba* 425 US 682 (1976), a majority of the United States Supreme Court found that the mere refusal of a commercial agency of a foreign government to repay funds mistakenly paid to it did not constitute an act of state. See

mandatory principles of international law requiring them so to proceed. In any event, state courts remain free in accordance with the rules of their own municipal legal system to hold or abstain from holding that a foreign act of state is invalid because in conflict with international law. There may well be some overlap between the 'Act of State' doctrine and the more generic doctrine of non-justiciability whereby courts, as a matter of judicial restraint, decline to exercise jurisdiction over matters within the political or other domains of the 'public interest' of foreign states.[4]

There is indeed no general principle of international law obliging states to give effect to the administrative acts of other states. This is clearly illustrated by the prevailing 'nationalistic' system of patents, under which, subject to exceptions, patents are granted solely on a domestic national basis, without any general obligation to recognise a foreign grant. A fortiori, if civil liability is excluded under the laws of a country, no action will lie in the courts of another state to enforce such liability.[5]

Side by side with the principle of equality, there are, however, de facto inequalities which are perforce recognised. For example, the five great powers, the United States, the Soviet Union, the United Kingdom, France, and China are the sole permanent members of the United Nations Security Council, and may 'veto' decisions of the Council on non-procedural questions (see article 27 of the United Nations Charter).[6] Moreover, there is the distinction between developed and less-developed countries, expressly recognised in the new Part IV of the General Agreement on Tariffs and Trade of 30 October 1947 (GATT), added by the Protocol of 8 February 1965 (see the new articles 37–38). Then, as mentioned in the early part of this chapter,[7] micro-states, with their limited resources and small population have had to be treated as incapable of coping with the full burdens of United Nations membership. An entity which cannot be received as a plenary member State of the United Nations is not in a practical sense one which has equal rights with a state actually admitted as a member.

The line between, on the one hand, equality of states, and, on the other hand, their independence, tends to become blurred. Thus it is maintained that the right of a state freely to choose and develop its

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also now *Banco Nacional de Cuba v Chemical Bank New York Trust Co* 594 F Supp 1553 (1984) (exercise of jurisdiction held to be permissible).

4. Cf *Underhill v Hernandez* 168 US 250 at 252 (1897); *United States v Sisson* 294 F Supp 515 (1968); *Buttes Gas and Oil Co v Hammer (No 2, 3)*; and *Occidental Petroleum Corpn v Buttes Gas and Oil Co (No 1, 2)* [1981] 3 All ER 616; and the decision of the High Court of Australia in the *'Spycatcher' Case, A-G for the United Kingdom v Heinemann Publishers Pty Ltd* (1988) 62 ALJR 344. See also Henkin 'Is there a "Political Question" Doctrine?' (1976) 85 Yale LJ 597.
5. See *Chaplin v Boys* [1971] AC 356 at 389.
6. See below, pp 643–645. There are other somewhat similar cases in the membership of the 'executive' organs of other international organisations.
7. See p 97 above.

political, social, economic, and cultural systems appertains to equality,[8] but stricto sensu this right is merely an expression of a state's independence.

Rules of neighbourly intercourse between states

There is one important qualification on the absolute independence and equality of states, which has found expression in the recent decisions of international courts and to some extent in the resolutions of international institutions. It is the principle, corresponding possibly to the municipal law prohibition of 'abuse of rights', that a state should not permit the use of its territory for purposes injurious to the interests of other states. Thus in the United Nations deliberations on the situation in Greece (1946–1949), it was implicitly recognised that, whatever the true facts might be, Greece's neighbours, Albania, Yugoslavia and Bulgaria were under a duty to prevent their territory being used for hostile expeditions against the Greek Government.[9] Similarly, the *Trail Smelter Arbitration Case* of 1941[10] recognised the principle that a state is under a duty to prevent its territory from being a source of economic injury to neighbouring territory, eg, by the escape of noxious fumes, and in the Declaration on the Human Environment adopted by the Stockholm Conference on the Human Environment in June 1972 (see Principles 21–22), it was proclaimed that states are responsible for ensuring that activities within their jurisdiction or control do not cause damage to the environment of other states, or of areas beyond the limits of national jurisdiction, thus affirming a more far-reaching principle than that of the *Trail Smelter Arbitration Case*. Another illustration is the *Corfu Channel Case (Merits)* (1949),[11] in which the International Court of Justice held that once the Albanian Government knew of the existence of a minefield in its territorial waters in the Corfu Channel, it was its duty to notify shipping and to warn approaching British naval vessels of the imminent danger, and therefore it was liable to pay compensation to the British Government for damage to ships and loss of life caused through exploding mines. The Court stated that it was a 'general well-recognised principle'

8. See the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, where this right is stated to be one of the elements of the sovereign equality of states. The Declaration also affirms that the duty to respect the personality of other states is an element of equality, although such duty seems to be more concerned with preserving the independence of states.
9. Cf art 4 of the Draft Declaration on the Rights and Duties of States, prepared by the International Law Commission of the United Nations in 1949, imposing a duty upon every state 'to refrain from fomenting civil strife in the territory of another state, and to prevent the organisation within its territory of activities calculated to foment such civil strife'.
0. *United Nations Reports of International Arbitral Awards* Vol III, 1905.
1. ICJ 1949, 4 et seq.

that every state is under an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'.

In article 74 of the United Nations Charter, the general principle of 'good-neighbourliness' in social, economic, and commercial matters, is laid down as one which member states must follow in regard to both their metropolitan and their dependent territories.

The principle of neighbourly obligations between states also underlies the United Nations General Assembly Resolution of 3 November 1947, condemning propaganda designed or likely to provoke or encourage threats to the peace, breaches of the peace, or acts of aggression.

Opinions have differed, not over the existence of the principle, but as to the limits of its application; eg, it is questioned whether a state devaluing or 'freezing' its currency can be under any liability for the ensuing damage suffered by other states as a consequence. However, in respect to new technologies involving the risk of trans-border effects of an injurious nature, it is not now seriously questioned since the Chernobyl nuclear reactor accident of 1986 in the Soviet Union (see below, pp 417–418) that there should be close co-operation and/or consultation between states to ensure that countries that are likely to be injuriously affected by technological accidents or dangers, such as the release of spreading radioactivity, are duly warned immediately, so that joint measures may be taken to minimise the detrimental consequences.

Peaceful co-existence

Closely associated with the principle of neighbourly obligations between states is the recently developed concept of 'peaceful co-existence'. Five principles of peaceful co-existence were expressly agreed to by India and the People's Republic of China in the Preamble to the Treaty on Tibet signed at Peking on 29 April 1954. These were:

1. Mutual respect for each other's territorial integrity and sovereignty.
2. Mutual non-aggression.
3. Mutual non-interference in each other's affairs.
4. Equality and mutual benefit.
5. Peaceful co-existence.

Subsequently, the doctrine of peaceful co-existence was referred to, or found expression in other treaties, and in numerous international declarations, such as the Declaration adopted by the United Nations General Assembly on 14 December 1957, and the Final Communiqué of the Afro-Asian Conference at Bandung, Indonesia, in April 1955, which adopted ten principles on the subject.[12] There is also a rapidly growing literature on

12. See also the Statement of Neutrality by Laos on 9 July 1962, whereby it bound itself to apply 'resolutely' the five principles of peaceful co-existence, and cf art III of the Charter of the Organisation of African Unity, Addis Ababa, May 1963.

the concept of peaceful co-existence, and its precise place in international law.[13]

Unfortunately, writers and publicists appear to disagree as to the areas embraced by, and the limits of, the doctrine. Some would restrict the concept of peaceful co-existence to rules or principles ensuring that states belonging to different political or economic systems should respect each other's sovereignty, and should not seek to impose their system or ideas upon other states. Others would extend the concept to cover the subjects of disarmament, and self-determination, and even so far as to include duties of active co-operation in economic, cultural, and other fields. In any event, most of the principles which, it is said, should be proclaimed as norms of peaceful co-existence, are by no means novel, and seem to be expressed or implied already in the Charter of the United Nations, and in the constitutions of other international organisations. Probably, the true value of the concept of peaceful co-existence lies in stressing the precise application of the rules in the Charter and in these constitutions to an international community divided, as it is at present, into hostile blocs, and, if so, to formalise and codify the principles involved would mitigate tensions, even if not much was added to the terms of the Charter.[14]

2. THE DIFFERENT KINDS OF STATES AND NON-STATE ENTITIES

The position of states at international law often varies, and it is therefore necessary briefly to consider certain special cases which arise. There may also, equally briefly, be examined in this connection the cases of certain non-state entities, subjects of international law. Mention may be made of an intermediate class of what may be described as state-like entities, or collectivities (collectivités étatiques); perhaps, the Holy See and the Principality of Monaco[15] may be regarded as falling within this category.

Federal states and confederations

A confederation (*Staatenbund*) is constituted by a number of independent

3. For useful bibliography, see *Report* of the Forty-ninth Conference at Hamburg of the International Law Association 1960 pp 368–370. See in addition, Vallat *Year Book of World Affairs* (1964) pp 249–258, Professor G. I. Tunkin's *Droit International Public: Problèmes Théoriques* (tr from Russian, 1965) pp 51–55, and Rosalyn Higgins *Conflict of Interests* (1965) Pt 3.
14. In this connection reference should be made to the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, and in particular the principles proclaimed under the heading 'The duty of States to co-operate with one another in accordance with the Charter'.
15. As to the Holy See, see p 67, n 13, above, and note that the relations between the Holy See and the Vatican City, on the one hand, and Italy, on the other hand, are now

states bound together by an international treaty or compact into a union with organs of government extending over the member states and set up for the purpose of maintaining the external and internal independence of all. The confederation is not a state at international law, the individual states maintaining their international position.

A federal state is, however, a real state at international law, the essential difference between it and the confederation being that federal organs have direct power not only over the member states, but over the citizens of these states. In most federal states, external policy is conducted by the federal government, but historically there have been exceptions to this rule. For example, the member states of the pre-1914 Federal Germany were to some extent states at international law; they could conclude treaties, appoint and receive envoys, etc, and questions of law affecting their relations were decided according to international law.

Protected and vassal states and protectorates

A vassal state is one which is completely under the suzerainty of another state.[16] Internationally its independence is so restricted as scarcely to exist at all.

The case of a protectorate or a protected state arises in practice when a state puts itself by treaty under the protection of a strong and powerful state, so that the conduct of its most important international business and decisions on high policy are left to the protecting state.

Protectorates are not based on a uniform pattern. Each case depends on its special circumstances and more specifically on:

a. the particular terms of the treaty of protection;[17]
b. the conditions under which the protectorate is recognised by third Powers as against whom it is intended to rely on the treaty of protection.[18]

Although not completely independent, a protected state may enjoy a sufficient measure of sovereignty to claim jurisdictional immunities in the territory of another state (per Lord Finlay in *Duff Development Co v Kelantan Government*[19]). It may also still remain a state under inter-

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governed by an agreement concluded in February 1984. Cf as to the status of the Holy See and the Vatican City over which the Holy See exercises sovereignty, D. H. Ott *Public International Law in the Modern World* (1987) p 58. On the international status of Monaco, see Jean-Pierre Gallois *Le Régime International de la Principauté de Monaco* (Paris, 1964).

16. Vassalage is an institution that has now fallen into desuetude.
17. *The Ionian Ships* (1855) Spinks 2, Ecc & Adm 212.
18. *Advisory Opinion of the Permanent Court of International Justice on the Nationality Decrees in Tunis and Morocco* (1923) Pub PCIJ, Series B, No 4, p 27.
19. [1924] AC 797 at 814. This is one of the most important distinctions between a protected state and a vassal; cf *The Charkieh* (1873) LR 4 A & E 59.

national law.[20] Protectorates, in the strict sense, have for all practical purposes now disappeared from the international scene.

Condominium

A condominium exists when over a particular territory joint dominion is exercised by two or more external Powers. A now historical example is that of the New Hebrides, in which the division of power was of some complexity, with some functions assigned to the joint administration, others residing in each of the national authorities (United Kingdom and France), subject to appropriate delegations of jurisdiction. This condominium, which had lasted for 74 years, ceased to exist when the New Hebrides attained independence on 30 July 1980, and assumed the name and style of the Republic of Vanuatu. It is not impossible that the current régime of collaboration in Antarctica[1] between the twelve parties to the 1959 Treaty on Antarctica could evolve into a condominium of a rather complex nature of division of powers and jurisdiction.[2]

Members of the Commonwealth

The position of members of the Commonwealth, the former British Commonwealth of Nations, has always been sui generis. It is only since the Second World War that they have finally completed a long process of emancipation, beginning as dependent colonies, next acquiring the status of self-governing colonies under the nineteenth century system of responsible government, and then as dominions moving towards the final goal of statehood. So it is that since 1948 even the name and style of 'dominions' had to be discarded.

The member states of the Commonwealth are now fully sovereign states in every sense. In the field of external affairs autonomy is unlimited; members enjoy and exercise extensively the rights of separate legation and of independent negotiation of treaties. They are capable of being subjects of international disputes and of conflicts as between themselves, and are at liberty to contract ties with non-Commonwealth states.[3] They may be separately and individually belligerents or neutrals. They have in fact concluded treaties with each other (cf the 'Anzac Pact' of 1944 between Australia and New Zealand). A marked development of the past

20. See *Case Concerning Rights of Nationals of the United States of America in Morocco* ICJ 1952, 176.

1. See pp 163–166 below.

2. *Division into Separate Zones:* Contrast with a condominium, a case of joint authority, the division of a territory or entity into two or more separate zones, each under the authority of a different state. Thus under the Memorandum of Understanding of 5 October 1954, signed in London by Great Britain, the United States, Italy, and Yugoslavia, the Free Territory of Trieste was divided into a Western and an Eastern Zone under the interim administration of Italy and Yugoslavia respectively.

3. Because of this freedom, among others, the Commonwealth has been described as the 'Open' Commonwealth; see, passim, M. Margaret Ball *The 'Open' Commonwealth* (1971).

thirty years has been the gradual supersession of inter se Commonwealth rules by the application of international law itself to practically all the relations between member states. Hence, also, the position of High Commissioners representing one member state in the territory of another has been assimilated to that of diplomatic envoys (cf the British Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952).

As for the Commonwealth itself, it is of course neither a super-state nor a federation, but simply a multi-racial association of free and equal states who value this association, who support the United Nations, who follow common principles of non-discrimination as to colour, race, and creed, who recognise for the purpose of their association, although some of them be republics, that the British Sovereign is head of the Commonwealth, and who, subject to exceptions, have somewhat similar institutions and traditions of government. There is no formal constitution, reliance being placed on accepted practices and consensus procedures. The Commonwealth possesses a Secretariat established in 1965 and located in London, yet the association is, to use an appropriate description given by one Commonwealth statesman,[4] 'functional and occasional'. Although it is sought through periodical Heads of Government Conferences, and latterly by Conferences of Chief Justices and Law Officers, to follow a common policy, differences of approach or of opinion are not excluded and may run a wide gamut (as in 1956, over the Anglo-French intervention in the Suez Canal zone, in 1962 and 1971 concerning the proposed terms of the United Kingdom's entry into the European Economic Community, in 1966 over the Rhodesian issue, and in 1971 over the question of the supply of arms by the United Kingdom to South Africa for joint defence of Indian Ocean sea routes). In ultimate analysis, the Commonwealth is held together by a web of mixed tangible and intangible advantages, that have evolved pragmatically, and are difficult to express in terms of legal relationships. Had the ties between member states of the Commonwealth been more formalised, it might have been appropriate to describe the Commonwealth as an international organisation, but it is at least correctly labelled as an 'association' of states.

The Declaration adopted on 22 January 1971, by the Commonwealth Heads of Government Conference at Singapore contained some pertinent statements as to the nature and purposes of the Commonwealth, which was defined as 'a voluntary association of independent sovereign States, each responsible for its own policies, consulting and co-operating in the common interests of their peoples and in the promotion of international understanding and world peace'. The Declaration also affirmed that 'membership of the Commonwealth is compatible with the freedom of member Governments to be non-aligned or to belong to any other group-

4. The late Sir Robert Menzies, Prime Minister of Australia, 1939–1941, and 1949–1966.

ing, association or alliance'. Emphasis was placed on the aspect of consultation; the Commonwealth was declared to be 'based on consultation, discussion and co-operation', and to provide 'many channels for continuing exchanges of knowledge and views on professional, cultural, economic, legal and political issues among member States'.

Recent developments in the areas of consensus and collaboration have included the establishment of working study groups in matters such as trade, energy and industry, and regional meetings, since 1978, of Commonwealth Heads of Government in the Asia/Pacific region (the so-called 'CHOGRM' meetings).

Trust territories

For all practical purposes, trust territories are now of historical interest only and will therefore be treated only briefly in the present edition of this book;[5] readers are referred to the 9th edition (1984) for a more detailed examination of the subject.[6]

Under Chapter XII of the United Nations Charter, there was established an International Trusteeship System for the supervision of trust territories placed under the United Nations by individual agreements with the states administering them, designated as 'Administering Authorities'. The System applied to: (i) territories then held under mandates established by the League of Nations after the First World War; (ii) territories detached from conquered enemy states as a result of the Second World War; and (iii) territories voluntarily placed under the System by states responsible for their government. The basic objectives of the System were to promote the political, economic and social advancement of the trust territories and their progressive development towards self-government or independence.

The Trusteeship Council was established under Chapter XIII of the Charter to supervise the administration of the trust territories and to ensure that governments responsible as Administering Authorities should take adequate steps to prepare them for the achievement of the above-mentioned objectives.

Eleven territories were placed under the System, but one only, the Trust Territory of the Pacific Islands, comprising former Japanese-mandated island territories, had the status of a 'strategic' trust territory, under the United States as Administering Authority according to an Agreement of 1947 approved by the United Nations Security Council. By 1981, all trust territories except the latter 'strategic' trust territory had either attained independence or were united with a neighbouring state to form an independent country. The position as to the Trust Territory of the Pacific

5. For discussion of the system of trust territories and for a comparison with the League of Nations mandates system, see Duncan Hall *Mandates, Dependencies, and Trusteeship* (1948). The legal aspects of the system are analysed by Sayre in an article in (1948) 42 AJIL 263 et seq.
6. See pp 112–116 of the 9th edn of this book.

Islands remains to be finalised. At the date of writing, the United States is still in the position of an Administering Authority, and has continued to report annually on its administration of the Trust Territory of the Pacific Islands to the Trusteeship Council, which is still in being. It should be mentioned that negotiations as to self-government for the Pacific Islands began in 1969 and by the late 1970s four separate entities had emerged, namely the Northern Marianas, the Marshall Islands, the Federated States of Micronesia and the Palau island group. The Northern Marianas opted for 'Commonwealth' status, ie incorporation with the United States, but with internal self-rule. The Marshall Islands and the Federated States of Micronesia elected to enter into compacts and subsidiary agreements providing for 'free association' status. The position concerning Palau remains indeterminate, and the relevant difficulties[7] are of such a nature as to remain outside the scope of this book. It cannot yet be said that the Trusteeship System has been formally wound up. The Trusteeship Council had consistently maintained, as it did, for example, in July 1976, that the peoples of the Pacific Islands have the right of self-determination. There is only a remote possibility of the future creation of a United Nations trusteeship in respect of a particular dependent territory.

One matter of substantial significance concerning trust territories and the earlier mandates system needs to be mentioned. This concerned the South African mandate in respect to South West Africa, now commonly known as Namibia. South Africa did not follow the example of other Mandatory Powers, and refused to bring South West Africa under the Trusteeship System. The questions of South Africa's obligations in that connection came before the International Court of Justice in 1950, which, although ruling by a majority that South Africa was not bound to place South West Africa under the Trusteeship System, nevertheless advised also by a majority that the territory remained under the administration of South Africa subject to the terms of the original mandate, and subject to the supervision of the United Nations General Assembly, which by necessary implication stood in the place of the previous supervisory authority, the League of Nations.[8] In the *South West Africa Cases, 2nd Phase*[9] the International Court of Justice held that individual member States of the League had no legal standing or claim, by themselves, to enforce the terms of a mandate, this being a matter for organic or

7. See (1988) 62 *Australian Law Journal* pp 562–565.
8. See ICJ 1950, 128. This view was upheld and reaffirmed by the international Court of Justice over twenty years later in its Advisory Opinion of 21 June 1971, on the *Legal Consequences for States of the Continental Presence of South Africa in Namibia (South West Africa)*. The Court ruled in addition that the failure of South Africa to comply with its obligation to submit to the supervision of United Nations organs made its continued presence in South Africa illegal; see ICJ 1971, 16 at 28, 35–43.
9. ICJ 1966, 6.

international action.[10] South Africa thus never became an Administering Authority in the strict sense under the United Nations Charter.[11]

Status of non-self-governing territories under United Nations Charter

The United Nations Charter accords a special status to colonial territories, possessions, and dependencies under the general designation of 'non-self-governing territories'. As in the case of trust territories, the concept of a trust reposing upon the administering states, is emphasised. By a Declaration regarding Non-Self-Governing Territories contained in Chapter XI of the Charter, members of the United Nations administering such territories recognised the principle that the interests of the inhabitants were paramount, accepted as a sacred trust the obligation to promote their well-being to the utmost, and undertook to develop self-government, and to assist in the evolution of free political institutions.

They also bound themselves to transmit regular information on conditions in these territories to the Secretary-General of the United Nations. The information thus transmitted came to be examined by a Committee of the General Assembly, known as the Committee on Information from Non-Self-Governing Territories. This Committee, formerly appointed on an ad hoc basis for renewable terms of three years, was converted into a semi-permanent organ as a result of a General Assembly Resolution in December 1961, appointing it until such time as the Assembly decided that the principles embodied in Chapter XI of the Charter, and in the Assembly's Declaration of 4 December 1960, on the Granting of Independence to Colonial Countries and Peoples[12] had been fully implemented. It was empowered to review, and make recommendations concerning social and economic conditions in non-self-governing territories, and it had in fact received evidence other than information transmitted under Chapter XI of the Charter, including statements by governments of administering countries, and by international institutions. In December 1963, the General Assembly discontinued the Committee on Information, and transferred its functions to the Special Committee (the Committee of Twenty-four) on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.[13]

The provisions of Chapter XI of the Charter have been given, in practice, a rather wider operation than was probably contemplated when these were drafted. The General Assembly has apparently taken the view that Chapter XI has greater force than that of a merely unilateral

10. The Court was equally divided on the question, the President's casting vote being decisive under art 55 of the Court's Statute.
11. Semble, an Administering Authority cannot unilaterally modify the status of a trust territory without the authority of the United Nations.
12. See below, pp 123–124.
13. See below, p 124.

undertaking. By various Resolutions, and by the appointment of ad hoc committees in respect to particular territories, the Assembly has sought to advance the attainment of independence by non-self-governing territories, to emphasise the obligations of states administering such territories, to promote the welfare of the inhabitants, and to procure a wider participation or association by the territories in, or with the work of the United Nations and its specialised agencies. A rather striking aspect is the extent to which thereby territories and dependencies have come under the cognisance of United Nations subsidiary organs. The decolonisation programme of the United Nations has progressed with such effectiveness that, at the date of writing, there are less than twenty territories, mainly small island territories, which can come within the cognisance of the United Nations organs administering Chapter XI of the Charter.

Neutralised states

A *neutralised state* is one whose independence and political and territorial integrity are guaranteed *permanently* by a collective agreement of Great Powers subject to the condition that the particular state concerned will never take up arms against another state—except to defend itself—and will never enter into treaties of alliance, etc, which may compromise its impartiality or lead it into war.

The object of neutralisation is to safeguard peace by:

a. protecting small states against powerful adjacent states and thereby preserving the balance of power;
b. protecting and maintaining the independence of 'buffer' states lying between Great Powers.

The essence of neutralisation is that it is a *collective* act, ie the Great Powers concerned must expressly or impliedly assent to the status of neutrality permanently conferred on the country, and that it is *contractual*, ie a state cannot be neutralised without its consent, nor can it unilaterally announce its neutralisation. Thus in 1938, when Switzerland took steps to obtain recognition of its full neutrality by the League of Nations, after a prior declaration of its independence and neutrality, the Soviet Foreign Minister—Monsieur Litvinoff—protested, perhaps correctly, that Switzerland could not so declare its neutrality in the absence of prior agreement with all other interested states. Nor is the case of the neutralisation of Austria in 1955 an exception to the principle. The Austrian legislature did, it is true, following upon the State Treaty of 15 May 1955, re-establishing an independent democratic Austria, enact a constitutional statute proclaiming Austria's permanent neutrality. But this self-declared neutrality was in pursuance of prior agreement[14] with

14. Indeed, under this agreement, Austria was to 'take all suitable steps to obtain international recognition' of such declared neutralisation. In the later case of the neu-

the Soviet Union, and was recognised and supported by the other Great Powers, and by other states.

Neutralisation differs fundamentally from neutrality, which is a voluntary policy assumed temporarily in regard to a state of war affecting other Powers, and terminable at any time by the state declaring its neutrality. Neutralisation on the other hand is a permanent status conferred by agreement with the interested Powers, without whose consent it cannot be relinquished. It is thus also essentially different from 'neutralism', a newly coined word denoting the policy of a state not to involve itself in any conflicts or defensive alliances. (There can be some fine shades of distinction between 'neutralism' and another expression, 'non-alignment'.)

The obligations of a neutralised state are as follows:

a. not to engage in hostilities except in self-defence;
b. to abstain from agreements involving the risk of hostilities, or granting of military bases, or use of its territory for military purposes, for example, treaties of alliance, guarantee, or protectorate, but not from non-political conventions, for example, postal or tariff conventions;
c. to defend itself against attack, even when calling on the guarantors for assistance, by all the means at its disposal;
d. to obey the rules of neutrality during a war between other states;
e. not to allow foreign interference in its internal affairs.[15]

The obligations of the states guaranteeing neutralisation are:

a. to abstain from any attack or threat of attack on the neutralised territory;
b. to intervene by force when the neutralised territory is violated by another Power, and the guarantors are called on to act.

It is believed that under current conditions, and having regard to the vast changes in the conditions of warfare and armed conflict, including subversion and internal strife fomented from outside, together with the difficulty of circumscribing and localising any major conflict, the institution of neutralisation has only a limited, specific role to play in the context of international law.[16]

Outstanding cases of neutralised states have been Switzerland, Belgium

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tralisation of Laos, the unilateral Statement of Neutrality by Laos on 9 July 1962, was subsequently supported by a Thirteen-Power Declaration on 23 July 1962, that the sovereignty, independence, neutrality, unity, and territorial integrity of Laos would be respected (the thirteen Powers included Great Britain, the People's Republic of China, France, India, the United States and the Soviet Union).

15. In its Statement of Neutrality of 9 July 1962, Laos also bound itself not to allow any country to use Laotian territory for the purposes of interference in the internal affairs of other countries.

16. Cf C. E. Black, R. Falk, K. Knorr, and O. Young *Neutralisation and World Politics* (1968).

and Austria. Belgium can no longer be regarded as a neutralised state because of its participation in certain pacts of security and mutual defence since the end of the Second World War (for example, the North Atlantic Security Pact of 4 April 1949), but Switzerland's status of permanent neutrality remains a fundamental principle of international law. Although more recent, Austria's neutralisation in 1955 is equally intended permanently to rest on the law of nations.

A neutralised state can become a member of the United Nations, for notwithstanding the provision in article 2 paragraph 5 of the United Nations Charter that member states must give the Organisation every assistance in any action taken in accordance with the Charter (which would include enforcement action), the Security Council may under article 48 exempt a neutralised state from any such duty. It is significant, in this connection, that Austria was admitted to the United Nations on 14 December 1955, that is to say, subsequent to the general recognition of its neutralisation.

Right of self-determination of peoples and dependent entities

The right of self-determination of peoples and dependent entities has been expressly recognised by the United Nations General Assembly in its Resolution on Self-Determination of 12 December 1958, and in its Declaration of 14 December 1960, on the Granting of Independence to Colonial Countries and Peoples. The right was defined in some detail, under the heading 'The principle of equal rights and self-determination of peoples', in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970. On 10 November 1975, the General Assembly adopted a resolution reaffirming 'the importance of the universal realisation of the right of peoples to self-determination, to national sovereignty and territorial integrity, and of the speedy granting of independence to colonial countries and peoples as imperatives for the enjoyment of human rights'. The Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights, unanimously approved by the General Assembly on 16 December 1966, and opened for signature on 19 December 1967, also recognise the right of peoples to self-determination.[17]

17. See also *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in South West Africa (Namibia)* ICJ 1971, 16 at 54–56, where the International Court of Justice treated the people of the Mandated Territory of South West Africa as having an actual right of progress towards independence, which had been violated by South Africa's failure as Mandatory Power to comply with its obligation to submit to the supervision of United Nations organs. In s VIII of the Helsinki Declaration adopted on 1 August 1975, the states participating in the Declaration pledged themselves to respect the right of peoples to self-determination. See generally on the subject of self-determination, M. Pomerance *Self-Determination in Law and Practice* (1982).

The right of self-determination has been treated as necessarily involving a number of correlative duties binding upon states, including the duty to promote by joint and separate action the realisation of the right of self-determination, and the transfer of sovereign powers to the peoples entitled to this right, and the duty to refrain from any forcible action calculated to deprive a people of this right. These duties have been expressed, or if not expressed are implied in the Declarations, above, adopted by the General Assembly, and in addition find some support in the practice of the past decade. First, there has been the rapid emancipation of many colonies and non-self-governing territories. Second, there has been the impact of the above-mentioned Declaration on the Granting of Independence to Colonial Countries and Peoples. In this Declaration, the General Assembly proclaimed the necessity of bringing to a speedy and unconditional end, colonialism in all its forms and manifestations, and called for immediate steps to be taken to transfer all powers to the peoples of territories which had not yet attained independence. By a subsequent Resolution of 27 November 1961, the Assembly established a Special Committee of Seventeen to implement the Declaration, and this Committee, enlarged in 1962 to consist of 24 members, has since been active in all directions.[18] Third, the process of ratification and acceptance of the two Covenants mentioned above, should consolidate acceptance of the duties correlative to the right of self-determination.

There still remains some difficulty as to what the expression 'self-determination' itself means, or includes. Some writers decline to treat it as a right of an absolute nature, stressing that it must be considered within the context of the people or group demanding to exercise it. Presumably, it connotes freedom of choice to be exercised by a dependent people through a plebiscite or some other method of ascertainment of the people's wishes.[19] Another difficult problem is to determine which communities of human beings constitute 'peoples' (ie the 'self') for the purpose of enjoying the right of self-determination.[20] Aspects such as common territory, common language, and common political aims may have to be considered. Semble, there must normally be a territorial unit

18. The full title of the Committee is 'Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples'. It has taken cognisance, inter alia, of the emancipation of trust territories, and the termination of trusteeship agreements, as, eg, in August 1975, in connection with the termination of the trusteeship of Papua New Guinea and its achievement of independence on 16 September 1975.
19. Cf the provisions for freedom of choice to be exercised by the people of West New Guinea, according to article XVIII of the Netherlands-Indonesia Agreement of 15 August 1962.
20. See Eagleton 47 AJIL (1953) 88–93, D. B. Levin *Soviet Year Book of International Law* (1962) pp 24–48, and generally the article by Professor Østerud, an authority on self-determination, 'Varieties of Self-Determination: the Case of the Western Sahara' (1985) 10 *The Maghreb Review* 20–27.

corresponding to the people to which the right may be regarded as attaching. Beyond this, there is the problem of whether, and, if so, to what extent the right of self-determination will, permit secession of part of the territory of a state.[1] An unqualified right of secession, as a derivative of the right of self-determination, could lead to disruption of state systems. In part for this reason, it is controversial according to the most recent practice and weight of opinion whether minority indigenous peoples or tribal groups in certain countries, eg, Canada and Australia, are 'peoples' entitled to self-determination.

Prior to 1958, it could be said that customary international law conferred no right upon dependent peoples or entities to statehood, although exceptionally some such right ad hoc might be given by treaty, or arise under the decision of an international organisation.[2] It is clear in the light of recent practice that such right is not conditioned upon the attainment of complete economic self-reliance, although economic viability may provide a ground, according to circumstances, to support entitlement to self-determination.

Self-determination may not necessarily involve solely and exclusively an absolute right to elect for autonomous statehood, but also an option to choose integration with the 'parent' state. Thus, eg, by the Act of Self-Determination of the people of the Cocos-Keeling Islands in December 1984, duly supervised by a United Nations mission, and later approved by the General Assembly (UN), the people voted for integration with Australia.

Sovereignty of peoples and nations over their natural wealth and resources

In a similar connection, is the so-called principle of 'economic self-determination', expressed in the United Nations General Assembly Resolution of 21 December 1952, affirming the right of peoples freely to use and exploit their natural wealth and resources. If the Resolution signified that, in the absence of treaty limitations or international law restrictions, a state was entitled to control the resources within its territory, it would merely enunciate a truism. The real object of the Resolution seems, however, to have been to encourage under-developed countries to make use of their own resources, as a proper foundation for their independent economic development, and to prevent their depletion by the action of other states.[3]

1. Cf Bucheit *Secession: The Legitimacy of Self-Determination* (1978) and Østerud, op cit, n 20, ante.
2. As, eg by the Resolution of the United Nations General Assembly in November 1949, that Libya and Italian Somaliland should become independent sovereign states, a Resolution adopted pursuant to the powers conferred by Annex XI, para 3, of the Treaty of Peace with Italy of 1947.
3. A somewhat related question concerns recent claims advanced for the general recognition of the 'right to development' of peoples (before self-determination), and of

Later, fuller and more elaborate expression was given to the principle in Resolutions of the General Assembly dated respectively 14 December 1962, and 25 November 1966, and on 17 December 1973, by Resolution adopted at its 28th Session, the General Assembly extended the scope of the principle to 'permanent sovereignty' over natural resources in the seabed and subsoil of, and in the waters of the seas within national jurisdiction. The right of all peoples freely to dispose of their natural wealth and resources was affirmed in identical terms in article 1 of the Covenant on Economic, Social and Cultural Rights of 16 December 1966, and article 1 of the Covenant on Civil and Political Rights of the same date. Article 25 of the former Covenant also declared that nothing therein was to be interpreted as impairing the 'inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources'. There have been other Resolutions of the General Assembly on the subject, more particularly its 1974 Resolution on Permanent Sovereignty over Natural Resources, its 1974 Declaration on the Establishment of a New Economic Order and the Charter of Economic Rights and Duties of States adopted by it in 1974, and these, together with the 1962 and 1966 Resolutions, reflect not only the idea of a state's sovereign control over its own resources, not to be surrendered but to be safeguarded even when foreign capital is imported to promote development, but also an insistence, implicitly, if not expressly, that it is the responsibility of the international community to assist in maximising the exploitation and use of the natural wealth of developing countries, and so contribute to strengthening their capability to promote their economic development by their own efforts. Since the ruling criterion is that of a state's permanent sovereignty over its own resources, it is this state's national law which according to the Resolutions must govern questions of compensation for nationalisation or expropriation of foreign enterprises, while remedies given in the national courts must be exhausted before seeking relief in the international forum.

One of the issues at the Stockholm Conference of June 1972 on the Human Environment was how to reconcile the sovereign rights of states to develop their own resources in their own way with the necessities of protection of the environment. In Principles 21 and 22 of the Declaration on the Human Environment adopted by the Conference, it was proclaimed, inter alia, that states have a sovereign right to exploit their own resources pursuant to their own environmental policies, while remaining responsible for ensuring that activities within their jurisdiction or control do not cause damage to the environment of other states.

This affirmation and re-affirmation of the principle of a nation's sovereign control over its own resources has undoubtedly generated some

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emancipated territories. See Dupuy (ed) *The Right to Development at the International Level* (1980).

new currents in international economic law. One important result has been the far-reaching United Nations programme for the evaluation and development of natural resources.

3. ASSOCIATIONS OR GROUPINGS OF STATES

States are free, consistently with their obligations under the United Nations Charter, to form associations or groupings for general or particular purposes. The Commonwealth, mentioned above,[4] remains an outstanding illustration, and so also the Organisation of American States (OAS), and the Organisation of African Unity. Some of these associations or groupings, for example the European Economic Community (EEC), and the North Atlantic Treaty Organisation (NATO), are, in effect, of the character of international organisations, and therefore come within the ambit of Chapter 20, below.

Since the end of the Second World War, the number of such associations or groupings of states has rapidly increased. The principal functions or purposes served by them are political, or economic, or related to the mutual defence and security of the members. The novel feature of these new associations or groupings is not only their diversity, but the establishment in each instance of a permanent or semi-permanent machinery, to enable them to function as working unities.

The majority of such bodies are regional in character or have regional implications, but sometimes include states not located in the region concerned.

On the economic side, there are the European Economic Community (EEC) established by the Treaty of Rome of 25 March 1957,[5] the European Free Trade Association (EFTA) established by the Stockholm Convention of 20 November 1959, and the Latin American Free Trade Association (LAFTA) established by the Montevideo Treaty of February 1960.[6]

An example of a union or alliance for mutual security purposes, supported by permanent machinery, has been the North Atlantic Treaty

4. See pp 116–118 above.
5. Starting with Belgium, France, the Federal Republic of Germany, Italy, the Netherlands, and Luxembourg, the EEC was in 1972 enlarged to include the United Kingdom, Ireland and Denmark. By a later enlargement of 1981 to include Greece, and one of 1986 to include Spain and Portugal, the Community's membership has become double that of 1957. Moreover, the Community has entered into conventions of 'association' in 1975, 1979 and 1983 respectively with the ACP (African, Caribbean and Pacific) countries.
6. In this connection, note the proposals advanced since at least 1968, and affirmed in 1980 and repeatedly in subsequent years, for the development of a 'Pacific Community', being an association embracing Western Pacific nations.

Organisation (NATO) formed pursuant to the North Atlantic Security Pact of 4 April 1949.[7]

It is too early as yet to determine the precise impact on international law of these associations or groupings, each with permanent organs, some of which indeed have been invested with unusual powers. Usages and practices may develop, pointing the way to a new field of international law.

7. Mention should also be made of ASEAN, an association of five states, in South-East Asia, namely Malaysia, the Philippines, Thailand, Indonesia and Singapore, formed under the Bangkok Declaration of 9 August 1967 for economic, social, cultural, technical and mutual assistance programmes.

CHAPTER 6

Recognition

1. RECOGNITION IN GENERAL[1]

The identity and number of states belonging to the international community are by no means fixed and invariable. The march of history produces many changes. Old states disappear or unite with other states to form a new state, or disintegrate and split into several new states, or former colonial or vassal territories may by a process of emancipation themselves attain statehood. Then, also, even in the case of existing states, revolutions occur or military conquests are effected, and the status of the new governments becomes a matter of concern to other states, which formerly had relations with the displaced governments, raising the question of whether or not to engage in formal or informal relations with the new régimes, either by recognition, or if a policy of non-recognition of new governments is not followed, solely by some kind of intercourse.

These transformations raise problems for the international community, of which one is the matter of *recognition* of the new state or new government or other change of status involved. At some time or other, this issue of recognition has to be faced by certain states, particularly if diplomatic intercourse must necessarily be maintained with the states or governments to be recognised.

However, the subject is one of some difficulty, and at this stage of the development of international law, can be presented less as a collection of clearly defined rules or principles than as a body of fluid, inconsistent, and unsystematic state practice, involving as well the adoption by states of different policies; eg, as will be seen below, some follow the traditional course of recognising or withholding recognition of new governments, whereas other states opposed to this course favour a system now of deciding, as the circumstances may require, to enter into relations with new régimes or to abstain from such relations, regardless of formal recognition or of the formal withholding of recognition.

1. See Chen *The International Law of Recognition* (1951); Jean Charpentier *La Reconnaissance Internationale et L'Evolution du Droit des Gens* (Paris, 1956); Hans-Herbert Teuscher *Die Vorzeitige Anerkennung im Völkerrecht* (1959); Harris *Cases and Materials on International Law* (1979) pp 143–173; Bucrgenthal and Maier *Public International Law* (1985) pp 191–194; D. H. Ott *Public International Law in the Modern World* (1987) pp 85 et seq.

The reasons for this are twofold:

a. Recognition is, as the practice of most states shows, much more a question of policy than of law. The policy of the recognising state is conditioned principally by the necessity of protecting its own interests, which lie in maintaining proper relations with any new state or new government that is likely to be stable and permanent.[2] Besides this, other political considerations, for example, trade, strategy, etc, may influence a state in giving recognition. Consequently there is an irresistible tendency in recognising states to use legal principles as a convenient camouflage for political decisions.
b. There are several distinct categories of recognition. At the outset there are the categories already mentioned—the recognition of new states, and the recognition of new heads or governments of existing states. Although very much the same principles are applicable to both, it is important that they should not be confused.[3] In addition to these two heads of recognition, there are the recognition of entities as entitled to the rights of belligerency, the recognition of entities entitled to be considered as insurgent governments, the recently proposed new category of recognition of national liberation or resistance movements, and the recognition of territorial and other changes, new treaties, etc (see below). Finally, there is the distinction to bear in mind between recognition de jure and de facto of states and governments.

It is important that in considering the international law and practice as to recognition, due allowance should be made for the exigencies of diplomacy. States have frequently delayed, refused, or eventually accorded recognition to newly-formed states or governments for reasons that lacked strict legal justification.[4] For example, in the First World War, Great Britain, France, the United States, and other Powers recognised Poland and Czechoslovakia before these latter actually existed as independent states or governments. Similarly, in the Second World War the grant of recognition was conditioned by the supreme necessity of strengthening the ranks in the struggle against the Axis Powers, as for example in the case of the recognition of the governments-in-exile in London. Political and diplomatic considerations also explain the puzzling divergencies among states since 1948 so far as concerned the recognition

2. This conclusion is drawn by the late Professor H. A. Smith from a study of British practice; see Smith *Great Britain and the Law of Nations* (1932) Vol 1, pp 77–80.
3. Hence, it is necessary when referring to a particular act of recognition to be most specific in stating what the state, government, or other entity is recognised as being. It is inadequate merely to state that some entity has been 'recognised'.
4. Among such considerations have been the following: That the entity recognised could give valued help as a co-belligerent; that the entity recognised was willing to conclude a general settlement with the recognising state; that recognition or non-recognition might offend an ally.

of the newly emerged State of Israel, and since 1949 of the People's Republic of China.

Naturally, the question has been raised whether recognition is a necessary institution, and, if not, accordingly whether it ought to be discarded either generally or in most instances. This was the view indeed of the late Richard Baxter, Judge of the International Court of Justice, 1979–1980, who felt that recognition caused more problems than it solved, and that its partial withdrawal would facilitate the maintenance of relations with states in which extra-constitutional changes of government were taking place.[5] In 1930, the then Minister for Foreign Affairs of Mexico, Mr Estrada, announced that his government would no longer issue declarations in the sense of grants of recognition inasmuch as 'such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments . . .'.[6] This policy, as thus announced, has become generally known as the 'Estrada doctrine', and has been adopted by a certain number of other governments, but obviously, as subsequent experience has shown, it has not eliminated the responsibility falling on governments, from time to time, of deciding with which of two rival régimes relations or any form of intercourse should be conducted. The same difficulty would necessarily be faced by those states (eg, the United States, the United Kingdom and Australia) which in the past twelve years have opted for a policy of not recognising or withholding recognition of new governments, but instead deciding according to the circumstances whether or not to maintain relations with them.

In form and in substance, recognition has continued to remain primarily a unilateral diplomatic act on the part of one or more states. No collective, organic procedure for granting recognition based on established legal principles has yet been evolved by the international community, although the provisions in the United Nations Charter (articles 3–4) directed to the admission of states to membership of the Organisation may incidentally in most instances amount to a certificate of statehood.

Accordingly, the recognition of a new state has been defined with some authority[7] as:

> '. . . the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organised, independent of any other existing State, and capable of observing the obligations of international law, and by which they manifest therefore their intention to consider it a member of the international community.'

5. See Galloway *Recognising Foreign Governments* (1978) Foreword, p xi.
6. See Whiteman *Digest of International Law* (1963) Vol 2, pp 85–86.
7. By the Institute of International Law; see Resolutions adopted at Brussels in 1936, art 1, 30 AJIL (1936) Supplement, p 185.

To express these two statements in another way, the state, to be recognised, must possess the four characteristics mentioned in the Montevideo Convention,[8] with particular regard to the capacity to conduct its international affairs, although the requirement of definiteness of territory is not generally insisted upon (cf the case of the recognition of Israel in 1949, while its boundaries were still not finally determined).

On the other hand, recognition as a government by those states which still follow the traditional course of recognising or withholding recognition of new governments and have not, like, eg, the United States, the United Kingdom and Australia, abandoned this practice, implies that the recognised government is, in the opinion of the recognising state, qualified to represent an existing state, but it does not necessarily signify approval of that government by the recognising state.

This act of recognition in both cases may be *express*, that is by formal declaration (which may be by diplomatic Note, *note verbale*, personal message from the head of state or Minister of Foreign Affairs, parliamentary declaration, or treaty),[9] or *implied* when it is a matter of inference from certain relations between the recognising state and the new state or new government. The manner of recognition is not material, provided that it unequivocally indicates the intention of the recognising state. There are no rules of international law restrictive of the form or manner in which recognition may be accorded.

Recognition under modern state practice involves more than *cognition*, that is to say more than an avowal of knowledge that a state or government possesses the requisite bare qualifications to be recognised. This is proved by the fact, inter alia, that substantial delays may occur before a state or government is recognised, notwithstanding that its status may be beyond doubt. The practical purpose of recognition, namely, the initiation of formal relations with the recognising state, must also always be borne in mind. Once granted, recognition in a sense estops or precludes the recognising state from contesting the qualifications for recognition of the state or government recognised.

Many writers have, however, sought to draw wider theoretical implications as to the object of recognition.

There are two principal theories as to the nature, function, and effect of recognition:

a. According to the *constitutive* theory, it is the act of recognition alone which creates statehood or which clothes a new government with any authority or status in the international sphere.
b. According to the *declaratory* or *evidentiary* theory, statehood or the authority of a new government exists as such prior to and inde-

8. See pp 95–96 above.
9. The minister concerned may also, by Press Statement, expressly declare that an otherwise ambiguous Note or *note verbale* constitutes formal recognition.

pendently of recognition. The act of recognition is merely a formal acknowledgment of an established situation of fact.

Probably the truth lies somewhere between these two theories. The one or the other theory may be applicable to different sets of facts. The bulk of international practice supports the evidentiary theory, inasmuch as while recognition has often been given for political reasons and has tended therefore to be constitutive in character, countries generally seek to give or to refuse it in accordance with legal principles and precedents. Also recognition has frequently been withheld for political reasons[10] or until such time as it could be given in exchange for some material diplomatic advantage to be conceded by the newly recognised state of government—a clear indication that the latter already possessed the requisite attributes of statehood or governmental authority. Moreover, a mere refusal by a single state to recognise could not affect the situation if a great number of other states had already given their recognition. Nor have states in practice regarded non-recognition as conclusive evidence of the absence of qualifications to be a state or a government. Indeed by insisting that unrecognised states or governments must observe the rules of international law, they have implicitly acknowledged that they possess some status as such.

The evidentiary theory is further supported by the following rules:

a. The rule that if a question arises in the courts of a new state as to the date at which the state came into existence, it will be irrelevant to consider the date when treaties with other states recognising it came into operation. The date when the requirements of statehood were in fact first fulfilled is the only material date.[11]
b. The rule that recognition of a new state has retroactive effect, dating back to its actual inception as an independent state.[12]

These two rules which apply also to newly recognised governments are based principally on the necessary consideration that there should be no

10. As in the case of the early refusal to recognise the Soviet Union because of its failure to fulfil contractual obligations of the former Tsarist Government.
11. See *Rights of Citizenship in Succession States Cases*, Annual Digest of Public International Law Cases, 1919–1922, Nos 5, 6 and 7. See also art 9 of the Charter of the Organisation of American States, Bogotá, 1948:—'The political existence of the State is independent of recognition by other States'.
12. *Aksionairnoye Obschestvo A M Luther v James Sagor & Co* [1921] 3 KB 532; and as to the retroactive effect of recognition, see further below in this chapter, pp 150–151. Further authority against the constitutive theory is the *Tinoco Arbitration* (1923) where the Arbitrator held that the revolutionary Tinoco Government of Costa Rica which came into power in 1917 was a properly constituted government, although not recognised by Great Britain, and that Great Britain was not estopped (ie precluded in law) by such prior non-recognition from later alleging that the government was in fact a duly and properly constituted one; see *United Nations Reports of International Arbitral Awards* Vol I, pp 371 et seq.

gap of time during which a state or government is out of existence. In other words, continuity is the essence of state sovereignty or of governmental authority. Otherwise, many transactions, contracts, changes of status, etc, of the utmost importance to private citizens, would be null and void because made in a period when the laws of the particular state or government under which they were effected were unrecognised.

The constitutive theory finds some support in the fact that upon recognition the recognised state or government acquires status, as such, in the municipal courts of the recognising state.[13]

Neither theory can be reconciled with the practice of States such as the United States, the United Kingdom and Australia which have abandoned the practice of giving recognition to new governments (see above).

Is there a duty to grant recognition?

It has been urged that states are subject to a duty under international law to recognise a new state or a new government fulfilling the legal requirements of statehood or of governmental capacity.[14] However, the existence of such a duty is not borne out by the weight of precedents and practice, particularly the divergencies in 1949–1980 in the recognition of the People's Republic of China, although it could perhaps be said that in recognising certain newly emerged states (ie decolonised territories or emancipated trust territories) some states considered that they were bound to accord recognition.

If indeed there were such a legal duty to recognise, it is difficult to say by whom and in what manner it could be enforced. To each duty, there must correspond a correlative right, and how would one define this right? Is it a right of the state claiming to be recognised, or a right of the international community, and how would such claims of right be presented? The answer to these questions must be that there is no general acceptance of the existence of the duty or the right mentioned. No right to recognition is laid down in the Draft Declaration on the Rights and Duties of States, drawn up by the International Law Commission in 1949. The action of states in affording or withholding recognition is as yet uncontrolled by any rigid rules of international law; on the contrary recognition is treated, for the most part, as a matter of vital policy that

13. See below, pp 146–147.
14. In observations forwarded to the United Nations in 1948 on the Draft Declaration on the Rights and Duties of States (see above, pp 99–100), the British Government stated that it favoured a development of international law under which recognition would become a matter of legal duty for all states in respect to entities fulfilling the conditions of statehood, etc. These observations of 1948 do not of course apply to the recognition of new governments, inasmuch as since 1980 the United Kingdom Government has abandoned the policy of such recognition (see below in this chapter).

each state is entitled to decide for itself.[15] Podesta Costa's view that recognition is a 'facultative' and not an obligatory act is more consistent with the practice. There is not even a duty on a state under international law not to recognise initially, or to withdraw recognition if the qualifications of statehood or of governmental authority cease to exist. The apparent arbitrariness of state practice in this regard is tempered by the consideration that most states endeavour, as far as possible, to give recognition according to legal principles and precedents, to the extent at least that, although they may withhold recognition for political reasons, when they do grant it they generally make sure that the state or government to be recognised at least possesses the requisite legal qualifications. To this degree states do treat recognition as a legal act. Lastly, if there were such a duty under general customary international law, it would be one observed by all major states, yet no such duty is acknowledged by states following the Estrada doctrine of non-recognition (see above), nor so far as concerns the recognition of new governments is the existence of the duty recognised by states such as the United States, the United Kingdom and Australia, which have abandoned the policy of such recognition of new régimes.

Implied recognition

Implied recognition is very much a matter of the intention of the state said to have given recognition. The implication is made solely when the circumstances unequivocally indicate the intention to establish formal relations with the new state or new government. Such clear-cut cases will naturally be limited. There are other cases in which a state may lay itself open to the inference of having recognised another state or government, for example, by entering into some form of relations with it. Such conduct can usually amount to no more than recognition de facto, or recognition of an entity as an insurgent authority, or indicate an intention to maintain, through agents, informal relations without recognition.

In practice, the only legitimate occasions for conclusively implying recognition de jure are:

1. The formal signature of a bilateral treaty by the recognised and recognising States (for example, the Treaty of Commerce between Nationalist China and the United States in 1928) as distinct from mere temporary arrangements or agreements. It is not necessary that the treaty be ratified.[16] The more recent practice, under which a state or government may, on occasions, conclude even a formal bilateral treaty with an unrecognised entity or régime, means that a close examination

15. Also municipal courts have adopted the view that the decision to recognise is a political one, to be performed by the executive, and not to be questioned in a court of law; cf *Oetjen v Central Leather Co* 246 US 297 (1918).

16. *Republic of China v Merchants' Fire Assurance Corpn of New York* 30 F (2d) 278 (1929).

of the bilateral treaty concerned and its surrounding circumstances is necessary before an implication of recognition is valid.[17]

2. The formal initiation of diplomatic relations between the recognised and recognising state.
3. The issue of a consular exequatur by the admitting state for a consul of an unrecognised state.

In certain exceptional circumstances, but not otherwise,[18] recognition has been inferred from the following circumstances:

a. Common participation in a multilateral treaty. However, states such as Great Britain and the United States have, sometimes, when signing a convention, declared that their signature was not to be construed as the recognition of a signatory or adhering Power not recognised by them.
b. Participation in an international conference.
c. Initiation of negotiations between a recognising and a recognised state.

Recognition of the validity of the laws decreed or enacted by a particular entity, does not necessarily import recognition of the law-making entity.[19]

Recognition subject to a condition

Sometimes states are recognised subject to a condition, generally an obligation which they undertake to fulfil. Thus, the Berlin Congress of 1878 recognised Bulgaria, Montenegro, Serbia, and Rumania, under the condition only that these states should not impose any religious disabilities on any of their subjects.

The effect of such conditional recognition is that failure to fulfil the obligation does not annul the recognition, as once given this is incapable of withdrawal. By breaking the condition, the recognised state may be guilty of a breach of international law, and it is open to the recognising states to sever diplomatic relations as a form of sanction, or otherwise to proceed. But the status which the recognised state has obtained from the act of recognition cannot then be retracted. By way of exception, however, the conditional recognition of states or governments which are just in process of emerging is probably revocable. Thus the recognition in 1919 by Great Britain of the Esthonian National Council 'for the time being

17. Cf B. R. Bot *Nonrecognition and Treaty Relations* (1968). Semble, the Treaty, initialled on 8 November 1972, between the Federal Republic of Germany (West Germany) and the German Democratic Republic (East Germany) by, inter alia, its preambular references to 'the two German States' and 'both German States' involved mutual recognition of each other's statehood.
18. Note, eg, the Protocol to the Declaration on the Neutrality of Laos, signed at Geneva on 23 July 1962. The United States, and the People's Republic of China, not then recognised by the United States, were both parties to the Protocol.
19. *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 at 961, [1966] 2 All ER 536 at 581.

provisionally and with all necessary reservations as to the future'[20] was no doubt revocable in the sense that it did not constitute an undertaking to continue the recognition if conditions altered.

In this topic of conditional recognition, the term 'condition' is thus not used in its true legal connotation as a vital term going to the root of a legal act, so that if the term be not performed such act becomes void or inoperative.

In practice states have repeatedly, as consideration for the grant of recognition, exacted from states or governments to be recognised some guarantee or undertaking or stipulation (for example, respect for private property as in the case of the United States recognition in 1937 of the new Bolivian Government). This practice is consistent with the predominantly political character of the unilateral act of recognition. It is true, however, that if recognition should under international law become purely and simply the cognitive act of registering the existence of statehood or of governmental capacity, logically it could not be subject to any such extrinsic term or condition.

Collective recognition

The advantages of recognition taking place by some collective international act, or through the medium of an international institution cannot be denied. It would obviate the present embarrassments due to unilateral acts of recognition.[1]

In the light of the Advisory Opinion of the International Court of Justice, on *Conditions of Membership in the United Nations*,[2] which recognises statehood as a primary qualification for admission to the United Nations, it is clear that such admission is tantamount to recognition of the member admitted as a state.[3]

20. *The Gagara* [1919] P 95.

1. There are a number of historical precedents of collective recognition; eg, the recognition of Bulgaria, Montenegro, Serbia and Rumania by the Berlin Congress of 1878, and of Esthonia and Albania by the Allied Powers in 1921. In principle, there is also no rule of international law which would preclude collective derecognition, ie collective withdrawal of recognition; more correctly, a number of states each withdrawing recognition pursuant to an agreement between them to that effect.
2. ICJ 1948, 57 et seq.
3. As distinct from the admission of a new member state to the United Nations, there is the question of the acceptance of the credentials of the government of an existing member state. Quaere whether accepting within the United Nations the credentials of a revolutionary government of a member state involves the same considerations as the recognition of that government. In a memorandum circulated to the Security Council members on 8 March 1950, the Secretary-General adopted the view that the two matters rested on different considerations, and that United Nations representation must rest, inter alia, on plenitude of capacity to fulfil the obligations of membership of the United Nations. In this connection, see D. I. Feldman *Soviet Year Book of International Law* (1961) pp 50–64. A stage may be reached where, unless the credentials of the effective government are accepted in the same manner as it has been recognised, the member state concerned will for all practical purposes be denied its due right of participating

Recognition of a head of state or of a new government

As already pointed out, this has nothing to do with the recognition of a state itself. It is well settled that if the government of one state should refuse the recognition of a change in the form of government of another well-established state, the latter does not thereby lose recognition of its statehood.

One must, however, be mindful of the fact, mentioned above, that since the late 1970s certain states follow a policy, varying in consistency from one state to another, of recognising states *only*, and of not granting or formally withholding recognition to new governments as such. This may be illustrated by a few examples. Thus in August 1977 the new development prior to that date in American recognition practice was summarised officially[4] as follows: '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.' In April 1980, the then British Secretary of State for Foreign Affairs, Lord Carrington, announced in the House of Lords that from then on the United Kingdom Government would 'no longer accord recognition to governments', and that 'we shall ... decide the nature of our dealings with régimes that come 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'. The most recent declaration of a policy of non-recognition of new governments was that made by Australia in January 1988 when it was announced that it would in the future not extend formal recognition whether de jure or de facto, to new governments taking power, but would replace recognition by the conduct of relations with new régimes 'to the extent and in the manner which may be required by the circumstances of each case'—thus in wider terms than the United Kingdom's declaration. It must therefore be stressed that the ensuing discussion of recognition of governments covers only the practice of states that do recognise governments as well as states and the practice previously followed by

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in the Organisation. The matter had been raised repeatedly from 1950 onwards in connection with the claim by the Soviet Government and other governments of member states that the Nationalist Government of China could no longer represent China within the United Nations, but that the credentials of the Government of the Communist People's Republic of China, which had been recognised by a number of states, should for that and other reasons be accepted. While ultimately, in 1971, support was obtained for acceptance of the latter government's credentials, controversy centred on the point whether the former government should remain a member.

4. United States *Department of State Bulletin* 10 October 1977, p 463. For criticism of the new policy see Henkin, Pugh, Schacter and Smit *International Law: Cases and Materials* (2nd edn, 1987) pp 249 et seq. The non-recognition of the new government of the foreign state does not involve cessation of the recognition of that state; of *Lehigh Valley Railroad Co v State of Russia* 21 F (2d) 396 (1927).

countries such as the United States, the United Kingdom and Australia (see above) which have ceased to follow a policy of recognising or withholding recognition of new governments.

In the case of *existing states*, no difficulty in recognising a government arises except when changes in the headship of the state or of its government take place in an abnormal or revolutionary manner.[5]

Where the change proceeds in a formal and constitutional way, recognition by other states is purely a matter of formality. But in the case of a revolution the recognition of the revolutionary government is a serious question and a decision thereon is only made with great care. It is practically impossible to lay down any definite legal principles on the matter, so materially do political considerations usually impinge thereon, while the practice is, as may be expected, confused and conflicting. The recognising government should at least be satisfied as to the prospects of stability of the new government. Although the premature recognition of a revolutionary government may justifiably be treated by the legitimate government as an unfriendly act, it is questionable in the light of modern practice whether, in the absence of some display of force or threat of force by the recognising state towards the legitimate government, this can be illegal as amounting to a breach of international law (for example, as representing an unlawful intervention).[6]

In the case of *nascent* states, recognition raises many problems for the recognising states; first, because of the merging of the new state with its new government and the difficulty of recognising the one without recognising the other; secondly, most states prefer, in the matter of recognition of nascent states, to be as non-committal as possible and to preface the date of recognition de jure by a stage of recognition de facto.

There is no difficulty, of course, where the new state is a former dependency or trust territory, and the parent or tutelary state, itself already de jure recognised, has consented to emancipation. Recognition

5. Another category of recognition advocated in recent years is that of the recognition of national liberation or resistance movements, on the one hand, and also, on the other hand, of peoples having a right to self-determination. National liberation or resistance movements have been admitted as participants, or on the basis of observer status, to international conferences or meetings. Cf also the case of the recognition by the United Nations General Assembly (by its Resolution of 20 December 1976) of the South West Africa People's Organisation (SWAPO) as the 'sole and authentic' representative of the people of Namibia (South West Africa). Some states have declined to follow others in recognising some particular liberation movements as the sole representatives of peoples awaiting self-determination.
6. A historical instance of premature recognition which was in fact treated as an intervention was that of the recognition by France in 1778 of the United States Government. The weight of subsequent practice, leaning in favour of the claims of revolutionary governments commanding popular support, has tended to discount the view that any diplomatic assistance to such governments may represent an intervention. In 1968–1969, during the course of the Nigerian Civil War, it was claimed that the recognition of the Biafran Government might constitute an intervention.

can be accorded automatically, and is essentially then a legal act of a cognitive nature. This is indeed what happened in the case of the recognition of the large number of African and Asian states, which have emerged since the end of the Second World War.

Withdrawal of recognition

As a rule, recognition de jure once given is irrevocable. This holds true even though recognition was given in the first instance from purely political motives to indicate to the world at large that relations with the recognised state or government were being initiated. It is a paradox that when a gesture is made in a contrary sense, indicating that no further relations will be maintained with the formerly recognised state or government, it is not in general attended by a withdrawal of recognition. A formal severance of diplomatic relations may be declared, but the once recognised state or government does not otherwise lose its status in the international community. Thus, Great Britain recognised the Soviet Government de jure in 1924, but later broke off relations in 1927, and although relations were subsequently resumed, participated in the vote of 1939 expelling the Soviet Union from the League of Nations. Neither the rupture of diplomatic relations nor the act of expulsion annulled recognition of the Soviet Government.

Sometimes a refusal to recognise is virtually equivalent to a state of severence of diplomatic relations. This is particularly well illustrated by the attitude of the United States of non-recognition of the Sovier Government before November 1933 when recognition was given. A communication of the United States Department of State to the New York Court of Appeals in 1933 characteristically defined this attitude:[7]

> 'The Department of State is cognisant of the fact that the Soviet regime is exercising control and power in territory of the former Russian Empire and the Department of State has no disposition to ignore that fact.
>
> The refusal of the Government of the United States to accord recognition to the Soviet regime is not based on the ground that the regime does not exercise control and authority in territory of the former Russian Empire, *but on other facts*.'

Non-recognition of a new state or new government does not mean non-intercourse with non-recognising states, just as non-intercourse does not necessarily signify non-recognition.[8] For instance, even before its 1980 declaration of a policy of non-recognition of new governments (see above), the British Government had in practice never declined to have talks or to transact necessary business with the agents or ministers of unrecognised states or governments, as witness the discussions with the

7. *Salimoff & Co v Standard Oil Co of New York* 262 NY 220 (1933).
8. In *Compania de Transportes Mar Caribe SA v M/T Mar Caribe* (1961) 55 AJIL 749, a United States District Court appears to have treated the rupture of diplomatic relations with Cuba by the United States on 3 January 1961, as a withdrawal of recognition.

Rhodesian Government after its unilateral declaration of independence in November 1965, although it was made plain that such informal relations or non-committal exchanges did not in any sense amount to formal diplomatic intercourse. Thus frequently consular appointments had been made to such unrecognised entities, although care was taken to express the appointments in such a way as not to involve even de facto recognition.[9] The primary consideration is that of convenience, and there is not involved or implied any mark of approval of the régime concerned. In the opinion of the International Law Commission in 1967,[10] a state may send a special mission to, or receive a special mission from, a state not recognised by it. Perhaps, the most significant recent example is the fact that on a large number of occasions, during the period before it accorded recognition, the United States participated in discussions or negotiations with the Communist People's Republic of China, including a series of exchanges and contacts in Warsaw, although refusing to grant formal recognition, and then later, some time after a meeting in Shanghai in 1972 between President Nixon and Chairman Mao-tse-tung, proceeded to maintain liaison offices in each other's capital, as a means, inter alia, of paving the way towards 'normalisation' of the relations between the two governments;[11] such 'normalisation' was fully achieved when recognition was accorded by the United States, taking effect as from 1 January 1979.[12] One may wonder whether this constitutes a tertium quid, in addition to recognition de jure and de facto (see below)—that is, a kind of non-formal tacit acceptance of the situation that a state or government is in control of the relevant territory.

2. RECOGNITION DE JURE AND DE FACTO

The practice of most states draws a distinction between recognition de jure and de facto.

Recognition de jure means that according to the recognising state, the state or government recognised *formally* fulfils the requirements laid

9. See Smith *Great Britain and the Law of Nations* (1932) Vol I, p 79. In 1949, Great Britain intimated to the newly formed Government of the Communist People's Republic of China that it was ready to conduct informal relations with authorities of that government through British consular officers, while stopping short of de facto recognition (see *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70 at 88–89).
10. See para 2 of draft art 7 of the Commission's Draft of Articles on Special Missions, and commentary thereon, in the *Report* of the Commission on the Work of its Nineteenth Session (1967). Art 7 of the Convention on Special Missions, opened for signature on 16 December 1969, merely provides that the existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission, para 2 of draft art 7 having been omitted.
11. See United States *Department of State Bulletin* of 10 October 1977, p 463.
12. See (1979) 80 *Department of State Bulletin* 26.

down by international law for effective participation in the international community.

Recognition de facto means that in the opinion of the recognising state, provisionally and temporarily and with all due reservations for the future, the state or government recognised fulfils the above requirements in fact (de facto).

It may be seen therefore that the epithets 'de jure' and 'de facto' are not, strictly speaking, descriptive of the process of recognition itself, but appertain to the status of the particular state or government, the recognition of which is in issue.

In modern times, the practice has generally been to preface the stage of de jure recognition by a period of de facto recognition, particularly in the case of a legally constituted government giving way to a revolutionary régime. In such a case, de facto recognition is purely a non-committal formula whereby the recognising state acknowledges that there is a legal de jure government which 'ought to possess the powers of sovereignty, though at the time it may be deprived of them', but that there is a de facto government 'which is really in possession of them, although the possession may be wrongful or precarious'.[13] Meanwhile de facto recognition secures considerable economic advantages to the recognising state, enabling it to protect the interests of its citizens in the territory of that state or government. At a later stage, when the need for reservations no longer exists because the future of the new state or new régime is completely assured, de jure recognition is formally given.

If there be conclusive evidence of continuing de jure recognition, a court is not entitled to find that there has been de facto recognition, even of an entity subordinate to the de jure recognised government.[14]

Where a court sitting in a particular territory has to determine the status of a new government which has illegally assumed control of that territory, there can be no question of recognition de jure of the legitimate government and of recognition de facto, at the same time, of the new government. The court will have to decide, not merely whether the usurping régime is an established de facto government, but whether it is a lawful government at all.[15]

The point may be raised whether the jus of de jure recognition means: (a) state law, (b) international law, or (c) abstract justice, in the sense of 'right'. Ideally, it should mean international law, which in this regard should be guided by (c)—abstract justice—and should condition (a)—state law. Unfortunately, state practice falls far short of such standards,

13. See *Aksionairnoye Obschestvo A. M. Luther v James Sagor & Co* [1921] 3 KB 532 at 543.
14. *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 at 903, 925, [1966] 2 All ER 536 esp at 545, 559.
15. See *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 723–725.

and the words de jure signify little more than the observation of legal or traditional forms in giving recognition, and a formal compliance by the recognised state or government with the requisite qualifications.

None the less, British practice in the matter of de jure recognition has been guided by a reasonably consistent policy based on precedent. To quote the late Professor H. A. Smith[16]:

> '... The normal policy of this country for over a hundred years has been to insist upon certain conditions as a precedent to the grant of de jure recognition of a new State or a new Government. We have required, first, a reasonable assurance of stability and permanence. Secondly, we have demanded evidence to show that the Government commands the general support of the population. Thirdly, we have insisted that it shall prove itself both able and willing to fulfil its international obligations.'

As to de facto recognition, where given by such states as do not belong to the group of states following a policy of non-recognition of new governments, it is misleading to regard this as always tentative or revocable; more generally it is simply a convenient prelude to the more formal and more permanent type of recognition—recognition de jure. Both types of recognition presuppose effective governmental control in fact.[17]

To take illustrations from British practice, the Soviet Government was de facto recognised on 16 March 1921, but only de jure on 1 February 1924. In 1936, Great Britain de facto recognised the Italian conquest of Abyssinia, and in 1938 de jure recognised Italy's sovereignty over that region. Also Great Britain de facto recognised the progressive occupation of different parts of Spain by the insurgent forces in the course of the Spanish Civil War 1936–1938, until finally de jure recognition was given to the Franco Government after all Spanish territory had been won over.

So far as concerns the legal incidents of recognition, there are few differences between de facto and de jure recognition.

The de facto recognition of a foreign government is as conclusively binding, while it lasts, as de jure recognition, for the reasons stated by Warrington LJ in *Aksionairnoye Obschestvo A M Luther v James Sagor and Co*:[18]

> 'In the latter case, as well as in the former, the Government in question acquires the right to be treated by the recognising State as an independent sovereign State, and none the less that our Government does not pretend to

16. See Smith *Great Britain and the Law of Nations* (1932) Vol I, p 239. US practice as to de jure recognition is to a similar effect; see M. M. Whiteman *Digest of International Law* (1963) Vol 2, pp 72–73. Cf the statement by Mr Herbert Morrison, Secretary of State for Foreign Affairs, on 21 March 1951, reported in 485 HC Official Report (5th series) cols 2410–2411.
17. *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 at 956–957, [1966] 2 All ER 536 at 579.
18. [1921] 3 KB 532 at 551.

express any opinion on the legality or otherwise of the means by which its power has been obtained.'

It follows also that the act of recognition de facto has retroactive operation exactly as in the case of recognition de jure. Moreover, transactions with the government of a foreign state which has received de facto recognition are binding on that foreign state and cannot be repudiated by a subsequent government which has overthrown its predecessor by force.[19]

One material difference is that it is not the practice of most states to receive as properly accredited diplomatic envoys, representatives of states which have not been recognised de jure.

A conflict of authority between a displaced de jure government and a newly recognised de facto government may often arise. In such an event, an English court of law adopts the view that so far as concerns matters in the territory ruled by the de facto government, the rights and status of the de facto government prevail. This rule would seem to follow from two notable cases, *Bank of Ethiopia v National Bank of Egypt and Liguori*,[20] decided by Clauson J, and the *Arantzazu Mendi*,[1] decided by the House of Lords. The former decision arose out of the situation created by the Italian conquest of Abyssinia in 1936. After the Italian Government had been recognised de facto, it enacted certain laws which were in conflict with those issued by the exiled Emperor of Abyssinia—the de jure ruler who had been forced to flee from his conquered country. Clauson J held that as the authority of the de jure ruler was merely theoretical and incapable of being enforced, whereas actually the Italian Government was in control of Abyssinian territory and de facto recognised, effect must be given to the laws of this government over those of the de jure monarch.

The case of the *Arantzazu Mendi* involved a conflict of rights between the legitimate and the insurgent governments in Spain during the Spanish Civil War 1936–1938, at a period when the insurgents had won over the greater part of Spanish territory. At this stage Great Britain continued to recognise the Republican Government as the de jure government of Spain, but also recognised the insurgent administration as the de facto government of that portion of Spain occupied by it. Proceedings were initiated in the British Admiralty Court by the de jure government against the de facto government to recover possession of a certain ship, and the latter government claimed the usual immunity from suit accorded to a fully sovereign state. The ship was registered in a port under the control of the de facto government, and had been handed over to that government

19. *Peru Republic v Dreyfus Bros & Co* (1888) 38 Ch D 348. Also, although a state is recognised only de facto as having authority over a particular area of territory, it is to be treated as having full jurisdiction over persons within that area; see *R v Governor of Brixton Prison, ex p Schtraks* [1963] 1 QB 55, [1962] 3 All ER 529, HL
20. [1937] Ch 513.
1. [1939] AC 256.

in England pursuant to a requisition decree issued by it. It was held that the writ must be set aside as the insurgent (or Nationalist) government was a sovereign state and was entitled to immunity. The argument put forward on behalf of the de jure government that the insurgent administration was not a sovereign state, since it did not occupy the whole of Spain, was rejected.

The decision in the *Arantzazu Mendi* has not escaped criticism, particularly on the ground that in such circumstances the concession of jurisdictional immunity to a de facto government without full sovereignty goes too far.[2] Properly considered, however, the case is merely a logical extension of the principles laid down in *Aksionairnoye Obschestvo A. M. Luther v James Sagor & Co* and in *Bank of Ethiopia v National Bank of Egypt*.[3] Taken together, the effect of the three decisions was virtually to erase a number of suggested distinctions between de jure and de facto recognition, so far as the municipal law effects of each are concerned.

None the less, recognition de facto may have a substantial function to perform in the field of international law for states which still follow a policy of recognising or withholding recognition of new governments. In this regard, its difference from recognition de jure is not merely one of a political character. By recognising a state or government de facto, the recognising state is enabled to acknowledge the external facts of political power, and protect its interests, its trade, and citizens, without committing itself to condoning illegalities or irregularities in the emergence of the de facto state or government. To this extent recognition de facto is probably a necessary legal expedient.

Besides there are these important differences generally followed or applied between de jure and de facto recognition which render the distinction one of substance:

a. only the de jure recognised state or government can claim to receive property locally situated in the territory of the recognising state;[4]
b. only the de jure recognised state can represent the old state for purposes of state succession, or in regard to espousing any claim of a national

2. Counsel in *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70 at 75, described the decision as 'the high-water mark of recognition of jurisdictional immunity in the case of de facto sovereignty'. In this connection, there would now have to be considered the impact of s 21 of the State Immunity Act 1978 (UK), as to the giving of a certificate of statehood, etc, by the Secretary of State; see p 148 below.
3. See also for a decision on the same lines, *Banco de Bilbao v Rey* [1938] 2 KB 176, where it was held that the acts of the de jure government were a mere nullity in the area controlled by the de facto government.
4. *Haile Selassie v Cable and Wireless Co Ltd (No 2)* (1938) 54 TLR 1087, revsd by Court of Appeal [1939] Ch 182, after de jure recognition of Italy's conquest of Abyssinia. However, the recognition de jure of a new state or government cannot operate retroactively so as to invalidate acts of the previous de jure government (*Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70).

of that state for injury done by the recognising state in breach of international law;

c. the representatives of entities recognised only de facto are not as a rule entitled to full diplomatic immunities and privileges;[5]

d. de facto recognition can, in principle, owing to its provisional character, be withdrawn on several grounds other than those normally justifying a withdrawal of de jure recognition; and

e. if a sovereign state, de jure recognised, grants independence to a dependency, the new state is to be recognised de jure and not otherwise.[6]

3. LEGAL EFFECTS OF RECOGNITION

Recognition produces legal consequences affecting the rights, powers, and privileges of the recognised state or government both at international law and under the municipal law of states which have given it recognition. Also, when the subject of recognition arises for examination, however incidentally, by the municipal courts of such states, various problems of evidence, legal interpretation and procedure enter into consideration.

Here it is important to bear in mind the limits between international law and state law. Recognition confers on the recognised state or government a status under both international law and municipal law. In this section, we shall first deal with the status under municipal law, and accordingly will examine for this purpose the law and practice normally applied by Anglo-American courts.

The capacity of a recognised state or government may be considered from a negative aspect, by ascertaining the particular disabilities[7] of one

5. *Fenton Textile Association v Krassin* (1921) 38 TLR 259. This point is, however, doubtful.

6. *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 at 906, [1966] 2 All ER 536 at 547.

7. There may, however, be other matters besides disabilities. One illustration is that of questions of nationality; eg, if a state is annexed by an unrecognised state, nationals of the annexed state will, in the municipal courts of a non-recognising country, be deemed to retain their citizenship. Acts or transactions, 'necessary to peace and good order among citizens', eg, marriages duly performed or transfers properly registered, and therefore not relevant to any question of power or disability of a state or government, may be valid notwithstanding the absence of recognition, the principle being that there should be no interruption of the administration of law and justice; see Grotius *De Jure Belli ac Pacis* Book I, Chapter IV, s xv 1, *Texas v White* 74 US 700 (1986) at 733; *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536; *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] 1 All ER 277 at 285–286; and *Advisory Opinion of the International Court of Justice on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* 21 June 1971 ICJ 1971, 16 at 56 (registrations of births, deaths, and marriages not invalidated). This 'necessity' doctrine ought not to be extended. Semble, it does not apply to the administrative orders and judicial decrees of an illegal régime, the con-

which is unrecognised. The principal legal disabilities of an unrecognised state or government may be enumerated as follows:

a. It cannot sue in the courts of a state which has not recognised it. The principle underlying this rule was well expressed in one American case:[8]

> '... A foreign power brings an action in our Courts not as a matter of right. Its power to do so is the creature of comity. Until such Government is recognised by the United States, no such comity exists.'

b. By reason of the same principle, the acts of an unrecognised state or government will not generally be given in the courts of a non-recognising state the effect customary according to the rules of 'comity'.
c. Its representatives cannot claim immunity from legal process.
d. Property due to a state whose government is unrecognised may actually be recovered by the representatives of the régime which has been overthrown.

Recognition transmutes these disabilities into the full status of a sovereign state or government. Accordingly, the newly recognised state or government:

i. acquires the right of suing in the courts of law of the recognising state;
ii. may have effect given by these courts to its legislative and executive acts both past and future;
iii. may claim immunity from suit in regard to its property and its diplomatic representatives;
iv. becomes entitled to demand and receive possession of, or to dispose of property situate within the jurisdiction of a recognising state which formerly belonged to a preceding government.[9]

At international law, the status of a de jure recognised state or government carries with it the full privileges of membership of the international community. Thus it acquires the capacity to enter into diplomatic relations with other states and to conclude treaties with them. Also, such other states become subject to various obligations under international law in relation to the newly recognised state or government, which in its turn incurs similar reciprocal obligations. Upon it, therefore, as from the date of recognition, fall both the burden and bounty of international law.

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stitution and laws of which are illegal and void; see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 727–729, and *Adams v Adams* [1971] P 188 at 208–211, [1970] 3 All ER 572 at 585–588.

8. See *Russian Socialist Federated Soviet Republic v Cibrario* (New York Court of Appeals) 235 NY 255 (1923). Semble, however, an unrecognised government if truly exercising complete authority, cannot be sued in an American municipal court, inasmuch as it is to be regarded as a sovereign government (*Wulfsohn v RSFSR* 234 NY 372 (1923)). Cf *United States v New York Trust Co* 75 F Supp 583 (1946) at 587 and *Upright v Mercury Business Machines* 213 NYS 2d 417 (1961).
9. See *The Jupiter* [1924] P 236, and *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch 513.

Status of states and governments in the courts of law

The rule in British countries and in the United States is that though the existence of a new state or a new government is merely a question of fact, it is one involving important political considerations and is therefore primarily to be determined by the political and not by the judicial organs of the state. Accordingly, on this question the court is entitled to consult the executive on the principle that it must act in unison with the 'will of the national sovereignty', which is expressed in external affairs through the executive alone.

Considerations of evidentiary convenience have also conditioned this principle of consultation of the executive. According to Lord Sumner in *Duff Development Co v Kelantan Government*,[10] British courts act on the best evidence available, and the best evidence in this regard is a statement by the appropriate Secretary of State on behalf of the Crown.[11] This will be so even if the statement purports to set out facts which in principle ought to be attested by the British Government in conjunction with other governments concerned, or interested.[12] Now, under section 21 of the State Immunity Act 1978 (UK), a certificate by or on behalf of the Secretary of State as to whether, for the purposes of Part I of the Act (privileges and jurisdictional immunities) a country is a state, any territory is a constituent territory of a federal state, and what person or persons should be regarded as the head or the government of a state, has statutorily been given conclusive force; the certificate is to be treated as 'conclusive evidence'. However, a statement by the executive that a particular government is *not* treated as such does not preclude a British court from holding that such government is a sovereign government,[13] or is in control of the territory concerned,[14] especially in relation to questions not involving jurisdictional immunity.

The deference of American and British courts[15] to the attitude of the executive in this connection has not escaped criticism. It has been objected that this solicitude for the views of the executive is so exaggerated as almost to amount to an obsession. Moreover, it is asserted that often the

10. [1924] AC 797 at 823.
11. See *Mighell v Sultan of Johore* [1894] 1 QB 149.
12. Cf *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536.
13. See *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 QB 552.
14. See *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] 1 All ER 277. Nor should a court act on, or accept a certificate by the executive that a foreign state is a friendly country; see the *'Spycatcher' Case, A-G for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1988) 62 ALJR 344 at 350.
15. The American Department of State 'Suggestion' (or Certificate) has been able to go so far as to 'suggest' immunity from jurisdiction in the case of a foreign state or government, and this may be binding on an American court; see, eg, *Rich v Naviera Vacuba SA and Republic of Cuba* (1961) 56 AJIL (1962) 550–552. The Department might also appear as amicus curiae.

courts have been more concerned not to embarrass the executive in its conduct of foreign affairs than to protect material interests of private citizens affected by changes in statehood or government. On the other hand, it is difficult to see how, on a contested issue of this nature, a court could take evidence or obtain the necessary materials for forming its judgment in any more satisfactory way. However, the executive now sometimes elects to give restrictively phrased certificates, in such form that the court may reach a decision uninfluenced by possible reactions on the executive's conduct of foreign policy.

Generally speaking, a British court will take judicial notice of:

a. the sovereign status of a state or of its monarch;[16]
b. the existence as a matter of uncontested fact of a foreign state or government, and if in doubt will apply for information to the appropriate Secretary of State, whose answer is conclusive.

The statement submitted by the executive to the court and inspected by it should not be subjected to any strained or unreasonable construction, the purpose being to avoid creating a divergence between the court and the executive. Thus in *The Annette*,[17] the statement was to the effect that the provisional government of Northern Russia 'had not yet been formally recognised', and Hill J refused to infer from this that the said government had been informally recognised.[18] It is established by the authorities that a clear, complete and unambiguous answer by the Secretary of State dispenses with further inquiry by the court, and excludes other evidence, if offered.[19] Nor can the executive be cross-examined as to the terms of its statement or certificate,[20] although if these are not sufficiently plain the court is entitled in ultimate resort to make its own independent examination[1].

A formal statement by the appropriate Secretary of State tendered to the court is far from being the sole method of conveying the executive's views. The Law Officers may appear, either by invitation of the court or

16. See *Mighell v Sultan of Johore* [1894] 1 QB 149.
17. [1919] P 105.
18. For forms of Foreign Office certificate, see the *Arantzazu Mendi* [1939] AC 256 at 264; *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 at 902–903; and *Adams v Adams* [1971] P 188 at 205, [1970] 3 All ER 572 at 583.
19. *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, at 956–958, [1966] 2 All ER 536, esp at 579, and *Van Heyningen v Netherlands East Indies* (1949) QSR 54. Nonetheless, the certificate or statement of the executive may always be interpreted by a British court; see *Golynia Ameryka Linie (Zeglugowe Spolka Akcyjna) v Boguslawski* [1953] AC 11 at 43.
20. See *Sayce v Ameer Ruler,Sadiq Mohammed Abbasi Bahawalpur State* [1952] 1 All ER 326; affd [1952] 2 All ER 64.
1. See *Sultan of Johore v Abubakar Tunku Aris Bendahara* [1952] AC 318. In the *Feivel Pikelny Case* (1955) London Times, 1 July, Karminski J had recourse to *Hansard* (ie the record of the House of Commons debates) in order to determine the actual date of recognition, where the Foreign Office Certificate was ambiguous on the matter.

on an intervener,[2] to inform the court of the attitude of the Crown. Also, letters sent by the Foreign Office to the solicitors acting for one party to the proceedings, and submitted to the court, will be regarded as sufficient evidence of the Crown's views.[3]

Retroactive effect of recognition

As we have seen, the recognition of a new state or government has a retroactive operation, and relates back to the date of inception of the particular state or government concerned.

In British courts, such retroactive operation was extremely wide. Thus:

a. A cause of action based upon the existence of a particular state or government at the date of institution of proceedings, was nullified if before or at the time of the hearing, the British Government treated another state or government as having been in existence at the date the action was commenced.[4]
b. A judgment of a court of first instance based upon the existence of a particular state or government at the date of judgment might be set aside on appeal if before or at the time the appeal was heard, the British Government treated another state or government as having been in existence at the time judgment was delivered.[5]

Two important decisions of the House of Lords, namely *Golynia Ameryka Linie (Zeglugowe Spolka Akcyjna) v Boguslawski*[6] and *Civil Air Transport Inc v Central Air Transport Corpn*[7] further elucidated the retroactive effect, according to British courts, of recognition.

The former case showed that, in the matter of the retroactive operation of recognition, where applicable, the certificate of the executive was to be treated as of overriding importance; hence, if such certificate plainly showed that recognition was not intended to relate back, any retroactive effect was excluded. In other words, whether and to what extent the act of recognition was retroactive should be governed by the intention of the recognising state, and this was logically consistent with the nature of recognition.

The latter case showed that duly vested proprietorial or other rights, resting upon a duly effected disposition or other legal act by the formerly recognised de jure government could not be invalidated by the subsequent recognition de jure of the new government; prima facie, recognition, where applicable, operated retroactively not to invalidate the acts of a

2. As to the Attorney-General's right of intervention, see *Adams v Adams* [1971] P 188 at 197–198, [1970] 3 All ER 572 at 576–577.
3. See, eg, *Banco de Bilbao v Rey* [1938] 2 KB 176 at 181.
4. *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch 513.
5. *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532.
6. [1953] AC 11.
7. [1953] AC 70.

former government, but to validate the acts of a government which had become the new de jure government.

Both cases contain dicta in the judgments to the effect that, prima facie, recognition de jure could not operate retroactively to validate acts done otherwise than in the territory, and so within the sphere of de facto control of the government recognised; but this, it was emphasised, was only a prima facie rule.[8]

It should be pointed out that the case law, above, on the retroactive effect of recognition is, in the light of the abandonment by the United Kingdom since 1980 of the policy of recognising new governments, as distinct from states, applicable in British courts only to the recognition of states, although such case law may be of persuasive authority to provide relevant principles in circumstances where the government is ready to enter into relations with a new foreign government and to treat it as such, or is, for example, ready to provide certification of that government's sovereign status pursuant to s 21 of the State Immunity Act 1978 (UK) for the purposes of that Act.

4. RECOGNITION OF INSURGENCY AND BELLIGERENCY

The topic of recognition of insurgency and belligerency, which had for many years been more or less a dead one, was revived in interest in the course of the Spanish Civil War, 1936–1938.

The problems which a civil war in a particular country may involve for outside Powers may be summed up as follows: These outside Powers will generally, except when they feel vital interests are at stake, maintain a policy of non-interference in the domestic affairs of another state. However, there may come a time when it becomes impossible as a matter of practical politics to continue such an attitude either because:

a. The operations of insurgent forces may attain such a degree that they are in effective occupation of and constitute the de facto authority in a large part of the territory formerly governed by the parent government.[9] In this case the problem is at once raised for outside Powers of entering into some contact or intercourse with the insurgents as the de facto authorities in order to protect their nationals, their commercial interests and their sea-borne trade in regard to the territory occupied.
b. The actual war between the parent government and the insurgent forces may reach such dimensions that outside Powers will be com-

8. See *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70 at 94.
9. There may, prior to this, be simply recognition of the rebel forces as *insurgents*, the purpose of which is to prevent the rebels being treated as mere criminals or pirates, and to preclude any suggestion that the legitimate government is to be held responsible for their acts. As to this distinction, see *The Ambrose Light* 25 Fed 408 (1885), and below, p 277.

pelled to treat the civil war as a real war between rival Powers, and not as a purely internecine struggle. In other words, these Powers will have to recognise belligerency. This is because difficult problems may arise which, unless outside Powers accept the risk of being drawn into the war, cannot be solved without treating the rival parties as belligerents. This usually occurs where the naval operations of the contending forces interfere with the sea-borne trade of a maritime Power. For instance, a maritime Power might find it difficult to resist an improper search of its ships for contraband by either party unless it were prepared to use force; on the other hand, the concession of belligerent rights would normalise the situation, by sanctioning the right of search, without compromising the maritime Power's authority and rights at international law.

On account of (a), external Powers may decide on the de facto recognition of the insurgents, limited to the particular territory of which they are in effective occupation. Thus in 1937, Great Britain conceded de facto recognition to the insurgents in the Spanish Civil War, in regard to the territory under their control, and also went so far as to exchange Agents. Alternatively, in the absence of any recognition, external states may enter into formal or informal relations with the body of insurgents in control of the relevant territory.

As to (b) certain conditions must exist before belligerency is recognised. First, the hostilities must be of a general character, as distinct from those of a purely local nature. Second, the insurgents must be in control of a sufficient portion of territory to justify the inference that they represent a rival Power of some magnitude. Third, both parties must act in accordance with the laws of war, and the insurgents in particular must have organised armed forces under a proper command. Even when all these conditions are present, the circumstances may preclude recognition of belligerency, as during the Spanish Civil War of 1936–1938 when the policy of 'Non-Intervention' of the European Powers and their desire to avoid complications leading to a general war, induced them to stop short of granting belligerent rights. It would appear, in other words, that the recognition of belligerency is facultative, and not a matter of duty.

The British practice in the matter of belligerent recognition was authoritatively stated by the Law Officers in 1867.[10] According to the terms of this statement, the mere declaration by insurgents that they have constituted a 'Provisional Government' is insufficient to justify belligerent recognition. Before the grant is made, consideration should be given to the length of time that the insurrection has continued; the number, order, and discipline of the insurgent forces; and whether the newly constituted

10. Smith *Great Britain and the Law of Nations* (1932) Vol I, p 263.

'Government' is capable of maintaining international relations with foreign states.

The grant of recognition of belligerency entails the usual consequences, to the recognising state, of a declaration of neutrality in the case of a regular war. The recognising state becomes entitled to neutral rights, and these must be respected by rival parties. At the same time, the status of belligerency confers certain rights under the laws of war on the parent government and on the insurgents, which are of advantage as long as the struggle retains its pitch and intensity. In particular, the legitimate government is exonerated from responsibility for acts committed by the insurgents in territory occupied by them.

Belligerent recognition is quite distinct from the recognition of either the parent or insurgent governments as the legitimate government. As stated by the British Foreign Secretary, in 1937:[11]

> 'Recognition of belligerency is, of course, quite distinct from recognising any one to whom you give that right as being the legitimate Government of the country. It has nothing to do with it. *It is a conception simply concerned with granting rights of belligerency which are of convenience to the donor as much as they are to the recipients.*'

5. NEW TERRITORIAL TITLES, TERRITORIAL AND OTHER CHANGES, AND TREATIES; NON-RECOGNITION

Often states acquire new territorial or other rights by unilateral act on their part which may be:

a. according to international law, or
b. in violation of international law.

In case b, recognition may be sought in order to turn a doubtful title into a good one and because the recognition will amount to a waiver by the other states of claims or objections inconsistent with the title thus recognised. In this way, the possibility that non-recognition may defeat a claim based upon acquiescence or prescription is excluded. The continuance of formal relations with the state concerned, after such territorial acquisition, does not of itself imply the recognition of the new territorial title.

In January 1932, there was enunciated by Mr Stimson, United States Secretary of State, a doctrine of non-recognition, which has since become widely known as the *Stimson Doctrine of Non-Recognition*. This declaration of policy was due to events in the Far East. In 1931, Japan, then a member of the League of Nations, invaded Manchuria, which was legally under the sovereignty of China. Subsequently, the Japanese forces overran and conquered Southern Manchuria. The United States refused

11. Then Mr Eden, later Sir Anthony Eden, and Lord Avon.

to recognise this new situation or any treaties with China legalising it, and to clarify this attitude, Mr Stimson, in a communication to the Chinese and Japanese Governments, announced that:

> 'The United States cannot admit the legality of any situation de facto nor does it intend to recognise any treaty or agreement between those 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.'

The Treaty of Paris referred to in Mr Stimson's communication was the General Treaty of 1928 for the Renunciation of War (known as the Briand-Kellogg Pact); this had been signed by the United States, as well as by China and Japan. Mr Stimson claimed that by the doctrine a caveat would 'be placed upon such actions which, we believe, will effectively bar the legality hereafter of any title or right sought to be obtained by pressure or treaty violation'.

The Stimson doctrine of non-recognition was explicitly a statement of United States national policy,[12] although at the same time it was, according to Professor Briggs,[13] 'in part, an attempt to establish the invalidity of treaties obtained through employment of duress in the wider sense of coercion against a State'. The Stimson declaration was followed some two months later by a Resolution adopted by the League of Nations Assembly on 11 March 1932, formulating a duty of non-recognition in these terms:

> '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.'

In the events which happened during the period 1932–1940, both the Stimson doctrine and the Assembly Resolution proved ineffectual, although towards the end of, and after the Second World War, the principle which they sought to uphold was to some extent vindicated by the restoration to certain states of the territory which had previously been taken from them by force.

Since the adoption of the United Nations Charter in 1945, followed by the establishment of the United Nations as a working body, there has been a discernible trend towards a doctrine of the non-recognition of territorial changes and treaties that have resulted from the threat or use of force against the territorial integrity or political independence of any

12. Which could be made effective by executive action in countries such as the United Kingdom and the United States where, in respect to recognition matters, a certificate or expression of opinion of the executive in an appropriate case will bind domestic courts. See pp 148–149 above.
13. Herbert W. Briggs *The Law of Nations. Cases, Documents and Notes* (2nd edn, 1953) p 847. See also the statement by Mr Stimson, quoted in the preceding paragraph.

state, or in any other manner inconsistent with the Purposes of the United Nations.[14] This is reflected in the following:

a. The provision in the Bogotá Charter of the Organisation of American States, 30 April 1948 (see article 17) that 'no territorial acquisition or special advantages obtained either by force or by other means of coercion' should be recognised.[15]
b. Article 11 of the Draft Declaration on the Rights and Duties of States, prepared by the International Law Commission in 1949, to the effect that every state is under a duty to refrain from recognising any territorial acquisition by another state obtained through the threat or use of force against the territorial integrity or political independence of another state, or 'in any other manner inconsistent with international law and order'.
c. Article 52 of the Vienna Convention on the Law of Treaties of 22 May 1969, providing that a treaty is void if its conclusion has been procured by the threat or use of force 'in violation of the principles of international law embodied in the Charter of the United Nations'.
d. The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, proclaiming the following principle: 'No territorial acquisition resulting from the threat or use of force shall be recognised as legal'.
e. Paragraph 3 of article 5 of the Definition of Aggression Resolution adopted by the United Nations General Assembly on 14 December 1974, providing as follows: 'No territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful'.

The question of obligatory non-recognition has arisen in relation to the situation in South West Africa (Namibia), where in spite of United Nations Resolutions and rulings of the International Court of Justice to the contrary, South Africa continued to purport to exercise authority, as if it were not subject to the supervision of United Nations organs.[16] A Resolution adopted by the United Nations General Assembly on 27 October 1966, declared that South Africa had failed to fulfil its obligations as a Mandatory Power, with the result that the mandate was terminated and South West Africa came under the direct responsibility of the United

14. Such threat or use of force is prohibited by art 2, para 4, of the United Nations Charter.
15. Cf for prior covenants of non-recognition by American states, the undertaking to this effect in the Anti-War Pact of Non-Aggression and Conciliation of 1933, and the Lima Declaration of 1938 on Non-Recognition of the Acquisition of Territory by Force.
16. The question of obligatory non-recognition also arose in regard to Rhodesia, following that territory's unilateral declaration of independence in November 1965. However, the matter is now of merely historical and academic significance, having regard to the establishment in 1980 of the new independent State of Zimbabwe, formerly Rhodesia, becoming a member of the Commonwealth, with majority rule for the non-white population.

Nations, thus carrying the implication that member states were bound to recognise this position, and not to recognise the continuance of South Africa's status as a Mandatory Power.

In its Advisory Opinion of 21 June 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in South West Africa (Namibia)*,[17] the International Court of Justice ruled:

1. that inasmuch as the continued presence of South Africa in Namibia was illegal by reason of its refusal to submit to the supervision of United Nations organs, South Africa was under an obligation to withdraw its administration from the territory immediately, and to end its occupation there; and
2. that member states of the United Nations were under an obligation not to recognise the legality of South Africa's presence in Namibia, or the validity of South Africa's acts on behalf of or concerning Namibia, and were to refrain from any acts and any dealings with the South African Government implying recognition of the legality of, or lending support or assistance to, such presence and administration. Moreover, the validity or effects of any relations entered into by any state with South Africa concerning Namibia ought not to be recognised by the United Nations or its Member States.[18]

Although the Advisory Opinion is confined to rulings upon the particular circumstances of South Africa's relationship to Namibia, these pronouncements may well be used in the future for wider purposes to support a generalised rule imposing a duty of non-recognition of all territorial and other situations brought about in breach of international law.

17. ICJ 1971, 16 at 54, 56.
18. The situation, at the date of writing, concerning Namibia, is politically indeterminate. The detail of the activities of various organs of the United Nations and of the moves directed to the achievment of complete and absolute independence for Namibia lie outside the scope of this book. The name 'Namibia', given to the former South West Africa, was proclaimed by the United Nations General Assembly as long ago as in the year 1968.

CHAPTER 7

State territorial sovereignty and other lesser territorial rights of states

1. TERRITORIAL SOVEREIGNTY AND OTHER LESSER RIGHTS OF STATES

As we have seen, one of the essential elements of statehood is the occupation of a territorial area, within which state law operates. Over this area, supreme authority is vested in the state.

Hence there arises the concept of 'territorial sovereignty' which signifies that within this territorial domain jurisdiction is exercised by the state over persons and property to the exclusion of other states. This concept bears some resemblance to the patrimonial notions of ownership under private law, and in fact the early writers on international law adopted many of the civil law principles of property in their treatment of state territorial sovereignty. To this day, their influence has persisted so that in particular the rules as to acquisition and loss of territorial sovereignty plainly reflect the influences of the civil law, but it is manifest that there are certain dangers in having recourse to Roman law and civil law analogies. However, it may be that in certain areas of the subject there is room for a wider application of the uti possidetis principle ('as you possess, you shall continue to possess'), and indeed in 1986 in the *Burkina Faso-Republic of Mali Case*,[1] a special chamber of the International Court of Justice applied the principle of uti possidetis as having 'exceptional importance' for the African continent, by reason of the fact that the primary aim of the principle was to secure respect for territorial boundaries which existed at the time when an African territory acquired independence; the object was to accord pre-eminence to legal title, defined by frontiers, over effective possession as a basis of sovereignty.

Territorial sovereignty was described by the learned Max Huber, Arbitrator in the *Island of Palmas Arbitration*, in these terms:[2]

1. ICJ 1986, 554, paras 20–26 of the Court's judgment. Cf observations of Judge Quintana in the *Frontier Lands Case* ICJ 1959, 209 at 255. In the award in the *Beagle Channel Arbitration* (Argentina–Chile) of 1977, reported in Wetter *The International Arbitral Process* (1979) Vol 1, pp 307 et seq, the Arbitral Tribunal took the view that the uti possidetis principle did not have such binding force with reference to the subject matter of the dispute before it as to govern overridingly a relevant boundary treaty between the parties (see paras 21–23 of the award).
2. 22 AJIL (1928) 875.

> 'Sovereignty in the relation 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.'

As the Advisory Opinion of the International Court of Justice on the *Western Sahara* (1975)[3] shows, legal ties of territorial sovereignty over people or land must be distinguished from ties of allegiance, in the case of persons, and mere customary rights in relation to land. On the other hand, state activity on an adequate scale, showing conclusively the exercise of authority, is one mark of the existence of territorial sovereignty. This corresponds to Max Huber's concept of the exercise of 'the functions of a state'.

It is sometimes said that territorial sovereignty is indivisible, but there have been numerous instances in international practice both of division of sovereignty, and of distribution of the components of sovereignty.

For instance, sovereignty is often shared jointly by two or more Powers as in the case of a condominium,[4] while states may by treaty restrict their right to transfer territory. Moreover, leases or pledges of a territory are frequently made by one state to another, as for example the leases of Chinese territory to Russia, France, Germany, and Great Britain at the end of the last century during the so-called 'Battle of the Concessions' between these Great Powers, and the leases of British bases in the West Atlantic to the United States in 1940 in exchange for 50 American destroyers which were urgently needed in the war against Germany. In the case of a lease, temporary sovereignty is exercised by the lessee state, while the lessor state possesses a sovereignty in reversion. A recent example is the case of the lease by China to Great Britain in 1898 for a term of 99 years of what is known as 'British Hong Kong' (ie the Island of Hong Kong, the Southern part of the Kowloon Peninsula and Stonecutters Island); the territory leased reverts to China in 1997, and an Anglo-Chinese Agreement was entered into on 19 December 1984 to arrange for the passing of sovereignty to China in that year. Again, sometimes sovereignty over a territory is held by one or more Powers in trust for the population of the territory concerned, as for example in the pre-war case of the League of Nations control over the Saar before its return to Germany in 1935. Thus, international law does not appear to restrict the manner in which the sovereignty as to particular territory can be bestowed on, or withdrawn from any state.

3. ICJ 1975, 12. In 1982, before the United Nations, the United Kingdom Government also distinguished territorial sovereignty from the right of self-determination, maintaining that Argentinian claims of sovereignty and the factors involved could not be relied upon to override the right of self-determination of the population of the Falkland Islands, which population represented 'a people' for the purposes of self-determination; see UN document, A/37/582, dated 29 October 1982.
4. See p 116 above.

Acquisition of territorial sovereignty

The five traditional and generally recognised modes of acquiring territorial sovereignty are: occupation, annexation, accretion, prescription, and cession. These modes are directly analogous to the civil law methods of acquiring private ownership.

As was pointed out in the *Island of Palmas Arbitration*,[5] these modes reduce essentially to the display of *effective* control and authority either by the state claiming sovereignty, or by a state from which the state claiming sovereignty can prove that title has been derived.[6] Thus occupation and annexation are based on an act of 'effective apprehension' of the territory, while accretion can only be conceived of as an addition to a portion of territory where there already exists an actual sovereignty. Prescription depends on the continuous and peaceful display of sovereignty over territory for a long period, while cession presupposes that the ceding state has the power of effectively disposing of the ceded territory. It is claimed by some writers, notably Kelsen, that cession per se does not operate to transfer territorial sovereignty until the receiving state has effectively established its authority over the ceded territory. Effectiveness is of course neither an absolute nor a self-evident concept, but is one to be judged and/or applied in relation to all the circumstances.

One additional mode of acquisition of territorial sovereignty, not included above, should be mentioned, namely adjudication or award by a Conference of states. This usually occurs where a Conference of the victorious Powers at the end of a war assigns territory to a particular state in view of a general peace settlement; for example, the territorial redistribution of Europe at the Versailles Peace Conference 1919. According to Soviet doctrine, territorial sovereignty may also be acquired by plebiscite, although this would appear to be less a mode of acquisition than a step preceding it.

Certain instances in the past of territorial sovereignty accruing to a state cannot readily be fitted into one or other of these traditional, generally accepted modes of acquisition. Such special cases have included, and may include the following:

a. territory accruing to a state by reason of a boundary delimitation effected by a mixed demarcation commission, or under an award ex aequo et bono by an arbitral tribunal settling a boundary dispute, or as the consequence of an adjudication by the International Court of Justice, determining the frontier between two states, as in its decision in 1986 in the *Burkina Faso-Republic of Mali Case*, above;
b. the grant of territorial rights to a state under a treaty between it and

5. See 22 AJIL (1928) 875–6.
6. See Kelsen *General Theory of Law and State* (1961 edn) pp 213–216, for discussion of the extent to which effectiveness governs the operation of these modes of acquiring title.

the rulers or representatives of some indigenous tribe or community, previously in sole and exclusive occupation of the area concerned;

c. long, continuous recognition by other states of a state's territorial sovereignty, notwithstanding obscurity or ambiguity surrounding the inception of that state's claim to title;
d. succession by a new state to the territory of its predecessor;
e. territory distributed as the result of a treaty of compromise or settlement in respect to disputed tracts of land, as eg, in the case of the Treaty of May 1985 between Chile and Argentina in settlement of their disputed territorial claims in the area at the eastern end of the Beagle Channel.

As to e, the present writer would indeed favour a general head of acquisition under the provisions of a treaty, in the same way as the draftsmen of the *Code Napoléon* (1803) admitted the acquisition of property as the result of obligations (see Book III, General Provisions, article 711).

The modes-of-acquisition approach to the creation and transfer of territorial sovereignty is both sound in principle and of practical value, provided that care is taken, in using this approach, not to confuse the mode itself with its component elements or ingredients (eg, in the case of the mode known as 'occupation', the element of display of authority is an ingredient of, but not itself a mode of acquisition of territorial sovereignty).

Occupation

Occupation consists in establishing sovereignty over territory not under the authority of any other state whether newly discovered, or—an unlikely case—abandoned by the state formerly in control. Classically, the subject matter of an occupation is terra nullius, and territory inhabited by tribes or peoples having a social and political organisation cannot be of the nature of terra nullius.[7] Where land is inhabited by organised tribes or peoples, territorial sovereignty has been on occasions acquired by local agreements with the rulers or representatives of the tribes or peoples.

In determining whether or not an occupation has taken place in accordance with international law, the principle of effectiveness is applied for the most part. In the *Eastern Greenland Case*,[8] the Permanent Court of International Justice laid it down that occupation, to be effective, requires on the part of the appropriating state two elements:

i. an intention or will to act as sovereign;
ii. the adequate exercise or display of sovereignty.

7. *Advisory Opinion of the International Court of Justice on the Western Sahara* ICJ 1975, 12. On the subject of 'colonisation' by occupation of African territory inhabited, at the time, by tribal peoples, see Malcolm Shaw *Title to Territory in Africa; International Legal Issues* (1984).
8. (1933) Pub PCIJ Series A/B, No 53.

In the case mentioned, title to Eastern Greenland was disputed by Norway and Denmark, and Denmark was able to prove circumstances which established these two elements on its part.

The element of intention is a matter of inference from all the facts, although sometimes such intention may be formally expressed in official notifications to other interested Powers. There must be evidence of nothing less than a permanent intention to assume control; a mere transient passage by the alleged occupying Power is by itself insufficient to satisfy this test. Nor are the independent, unauthorised activities of private individuals, without subsequent ratification, valid for this purpose.[9] Hence, discovery alone, even if accompanied by a proclamation of sovereignty in situ, or the hoisting of a national flag, etc, has been regarded by writers as conferring an 'inchoate' title only, unless such discovery be consummated by some more significant acts or activity. As regards the second requirement of exercise or display of sovereignty, this may be satisfied by concrete evidence of possession or control, or according to the nature of the case, a physical assumption of sovereignty may be manifested by an overt or symbolic act[10] or by legislative or executive measures affecting the territory claimed, or by treaties with other states recognising the claimant state's sovereignty, by fixing of boundaries, and so on. The degree of authority necessary for this purpose will vary according to the circumstances; thus, a relatively backward territory does not require the same elaborate control and government as one more developed and civilised.

In the *Minquiers and Ecrehos Case*,[11] relating to disputed British and French claims to certain Channel islets, the International Court of Justice stressed the importance of actual exercise of 'State functions', eg, local administration, local jurisdiction, and acts of legislative authority, as proving the continuous display of sovereignty necessary to confirm title. For this reason, upon the evidence as to long continued exercise of state functions by British authorities, the Court preferred the claim of Great Britain. This same principle of the exercise of state activity on an adequate scale, as distinct from routine or inconclusive acts not necessarily evidencing a firm intention to establish territorial sovereignty, was applied

9. See *Fisheries Case* ICJ 1951, 116 at 184.
10. See the *Clipperton Island Arbitration* (1931) 26 AJIL (1932) 390. As this Arbitration shows, an actual manifestation of sovereignty on the locus of the territory may serve to create a stronger title than a historic claim of right, unsupported by such a concrete act. In point of fact, the actual award indicated also that importance was attached to the circumstance, inter alia, that France, the claimant by virtue of the symbolic act, had given due notice to the world of what it had done by the publication of a declaration of sovereignty in English in a journal in Hawaii.
11. ICJ 1953, 47 at 68–70.

also by the Court in 1975 in its Advistory Opinion on the *Western Sahara*.[12]

An act of occupation more frequently than not involves in the first instance an act of discovery. It now follows from the *Island of Palmas Arbitration*, above, decided by M. Huber as Arbitrator, that a mere act of discovery by one state without more is not sufficient to confer a title by occupation, and that such incomplete appropriation must give way to a continuous and peaceful display of authority by another state. In this arbitration, the contest of title lay between the United States, claiming as successor to Spain which had originally discovered the island disputed, and the Netherlands, which according to the historical evidence submitted to the Arbitrator, had for a very long period purported to act as sovereign over the island. The Arbitrator adjudged the island to the Netherlands, and in giving the reasons for his award laid supreme emphasis on the fact that long continuous exercise of effective authority can confer title at international law.

It may be important to determine what extent of territory is embraced by an act of occupation. Various theories on this point have been held from time to time,[13] and two such theories have assumed particular significance in connection with the claims of certain states in polar regions, namely:

1. The theory of *continuity*, whereby an act of occupation in a particular area extends the sovereignty of the occupying state so far as is necessary for the security or natural development of the area of lodgment.
2. The theory of *contiguity*, whereby the sovereignty of the occupying state reaches to those neighbouring territories which are geographically pertinent to the area of lodgment.[14]

Both theories are to some extent reflected in the claims made by states to polar areas according to the *sector principle*.[15] By claims based on this principle, certain states with territory bordering on the polar regions have asserted a sovereign title to land or frozen sea within a sector defined by the coastline of this territory and by meridians of longitude intersecting

12. ICJ 1975, 12.
13. For discussion of the theories, see Westlake *International Law* (2nd edn, 1910) Vol I, pp 113 et seq.
14. The theory of contiguity was rejected by Arbitrator Huber in the *Island of Palmas Arbitration*, p 156 above; he declared it to be 'wholly lacking in precision'. In the *North Sea Continental Shelf Cases* ICJ 1969, 3 at 30–31, the International Court of Justice preferred the theory of continuity to that of adjacency or proximity (ie contiguity) as an explanation of the coastal state's rights in regard to the continental shelf; see also pp 248–249, 270–272 below.
15. The sector claims of Chile and Argentina in the Antarctic, it would seem, rest on contiguity. For a map of the Antarctic sector claims, see London *Times*, 18 January 1955, p 9, or *North Sea Continental Shelf Cases, Pleadings, Oral Arguments, Documents* (1968) Vol I, p 81; and ibid, p 82 for a map of the Arctic sectors.

at the North or South Pole as the case may be. These claims have been advanced both in the Arctic[16] (by the Soviet Union and Canada, in particular) and in the Antarctic (by Argentina, Australia, Great Britain, Chile, France, New Zealand, and Norway).[17] The principal justification for sector claims is the inapplicability to polar regions, with their inaccessibility, climatic conditions, and lack of settlement,[18] of the normal principles of physical assumption of control implicit in the international law of occupation. Also the view has been advanced that the sectors themselves correspond to a just and equitable division. On the other hand, it is fairly arguable that the sector claims rest on no stronger basis than the mutual acquiescence of the claimant states. In effect, they amount to no more than notifications of future intention to assume full control, something akin to designations of spheres of influence or interest. Significantly, sector states have sought to fortify their title by the ordinary methods of administrative control, state activity, etc, traditionally employed by states desiring to acquire title by occupation. Other criticisms of sector claims are fairly and justly directed to the arbitrary character of the sector lines, and to the fact that these lines lie across large areas of the open sea.

One point is clear. The practice of a limited number of states in making sector claims has not created a customary rule that such a method of acquiring polar territory is admissible in international law. Here, it is only necessary to mention the reservations of non-sector states and doubts of jurists on the validity of sector claims, and the widely held view that polar areas should be subject to an international régime. Reference may be made in this connection to the Treaty on Antarctica signed at Washington on 1 December 1959, by the seven Antarctic sector states and

16. The sector theory appears to have been first advanced in regard to the Arctic, and not in regard to the Antarctic. The Soviet sector claim rests mainly on a decree of 15 April 1926, but Canada's claim is founded, inter alia, on statements or declarations made at various times by Canadian political personages without explicit action by legislation or diplomatic exchanges to underpin such claim; see F. M. Auburn *Antarctic Law and Politics* (1982) pp 17–23. It is arguable that the Soviet and Canadian claims to exercise sovereign rights over certain Arctic areas were or could be founded on principles other than the sector theory. On the one hand, the Soviet claim could be considered as based on continuity (see above), while, on the other hand, the Canadian claim has been reinforced by reliance on the alleged necessity for anti-pollution measures in Arctic areas where the responsibility for enforcing these must be borne by Canada; cf the Canadian *Arctic Waters Pollution Prevention Act* 1970.
17. The British sector claim conflicts with the Argentinian and Chilean claims which themselves overlap.
18. These factors may be overcome by new technical developments in the field of aviation. Already, aviation has made it possible to supply winter bases in polar regions. In addition, 'great circle' air routes across the Arctic have been pioneered and are in regular use. Apart from aviation, there is the possibility that the inaccessibility of polar regions may be reduced through the use of nuclear submarines. On 31 July 1962, two United States nuclear submarines met at the North Pole.

Belgium, Japan, South Africa, the Soviet Union, and the United States. This treaty, which in effect created the whole area south of 60° south latitude a demilitarised and nuclear-free zone, provided, inter alia, that Antarctica should be used for peaceful purposes only, that there should be freedom of scientific investigation there, that the parties should exchange information regarding Antarctic scientific programmes, that nuclear explosions and the disposal of radioactive wastes in Antarctica should be prohibited, and that all areas in Antarctica should be freely available for inspection by observers of the contracting states. It was, however, expressly provided in article IV of the treaty that nothing therein was to be interpreted as a renunciation of claims or of any basis of claim in Antarctica, and that no acts or activities taking place while the treaty is in force were to serve as a basis for asserting, supporting, or denying a claim to territorial sovereignty in Antarctica, or create any rights of sovereignty there, while no new claim or enlargement of an existing claim was to be asserted. The result is that, during the currency of the Treaty, Antarctic sector claims are 'frozen', and the status quo of Antarctic non-sector bases of claim is preserved.[19]

In order to further the principles and objectives of the Antarctic Treaty, Consultative Meetings of the parties to the treaty have been held at different capital cities in turn. These Antarctic Treaty Consultative Meetings (ATCMs) have led to significant developments. The Brussels Meeting of 1964 was especially notable for the adoption of the Agreed Measures for the Conservation of Antarctic Fauna and Flora, article VIII of which provided for the zoning of 'Specially Protected Areas'. A number of such areas have since been designated. At the Tokyo ATCM in 1970,[20] two important Recommendations were adopted, one relating to man's impact on the Antarctic environment, which provided for research in the matter and for interim measures to reduce harmful environmental interference, and the other for exchange of information concerning launchings of scientific research rockets in the Treaty Area. The Eighth ATCM, held at Oslo in June 1975, was a milestone in this continuing process of

19. Pursuant to art XIII, para 1 of the treaty, a number of states other than the twelve original signatories acceded to the treaty. Also under art IX, para 2 of the treaty certain states were granted consultative status, enabling them to participate in Consultative Meetings of the parties, on the basis that they had demonstrated interest in Antarctica by 'conducting scientific research there'; see F. M. Auburn *Antarctic Law and Politics* (1982) pp 147 et seq. At the date of writing there are twenty states having such consultative status in addition to the original signatories.

20. For text of the Recommendations and other measures adopted by the Consultative Meetings prior to the Tokyo Meeting of 1970, see the publication *Basic Documents, The Antarctic Treaty* (Tokyo, 1970) prepared for the Tokyo Meeting. Cf also the Convention for the Conservation of Antarctic Seals negotiated by the signatories of the Antarctica Treaty in February 1972, which Convention has been regarded as a model of international law-making in the ecological domain of the preservation of living species.

consultation. Under the chairmanship of the late Dr Edvard Hambro of Norway[1] the Meeting made a start in examining the looming economic problems of the Treaty Area relating to future commercial exploitation of the area's resources. Special attention was paid to mineral resources, and inquiries were set in motion as to the ecological effects, and political and legal issues involved in Antarctic mineral exploitation, coupled with an understanding that, in the interim, there was to be abstention from exploitation. Other recommendations adopted at Oslo provided for the continuing protection of the Antarctic environment, with a prohibition of disposal of nuclear wastes there, and for scientific and technical co-operation between the treaty parties.

This interest in resource exploitation in Antarctica was continued at the important Tenth ATCM held at Washington in September–October 1979, which represented a further step in the process of establishing a mineral exploitation régime for the area, and also paved the way for the conclusion at Canberra on 20 May 1980 of a multilateral Convention on the Conservation of Antarctic Marine Living Resources.[2] This Convention embodied, inter alia, the concept that the relevant area in Antarctica, to which it applies, is a single ecosystem because of the interrelationships of the living species there. The discussions on a mineral exploitation régime in Antarctica have continued since 1980, leading to sessions of special ATCMs in 1982 and subsequent years for the purpose of negotiations, which culminated in the conclusion on 2 June 1988 at Wellington, New Zealand, of a Convention on the Regulation of Antarctic Mineral Resource Activities, the Final Act of which Convention was signed by the twelve original signatories, the twenty states with consultative status and some states not having such consultative status. The Convention is applicable to a particular area only, and does not apply, inter alia, to the deep seabed. The Convention serves to fill a gap of some significance in the existing system for the international economic management of the Antarctic region.

The fact that the measures, arrangements and international conventions constituting the régime for the control of the Antarctic have been due primarily to the efforts of the twelve states which were parties to the Washington Treaty of 1959 has occasioned criticism and controversy, more especially by Third World countries at sessions of the United Nations General Assembly in the past eight years. First, it has been maintained that the present system should be replaced by direct involvement of the United Nations as the appropriate organisation for dealing

1. See Dr Hambro's article 'Some Notes on the Future of the Antarctic Treaty Collaboration' 68 AJIL (1974) 217–226.
2. As to this Convention, see note in (1980) 54 ALJ 432–434. Under arts VII and XIII of the Convention, a Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) has since been established with headquarters at Hobart, Australia, the southernmost capital city of that country.

with the affairs of the Antarctic, while about four years ago there was a call for the United Nations to be the central repository of all information concerning Antarctica. Second, it is claimed that like the high seas beyond national jurisdiction (see below, pp 257–261), the Antarctic is part of the common heritage of mankind, and any revenues obtained from the exploitation of the region should be shared with Third World countries. Third, it is proposed that the Antarctic area should become a kind of 'world heritage park', unspoiled by economic activity and environmentally intact and protected in an appropriate manner.

In reply to these claims, the merits of the existing system have been vigorously defended by the Treaty states.

Annexation

Annexation[3] is a method of acquiring territorial sovereignty which is resorted to in two sets of circumstances:

a. Where the territory annexed has been conquered or subjugated by the annexing state.
b. Where the territory annexed is in a position of virtual subordination to the annexing state at the time the latter's intention of annexation is declared.

Case a. is the more usual, but there have been modern instances of case b., as, for example, the annexation of Korea by Japan in 1910, Korea having then been under Japanese domination for some years. Conquest of a territory as under a. is not sufficient to constitute acquisition of title; there must be, in addition, a formally declared intention to annex, which is usually expressed in a Note or Notes sent to all other interested Powers. It follows that sovereignty is not acquired by victorious states over the territory of a vanquished state, if they expressly disclaim an intention to annex it.[4] An annexation which results from gross aggression committed by one state against another, or which has been effected by force contrary to the provisions of the United Nations Charter, ought not, semble, to be recognised by other states.[5]

3. Distinguish the so-called 'peaceful annexation', ie the taking over of territory in the name of a state, by proclamation followed by settlement, without the use of force to conquer the territory. Cf the use of the expression 'peaceful annexation' in *Cooper v Stuart* (1889) 14 App Cas 286 at 291, PC, with reference to the colonisation of Australia by Great Britain; and see also *Coe v Commonwealth of Australia and the United Kingdom Government* (1979) 53 ALJR 403.
4. Cf the case of such a disclaimer by the allied Powers in 1945 in respect to Germany after the unconditional surrender by the German Government. According to Judge Jessup in *The South West Africa Cases*, 2nd Phase, ICJ 1966, 6 at 418–419: 'It is commonplace that international law does not recognise military conquest as a source of title'. Cf *Callas v United States* 253 F (2d) 838 (1958).
5. See above, pp 153–156.

Accretion

Title by accretion[6] occurs where new territory is added, mainly through natural causes, which can be by fluvial action or otherwise (eg wind blown sand[7]), to territory already under the sovereignty of the acquiring state. No formal act or assertion of title is necessary. It is immaterial whether the process of accretion has been gradual or imperceptible, as in the normal case of alluvial deposits or alluvial formation of islands, or whether it has been produced by a sudden and abrupt transfer of soil, provided that this has become embedded, and was not in any event identifiable as originating from another location.[8] If gradual or imperceptible, this means gradual or imperceptible in its progress, rather than gradual or imperceptible after a long lapse of time.[9] The rules of Roman private law regarding the division of ownership over alluvial deposits in streams or rivers between the riparian owners are by analogy applicable to the problem of apportioning sovereignty between riparian states where similar deposits occur in boundary rivers.

Cession

Cession is an important method of acquiring territorial sovereignty. It rests on the principle that the right of transferring its territory is a fundamental attribute of the sovereignty of a state.

The cession of a territory may be voluntary, or it may be made under compulsion as a result of a war conducted successfully by the state to which the territory is to be ceded. As a matter of fact, a cession of territory following defeat in war is more usual than annexation. A cession by treaty is void where the conclusion of the treaty has been procured by the threat or use of force in violation of the principles of international law embodied in the United Nations Charter; see art 52 of the Vienna Convention of 1969 on the Law of Treaties. As examples of voluntary cession may be cited the sale of Alaska by Russia to the United States in 1867, and the exchange of Heligoland for Zanzibar by Germany and Great Britain in 1890. Compulsory cession is illustrated by the cession to Germany by France in 1871 of Alsace-Lorraine—subsequently returned to France at the end of the First World War.

Any transaction (such as a gift, sale, or exchange) will be valid as a cession if it sufficiently indicates an intention to transfer sovereignty from one state to another.

A ceding state cannot derogate from its own grant. Hence, it is, that

6. See Hyde *International Law* (2nd edn, 1947) Vol I, pp 355–6.
7. See *Southern Centre of Theosophy v State of South Australia* [1982] AC 706, [1982] 2 All ER 283, PC.
8. See Shalowitz *Shore and Sea Boundaries* (1964) Vol II, pp 537–539, as to the different meanings of accretion, alluvion, reliction, erosion, and avulsion.
9. See *Southern Centre of Theosophy v State of South Australia* [1982] AC 706, [1982] 2 All ER 283, PC.

there necessarily pass under a cession of territory all sovereign rights pertaining to the territory ceded. By parity of reasoning, a ceding state cannot transfer more than that over which it has been exercising sovereignty; therefore, the receiving state will take the ceded territory subject to any limitation of sovereignty or sovereign rights (eg, in respect to a particular area) that formerly bound the ceding state.

Prescription

Title by prescription (ie *acquisitive* prescription) is the result of the peaceable exercise of de facto sovereignty for a very long period over territory subject to the sovereignty of another, and this may be as the consequence of the immemorial exercise of such sovereignty (ie for such period of time as in effect to extinguish memories of the exercise of sovereignty by a predecessor) or as the result of lengthy adverse possession only.[10] A number of jurists (including Rivier and de Martens) have denied that acquisitive prescription is recognised by international law.[11] There is no decision of any international tribunal which conclusively supports any doctrine of acquisitive prescription, although it has been claimed that the *Island of Palmas Case*, represents such a precedent.[12] Nor is there any recognised principle of innernational law fixing in terms of years the period of time that will constitute a good root of title. As a practical matter it is also difficult to conceive of any case in which the lawful sovereignty of a state over territory would give way before possession and control by another. Indeed, it has never been accepted that the mere silence of a state with regard to territory claimed to belong to it could result in the divesting of its claim by anything less than the indicia of an effective occupation. In the *Frontier Lands Case* (Belgium-Netherlands),[13] it was held by the International Court of Justice that mere routine and administrative acts performed by local Netherlands officials in a certain area could not displace the legal title of Belgium to that area under a duly concluded convention.

On the other hand, it is true that if territory formerly belonging to State A is to be acquired by another entity or state, there is no requirement at international law that State A must evince an animus disponendi. If

10. This distinguishes acquisitive prescription from occupation, which involves the acquisition of sovereignty over terra nullius.
11. Cf *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (1949) published by the United Nations, p 39.
12. In that case, Arbitrator Huber did not expressly base his award on any doctrine of acquisitive prescription. See *United Nations Reports of International Arbitral Awards* Vol 2, 829.
13. ICJ 1959, 209. Also, subsequently, in the *Case Concerning the Temple of Preah Vihear (Merits)* (Cambodia-Thailand) ICJ 1962, 6 the Court declined to treat the acts of merely local administrative authorities in a certain disputed area, as negativing a consistent attitude of the central authorities of Thailand, accepting as valid a certain frontier line, which placed the area under the sovereignty of Cambodia.

prescription is to be regarded as a good root of international legal title, the critical points are the length of the period of public and peaceful exercise of de facto sovereignty, whether this has remained uninterrupted, and the strength of the title displaced. The adequacy of length of the period would have to be decided by an international tribunal; and there should be caution in applying analogies from Roman law, or other systems of domestic law.

Acquisition of territorial sovereignty by newly emerged states

The acquisition of territorial sovereignty by newly emerged states, such as 'decolonised' dependencies or emancipated trust territories appears to be sui generis. The theoretical dilemma here is that territory is one of the components of statehood, yet until the new state comes into being, in principle, there is no entity capable of taking title. In the writer's view, this abstract difficulty can be resolved by treating the people of the territory, as such, provided they have a sufficient degree of political maturity, as having or acquiring sovereignty pending the attainment of statehood.[14] Upon the foundation of the new state, there is simply a crystallisation of the situation, the territorial sovereignty of the people then becoming that of the state itself.

This view as to the acquisition of territory by newly emerged states is consistent with the principle proclaimed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations, adopted by the General Assembly in 1970, namely, that the territory of a colony or non-self-governing territory has under the Charter 'a status separate and distinct from the territory of the State administering it', which subsists until the people concerned has exercised its right of self-determination.

Loss of territorial sovereignty

To the modes of acquiring sovereignty over territory just considered, there correspond exactly similar methods of losing it. Thus territorial sovereignty can be lost by dereliction (corresponding to occupation on the acquisitive side, and which requires a converse intention on the part of the abandoning state to divest itself of effective control[15]) by conquest, by operations of nature (corresponding to accretion on the acquisitive side), and by prescription. There is, however, one method of losing

14. Cf *Advisory Opinion of 21 June 1971, of the International Court of Justice on the Legal Consequences for States of the Continental Presence of South Africa in South West Africa (Namibia)*, treating the people of the Mandated Territory of South West Africa as having a right of progress towards independence, which had been violated by South Africa's failure as Mandatory Power to comply with its obligations to submit to the supervision of United Nations organs. The Court referred to the people as a 'jural entity'; see ICJ 1971, 16 at 56.

15. Cf *Clipperton Island Arbitration* (1931) *United Nations Reports of International Arbitral Awards* Vol II, p 1105, at pp 1110–1111.

territory which does not correspond to any mode of acquiring it, namely, revolt followed by secession of a part of the territory of the state concerned.

Sovereignty over the air space

The development of aviation as from the early years of the present century immediately raised problems as to the sovereignty of states over their superjacent air space.

Before the First World War (1914–1918) the only point on which there was universal agreement was that the air space over the open sea and over unappropriated territory was absolutely free and open. In regard to the air space over occupied territory and over waters subject to state sovereignty, there were a number of different theories,[16] but upon the outbreak of the First World War in 1914, it was found, as a matter of practical exigency, that the only one commanding acceptance by all states was the theory of sovereignty of the subjacent state over the air space to an unlimited height, ie usque ad coelum. This was adopted and enforced not merely by the belligerents, but also by neutral states. It was confirmed in article 1 of the Paris Convention of 1919 for the Regulation of Aerial Navigation, whereby the parties recognised that every state has 'complete and exclusive sovereignty' over the air space above its territory and territorial water. As we shall see below,[17] this usque ad coelum principle has been affected by recent developments in the upper strata of the atmosphere and in outer space.

The Paris Convention contained elaborate provisions for the international regulation of air navigation, partly with the object of establishing uniformity. It established the distinction, which is still currently maintained between (a) scheduled international airlines or air services (described in article 15 as 'regular international air navigation lines' and 'international airways'); and (b) aircraft not belonging to such scheduled airlines or air services. The latter aircraft, provided that they were of parties to the Convention, were to have 'freedom of innocent passage' through the air space of other parties, subject to their observance of the conditions laid down in the Convention (article 2). The former, however, were to have no right of operating, with or without landing, except with the prior authorisation of the states flown over (article 15). The Convention and its annexed Regulations provided also for the registration

16. These included, in addition to the usque ad coelum theory, the following: (a) complete freedom of the air space; (b) sovereignty of the subjacent state up to a specific height, the remaining air space being free; (c) sovereignty of the subjacent state up to a specific height, that state having a right to regulate the passage of aircraft through the remaining air space. In 1910 an inconclusive conference on the subject of air traffic under international law was held at Paris; for a first-hand account of the proceedings, see Sir Harold Butler's book *Confident Morning* (1950) pp 83–95.

17. See pp 177–188 below.

of aircraft, for certificates of airworthiness, for aircrew licences, for rules of traffic near aerodromes, etc. The Convention did not apply to certain American states, including the United States, but these[18] became party to the Havana Convention of 1928 on Commercial Aviation, containing substantially similar provisions, although differing from the former instrument in being primarily a commercial agreement and in containing no annexed technical regulations.

In general, prior to the Second World War, landing rights for foreign aircraft remained within the discretion of the state concerned.

The prodigious increase in trans-continental and inter-oceanic aviation, following on technical developments both before and during the Second World War, raised new problems as to freedom of air transit and landing rights for international airlines. States operating regular international airlines which did not possess convenient air-strips in other parts of the world naturally clamoured for such rights as against states which did have these landing grounds. Also, as between states which desired to maintain their own scheduled air services, even to distant countries, problems arose of the allocation of air traffic. These and allied questions formed the subject of an International Civil Aviation Conference which met at Chicago in November 1944. The object of this Conference at which over 40 states were represented was to conclude world-wide arrangements governing commercial air traffic rights as well as technical and navigational matters relating to international aviation. The main discussions were concerned with obtained agreement by all states to the concession of the 'Five Freedoms of the Air', namely, the rights of the airlines of each state to:

1. fly across foreign territory without landing;
2. land for non-traffic purposes;
3. disembark in a foreign country traffic originating in the state of origin of the aircraft;
4. pick up in a foreign country traffic destined for the state of origin of the aircraft;
5. carry traffic between two foreign countries.

The proposal of the 'Five Freedoms' was fostered by the United States, at that time the most powerful operator state, but no unanimous enthusiasm was shown at the Conference for making these part of the law of nations. Only the first two 'Freedoms' appeared to obtain the support of a majority of the states represented. Accordingly, the Conference was constrained to draw up two Agreements:

a. The International Air Services Transit Agreement providing for the first two 'Freedoms', namely, flying without landing, and landing

18. Chile, which was a party to the 1919 Convention, was also a party to the Havana Convention, but denounced the earlier Convention in 1936.

rights for non-traffic purposes in foreign territory. Subject to the provisions of this Agreement, a state party might designate the route to be followed within its territory, and the airports which could be used.

b. The International Air Transport Agreement embodying all 'Five Freedoms'. States parties to this Agreement might refuse to the aircraft of other states access to the internal air traffic within their territory. The majority of the states represented at the Conference signed the first Agreement, but less than half signed the second, and a few states abstained from signing either. It is clear from this that the third, fourth, and fifth 'Freedoms' do not command general acceptance as absolute principles of international law.

Besides these two Agreements, the Conference drew up a Convention on International Civil Aviation setting out general principles of international air law which were also to condition the privileges granted in the two Agreements, and establishing a permanent international civil aviation organisation. Further, the Convention provided codes of operation for aircraft and personnel and health and safety rules, and recommended customs and immigration methods and navigational facilities for member states of the Organisation. The permanent aviation organisation under the title of the International Civil Aviation Organisation (ICAO) has been actively functioning since 1947 with considerable achievements to its credit in the legal and technical fields, including the adoption of standards and recommended practices as annexes to the Convention, and the adoption or conclusion of the Geneva Convention of 1948 on the International Recognition of Rights in Aircraft, of the Rome Convention of 1952 on Damage Caused by Foreign Aircraft to Third Parties on the Surface, and of the Protocol of Amendment to the Warsaw Convention of 1929[19] concerning the Liability of the Air Carrier to Passenger and Cargo, concluded at The Hague in 1955.

19. The precise title of which is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, 12 October 1929. The question of the revision of the Warsaw Convention, so far as concerns the upper limit of liability for passenger injury or death, the basis of responsibility, and related matters of insurance, became an acute issue in 1965–1966, arising out of the United States Government's dissatisfaction with the limit contained in the Convention, as amended at The Hague in 1955. This led to the negotiation in 1966 of the so-called 'Montreal Agreement', whereby a number of foreign and United States carriers operating in or into the United States undertook to accept a substantially higher limit and in effect acquiesced in the principle of absolute liability; cf R. H. Mankiewicz 'Air Transport Liability—Present and Future Trends' III J World Trade (1969) 32–48. The upper liability limit was raised in amendments to the Warsaw Convention effected by a Protocol adopted on 8 March 1971, by a conference convened at Guatemala under the auspices of the International Civil Aviation Organisation (ICAO). For all practical purposes, liability was to be strict and absolute, and provision was made for quinquennial conferences during the decade following the entry into force of the Protocol, to increase the upper liability limit. In 1975 at a conference convened by the ICAO at

The Chicago Conference did not result in material alterations to the international law of the air. This is apparent from a perusal of the more general chapters (Chapters I–III) of the Convention on International Civil Aviation which lay down principles very similar to those adopted in the Paris Convention of 1919; for example, the principle of a state's complete and exclusive sovereignty over the air space above its territory (articles 1–2), and the principles as to registration and nationality of aircraft (articles 17–21). The drafting was sharpened in many respects; for example, article 5, instead of granting 'freedom of innocent passage' according to the somewhat ambiguous terms of article 2 of the Paris Convention, granted to aircraft 'not engaged in scheduled international air services' the right to 'make flights into or in transit *non-stop*' across the territory of a state party, and to 'make stops for non-traffic purposes' without obtaining that state's prior permission, subject to the right of that state (for example, for security reasons) to require immediate landing.[20] 'Scheduled international air services' were not to be operated 'over or into the territory' of a contracting state, except with the special permission or other authorisation of that state, and in accordance with the terms of such permission or authorisation, although non-scheduled aircraft might discharge passengers, cargo, or mail, subject to the regulations, etc, of the state concerned. Thus the distinction between scheduled international air services, whose rights of overflight or landing depend on the consent of the subjacent state, and non-scheduled aircraft, with restricted rights of passage and landing, was continued. One point of interest was that internal air traffic, ie air *cabotage*, might be reserved entirely to the territorial state, and by the conjoint effect of articles 2 and 7, included traffic between the mother country and overseas territories or dependencies. Here again, the position under the Paris Convention remained unchanged.[1]

Other important points under the Convention are that state aircraft (including government military aircraft) were to have no rights of flight over or landing in the territory of other states without special authorisation of the subjacent state, and that in time of war or duly notified

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Montreal to deal with the problem of expressing limits in an appropriate currency, three Additional Protocols were approved, respectively amending the Warsaw Convention, that Convention as amended by the Protocol adopted at The Hague, and the Guatemala City Protocol of 1971.

20. Under the Convention, these rights of overflight and landing in territory are subject to a number of qualifications and restrictions; eg as regards routes, articles that may be carried, and areas that may be flown over.

1. The standard works on the law of international air transport are Bin Cheng *The Law of International Air Transport* (1962), and Shawcross and Beaumont *Air Law* (Loose Leaf Service to date, Butterworths, London). For a concise but very comprehensive treatment of the whole subject of international air law, see Ch 19, 'Australia and International Air Law' by T. A. Pyman and L. C. Morris in K. W. Ryan (ed) *International Law in Australia* (1984) pp 456–523.

emergency, declared to be such, states are free, whether as belligerents or neutrals, from obligations under the Convention, although they may opt to observe these. Reference should be made also to the duties laid down by the Convention in general terms that subjacent states should observe equality of treatment and non-discrimination in regard to other states using their air space, and that all states should take such measures as are necessary to make international air navigation safer and easier.

The above-mentioned principles represent the main general rules of the international law of the air. They embrace an exceedingly narrow range, leaving unregulated a host of important matters affecting international air traffic. The need still remains for a multilateral convention to mitigate the effects of the current rivalry for air routes and air commerce, although such a convention seems a visionary ideal.

As was foreshadowed when the Chicago Conference terminated, the subject of allocation of traffic between competing scheduled international airlines, which the Conference was not able to regulate by multilateral general agrement, has come under regulation in particular cases by bilateral agreements between the states concerned.[2] One of the most important of these treaties was the Bermuda Agreement of February 1946 (replaced by another Bermuda Agreement of July 1977, known commonly as 'Bermuda 2'), between Great Britain and the United States, which has served as a model for later bilateral agreements. This mushrooming of bilateral treaties conferring, subject to ad hoc conditions, all or some of the 'Five Freedoms', has not been without its defects; it has, for instance seriously impaired the uniformity of law and practices which was one of the primary objects of the Chicago Conference. On the other hand, a diligent examination of the treaties reveals a number of similar or common features, such as the dependence of transit and traffic rights upon reciprocity, the recognition of a principle that international air transport should be facilitated, and substantial uniformity in the drafting of administrative and technical clauses. In July 1946, the United States had withdrawn from the Air Transport or 'Five Freedoms' Agreement, thus recognising that the international regulation of air traffic by multilateral general agreement was impracticable. So, in respect at least of scheduled international airlines or air services, multilateralisation proved impossible, and as reflected in bilateral networks of intergovernmental agreements concerning transit, traffic, and landing rights, the doctrine of sovereignty in the 'closed air space' now prevails. Indeed, in other areas, states are extending rather than restricting this doctrine, for example by the establishment for security purposes of 'air defence identification zones'

2. Non-scheduled air services also became the subject of bilateral agreements, and in one instance of a multilateral agreement, namely the Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, concluded at Paris on 30 April 1956.

(ADIZs) above the maritime approaches to their coasts,[3] and by other expedients.[4]

The recent emergence of wide-bodied airliners with greatly augmented passenger capacity and increased rate of frequency of journeys, by reason of higher speeds, has already pointed to some problems in the practical working of bilateralism, which is founded primarily upon the exchange of traffic rights. Such an exchange becomes difficult where, in respect to a particular country of embarkation and disembarkation, there is not enough volume of traffic for economic division among carriers, so that protectionist restrictions become necessary, unless it is clear that the volume will increase. For this reason, if the trend towards larger, speedier airliners continues upon a global scale, multilateral or regional solutions may perhaps be needed.

Apart from aviation traffic, problems of abuse of the air have come within the scope of international law. In respect to radiocommunications, two principles have emerged:

a. That every state has a right to prevent its air space being traversed by injurious transmissions of radio waves.
b. That every state is under a duty not to allow, and to prevent its territory being used for the transmission of radio waves injurious to other states.[5]

Then there is the Moscow Treaty of 5 August 1963, banning nuclear weapon tests in the atmosphere, in outer space, and under water; under this Treaty to which over 100 states currently are parties, the contracting states undertake to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, at any place under their jurisdiction or control in the atmosphere, or beyond the limits of the atmosphere, including outer space, or under water including territorial waters or the high seas (see article I generally).[6] Other modern technological developments appear to require some principles for the protection of all states from injury through

3. Eg, by the United States and Canada. For bibliographical note on air defence identification zones, see Taubenfield *Review of International Commission of Jurists* December 1969, p 36, n 2. Aircraft of other states entering an ADIZ may be required to give notification beforehand of the course of flight, and even periodically to report their precise location.
4. An interesting post-war development has been the practice of nominating 'air corridors', which may be used by approaching aircraft, leaving the remainder of the air space 'closed' and under the absolute control of the authorities of the subjacent state or territory.
5. Cf Le Roy 32 AJIL (1938) 719 et seq. Quaere, whether the 'jamming' of international broadcasts is illegal. It is claimed that such local 'jamming' contravenes paragraph 2 of article 19 of the International Covenant of 1966 on Civil and Political Rights (freedom to impart information through any media 'regardless of frontiers') and article 35 (1) of the International Telecommunications Union (ITU) Convention of 1973 (prohibition of harmful interference with radio services).
6. For the text of the Treaty, see *UK Treaty Series*, No 3 (1964) Cmd 2245.

the air space; for example, states by the use of rain-making devices in their air space may deprive adjacent states of the benefit of rain-bearing clouds, thereby causing a drought, or again by the use of atomic energy for certain purposes, may cause dangerous radiations affecting the air or clouds above the territory of neighbouring states. In this connection, although no state is an insurer for neighbouring states against damage to the air space, there is probably a duty not to cause gross or serious damage which can be reasonably avoided, and a duty not to permit the escape of dangerous objects. The trend towards strict liability in this regard is reflected in the Treaty on Principles governing the Activities of States in the Exploration of Outer Space, including the Moon and Other Celestial Bodies, signed on 27 January 1967, and in the Convention on International Liability for Damage Caused by Space Objects, approved by the United Nations General Assembly in 1971, and signed in March 1972 (see below).

There are other problems concerning the air space and the atmosphere generally which have of necessity brought about developments in international law, or created problems requiring international legal solutions. Certain of these concern questions of pollution or the protection of the environment, which questions are considered in Chapter 14, below. The influence of modern technology on the evolution of new rules of international law could not be better illustrated. For example, thorough research demonstrated that the release of chlorofluorocarbons (CFCs) and other so-called 'greenhouse gases' (eg, those produced by the burning of fossil fuels) found their way into high levels of the atmosphere, and led to chemical reactions depleting to a dangerous extent the ozone layer that protected the earth from the sun's ultraviolet rays, and rendering possible a progressive warming of the atmosphere which could bring about melting of the polar ice caps, a consequent rise in the level of the oceans and radical climatic changes. A conference of 46 countries at Vienna in March 1985 adopted a Convention for the Protection of the Ozone Layer, and this was followed by another gathering (representing 27 of the 46 countries mentioned above) at Montreal in September 1987 which adopted a Protocol to that Convention for the reduction of the consumption of CFCs and other products likely to have similar consequences.[7] As recently as June–July 1988, another conference, not solely intergovernmental but attended by over 300 scientists and other concerned persons from over 40 countries, was held at Toronto, Canada, on the theme 'The Changing Atmosphere'; inter alia, a resolution was adopted for a substantial reduction of carbon dioxide emissions, while there was general support for the far-reaching suggestion that the international community should adopt a code of the International Law of the Atmos-

7. See also Chapter 14, below, p 416.

phere similar to the code of the International Law of the Sea contained in the United Nations Convention of 1982 on the Law of the Sea.[8]

Upper strata of the atmosphere, outer space and the cosmos

New problems of international law have been created by the greatly intensified activities of states in the upper strata of the atmosphere, in outer space, and in the cosmos,[9] and by the correspondingly spectacular advances in space technology, in aeronautical navigation, and in planetary exploration, both manned and unmanned.[10]

Into and through the upper strata of the atmosphere, that is beyond the present operating ceilings of conventional jet engine or piston engine aircraft,[11] states have been able to project balloons, rockets, and long-range missiles, and to transmit radio waves, while non-conventional machines, such as rocket-powered aircraft, have demonstrated a capability to reach unprecedented altitudes in the airspace.

As to outer space and the cosmos, the launching of the first artificial earth satellite in 1957 by the Soviet Union has been followed by space activities on a constantly increasing scale. First, there have been not only the number, weight, and orbital ranges of the satellites and sub-satellites projected, but also their functional diversity, for purposes, inter alia, of metereology, missile detection, espionage, navigation, earth survey, remote sensing of the resources of the earth,[12] monitoring of pollution, ionospheric measurement, solar radiation measurement, photography, and communications, including telecommunications. Second, the Soviet

8. See Chapter 9, below, pp 261–289.
9. The term 'cosmos' is used here to denote the remoter regions of outer space.
10. The following represents a short list of recommended books and articles on space law: Gyula Gal *Space Law* (1969); McWhinney and Bradley (eds) *New Frontiers in Space Law* (1969); D. Goedhuis 'Reflections on the Evolution of Space Law' XIII Netherlands ILR (1966) 109–149, and 'The Present State of Space Law' in *The Present State of International Law and Other Essays* (1973) pp 201–244; Professor Bin Cheng's articles 'The 1967 Space Treaty', Journal du Droit International, July–September 1968, pp 532–644, 'Analogies and Fiction in Air and Space Law' (1968) CLP 137–158, and 'The 1968 Astronauts Agreement or How not to Make a Treaty', *Year Book of World Affairs* (1969) pp 185–208; Howard J. Taubenfeld 'Progress in International Law: Outer Space and International Accommodation', Review of International Commission of Jurists, December 1969, pp 29–38; O. O. Ogunbanwo *International Law and Order Space Activities* (1975); G. C. M. Reijnen *Legal Aspects of Outer Space* (1976); N. Jasentuliyana and R. S. K. Lee *Manual on Space Law* (1981) Vols 1 and 2; and M. Benko, W. de Graaf and G. C. M. Reijnen *Space Law in the United Nations* (1985).
11. Even high altitude flights of conventional aircraft have necessitated the establishment of special control centres.
12. *Remote sensing:* Unceasing international efforts have been in progress to ensure the continuity, compatibility and complementarity of systems employed by different states for the remote sensing of Earth. Some states may be concerned about being 'sensed' without their consent, and/or about the data thereby procured not being made available to them. In 1986, COPUOS was able to agree on a draft of principles to govern remote sensing from outer space. See generally N. M. Matte (ed) *Legal Implications of Remote Sensing from Outer Space* (1976).

Union and the United States as the two principal space Powers have conducted far-reaching experiments in penetration of the cosmos, beginning with the Soviet Union's success in 1959 in hitting the moon and photographing its reverse side, and continuing with even more distant space probing, to planets such as Mars and Venus. Third, the man-in-space programmes of these two Powers resulted in sustained orbital flights by cosmonauts, and culminated in the lunar landings and explorations by United States cosmonauts in 1969–1971, while both manned and unmanned rover vehicles have traversed lunar territory and retrieved samples of lunar soil and rock. Apart from these concrete results, space shuttles, both reusable and otherwise, have been successfully launched and completed missions, while the possibility of space stations, even of a permanent nature, appears to have been demonstrated.

In addition to the knowledge of the moon and planetary systems gained from the lunar landings and space probes, there have been the great discoveries contributing to extra-terrestrial science, namely those concerning the nature of space itself, the magnitude of the cosmic rays, the radiation zones surrounding the earth, the extent of the earth's magnetic field, the character of the ionosphere, and the measurement of micro-meteorite density.

It has been difficult indeed for the international law of space to keep up with the unflagging speed of this progress in space technology and exploration. Yet space law can only in a very limited way anticipate these advances, for the formulation of its rules is necessarily dependent upon reliable data obtained through activities in outer space and the cosmos. As Judge Manfred Lachs of the International Court of Justice, himself a distinguished space lawyer, has said in another connection:[13]

> 'Whenever law is confronted with facts of nature or technology, its solution must rely on criteria derived from them. For law is intended to resolve problems posed by such facts and it is herein that the link between law and the realities of life is manifest. It is not legal theory which provides answers to such problems; all it does is to select and adapt the one which best serves its purposes, and integrate it within the framework of law.'

It was recognised in fact at the Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space held at Vienna in August 1982 ('UNISPACE 82', as the Conference was called) that legal controls over *all* activities in or related to outer space are out of the question. Apart from this, a large portion of future international outer space law will be institutional law, consisting of rules governing the relationships between the numerous international and national agencies concerned with space questions, such as the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS), the International Telecommunications Satellite Organisation (INTELSAT), the International

13. In the *North Sea Continental Shelf Cases* ICJ 1969, 3 at 222.

System and Organisation of Space Communications (INTERSPUTNIK), the European Space Agency (ESA), the United States National Aeronautics and Space Administration (NASA), and the Centre National d'Etudes Spatiales (CNES) in France.

It has been sought to formulate some of the rules applicable in this domain in the following instruments, namely:

a. The nuclear weapons test ban Treaty of 1963, referred to above, under which states parties undertake to prohibit, prevent, and not carry out nuclear weapon test explosions beyond the limits of the atmosphere, including outer space.
b. The Treaty on Principles governing the Activities of States in the Exploration and Uses of Outer Space, including the Moon and Other Celestial Bodies, signed on 27 January 1967 (referred to below as the 1967 Space Treaty).
c. The Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, signed on 22 April 1968 (referred to below as the 1968 Astronauts Agreement).
d. The Convention on International Liability for Damage Caused by Space Objects (referred to below as the Liability Convention of 1972), adopted in draft form on 29 June 1971, by the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS),[14] and then by the General Assembly, being signed at Washington, London, and Moscow on 29 March 1972.
e. The Convention on Registration of Objects Launched into Outer Space, approved by the General Assembly on 12 November 1974, and opened for signature on 14 January 1975 (referred to below as the Registration Convention of 1975).
f. The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, adopted by the General Assembly on 5 December 1979 (referred to below as the Moon Treaty of 1979).

There is also a large measure of agreement on broad principles as reflected in a number of hortatory General Assembly Resolutions.[15] The most important instrument to date is the 1967 Space Treaty which propounds in effect a first code of space law, although it must be borne in mind that all the instruments are interdependent, and were largely influenced and

14. The Committee was established by the General Assembly on 12 December 1959, and primarily through its Legal Sub-Committee and its Scientific and Technical Sub-Committee has proved to be the main forum for the initiation and adoption of law-making projects in the field of space law.
15. As to the effect of the earlier Resolutions, see Bin Cheng 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' V Indian JIL (1965) 23.

conditioned by the principles and guide-lines proclaimed by the General Assembly in its Resolutions.[16]

Upon the basis of these instruments and Resolutions, it is possible, allowing for the risks of generalisation, to formulate some of the fundamentals of the international law of space.

First, it is clear that the usque ad coelum rule, ie the doctrine of the sovereignty of the subjacent state to an unlimited height, cannot work in practice. States have not insisted on the rule, inasmuch as they have acquiesced, and still acquiesce in the repeated crossing, without their prior consent, of their superjacent space by orbiting satellites and capsules at heights of one hundred miles and more.[17] Apart therefrom, there is some difficulty in applying to space, one of the considerations notionally underlying the usque ad coelum rule, namely, that of a vertical column which remains permanently and statically appurtenant to a particular subjacent state, because this does not strictly correspond to the scientific or astronomical facts.[18]

On the other hand, most states agree on the *principle* that, particularly for security purposes, there must be sovereignty up to some upper limit, ie some demarcation either in the upper atmosphere itself, or between the atmosphere and space, although there is no *consensus* as to a precise figure for this height. The suggested limits have ranged from 300 miles upwards, although latterly a well-founded course of opinion favours 110 kilometres or thereabouts above sea-level, out of regard for the lower limit of space in which artificial satellites have demonstrated ability to

16. The 1967 Space Treaty, the 1968 Astronauts Treaty, the Liability Convention of 1972, the Registration Convention of 1975, and the Moon Treaty of 1979 (see above) were in fact approved beforehand by General Assembly Resolutions.
17. On the other hand, the claim has been made on behalf of some states that the doctrine of the permanent sovereignty of every state over its natural resources (see pp 125–127) extends to information as to such natural resources, thereby constituting an objection to the acquisition of resource data, even for scientific purposes, by the employment of remote sensing satellites, and as well to the dissemination of such data, even for the benefit of science. This claim has been disputed, and it is said that such acquisition and dissemination of data, and the processing thereof, are not only compatible with the Space Treaty of 1967, but are unobjectionable as being for the benefit of the international community as a whole.
18. Cf Bin Cheng 'From Air Law to Space Law' (1960) CLP 228, at p 232 and McDougal 51 AJIL (1957) 74–77. There is, on the other hand, a division of opinion on the question whether the geostationary orbit (ie that orbit over the equator at such a height that the satellite there appears stationary) is within outer space, and therefore governed by the Space Treaty of 1967. It has been claimed that relevant segments of the geostationary orbit are part of the territory over which equatorial States exercise their national territorial sovereignty, but this is disputed. It is non-controversial that outer space has the status of a res extra commercium; see Bin Cheng 'The Legal Status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use' (1983) 11 Journal of Space Law 89 at p 91, and art II of the 1967 Space Treaty.

orbit.[19] There seems to be some apathy on the question of the necessity for fixing a demarcation height, and doubtless this reflects an underlying feeling that states may come to possess rights to a greater height than is now regarded as possible.[20] States appear ready to concede, albeit provisionally without any final waiver of their sovereignty, a right of innocent passage for objects launched for peaceful or scientific purposes, but not for military missiles. It seems undisputed that each state may claim sovereignty up to that height of the atmosphere where air density remains sufficient for the operation of conventional aircraft.

Second, outer space beyond this upper limit, whatever it may be, and celestial bodies are subject to international law and the United Nations Charter, are free for exploration and use by all states on a basis of equality, in conformity with international law, such exploration and use to be carried on for the benefit and in the interests of all mankind, and are not subject to national appropriation.[1] These principles were specifically commended to states by the United Nations General Assembly in its Resolutions of 20 December 1961, and of 13 December 1963, and were enunciated in articles 1–111 of the 1967 Space Treaty. Article IV indeed makes provision that the moon and other celestial bodies are to be used by all states parties exclusively for 'peaceful purposes', prohibiting thereon the establishment of military bases, installations, and fortifications, weapons testing, and military manoeuvres. It has been a matter of controversy whether the expression 'peaceful purposes' connotes 'non-military purposes' or, on the other hand, 'non-aggressive purposes'. Also under article II, outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation,

19. Under a resolution adopted by the 1968 Conference of the International Law Association, the term 'outer space' as used in the 1967 Space Treaty should be interpreted so as to include all space at and above the lowest perigee achieved at the date of the Treaty (27 January 1967) by any satellite put into orbit, without prejudice to the question whether at some later date the term is held to include space below such perigee. At the eighteenth session of the United Nations Outer Space Committee in June 1975, the Italian delegation proposed a delimitation into two zones, atmospheric and outer space, with the 'vertical' frontier fixed at about 90 kilometres from the earth's surface. There is considerable support for the view that the upper limit of the atmosphere should be lowest altitude or perigee at which artificial earth satellites can remain in orbit without being destroyed by friction with the air; see Perek 'Scientific Criteria for the Delimitation of Outer Space' (1977) 5 Journal of Space Law 111 at p 118, and V. Kopal 'The Question of Defining Outer Space' (1980) 8 Journal of Space Law 154.

20. According to a working paper prepared by the United Nations Secretariat on the definition and/or delimitation of outer space (see UN document A/AC.105/C.2/7, 1970) no proposal on the matter appears to command general support, while states are even divided about the necessity for such definition or delimitation, some countries being of the view that it might complicate and hinder progress in the peaceful exploration and use of outer space, or at least is irrelevant to the flight of space vehicles.

1. Quaere, whether photographs from a satellite of State A of military installations, etc, of State B would be legitimate under these principles, if effected for defensive purposes only.

or by any other means (cf the provision of article XI of the Moon Treaty of 1979).

Third, it is the duty of every state launching a satellite or object into orbit or beyond, to give due notice of the launching thereof, and information concerning such matters as orbits, weights, and radio frequencies. In its above-mentioned Resolution of 20 December 1961, the General Assembly called on states to furnish such information promptly to the Committee on the Peaceful Uses of Outer Space, through the Secretary-General of the United Nations, and requested the Secretary-General to maintain a public registry of such information. Steps were subsequently taken to establish a public registry of information concerning outer space launchings. These principles received more detailed application and amplification in the Registration Convention of 1975 which, inter alia, makes provision for the national registration by launching states of space objects projected into outer space, and also for a central registry in respect to such objects to be maintained by the Secretary-General of the United Nations, while additional means and procedures were laid down for states to co-operate in the identification of space objects so as, inter alia, to mitigate hazards. Article XI of the 1967 Space Treaty casts a duty upon states parties to inform the United Nations Secretary-General, as well as the public and the international scientific community, of the nature, conduct, locations, and results of activities in space conducted by them, and such information is to be disseminated by the Secretary-General, immediately and effectively. This article stands in close relationship to article 5 of the 1968 Astronauts Agreement, obliging states, according to the circumstances, to give notice of the location of space objects returned to earth, or to recover them, or to restore them to, or hold them at the disposal of the launching authority.

Fourth, having regard to the discoveries concerning the nature of outer space, it is the duty of every state launching objects into orbit or beyond to take precautions to avoid injury to other states, or any permanent changes in the environment of the earth, or the contamination of the upper atmosphere and outer space, and of celestial bodies and the earth, or any impairment of the free use of scientific exploration of the upper atmosphere and outer space. This basic duty has received more ample expression in the provisions of articles VI, VII, and IX of the 1967 Space Treaty. Article VI sets out in the most general terms that states parties to the treaty are to bear international responsibility for national activities in outer space, while article VII, dealing specifically with the launching of space objects, lays down that each state party launching or procuring the launching of a space object, or from whose territory or facility an object is launched is internationally liable for damage to another state party or to its natural or juridical persons by such object on earth, in the airspace, or in outer space. Article IX imposes a duty of non-contamination, and of prevention of harm to the environment of earth resulting

from the introduction of extraterrestrial matter; there are also duties of consultation beforehand, if any activity or experiment is believed to be potentially harmful to the activities of other states parties in the exploration and use of space.

The liability of states for damage caused by space objects has been spelled out in more detail, as regards both substance and procedure, in the Liability Treaty of 1972. Under articles II–III, a launching state is to be 'absolutely liable' to pay compensation for damage caused by its space object on the earth's surface or to aircraft in flight, provided however that if damage be caused elsewhere than on the surface of the earth to a space object of another launching state or persons or property aboard this object, it is to be liable only if the damage is due to its fault[2] or the fault of persons for whom it is responsible; while there is to be no liability for damage to nationals of the launching state or foreign nationals participating in the operation of the space object, or during the time when, by invitation, they are in the vicinity of the launching or recovery area (see article VII). There is provision for a Claims Commission to function where the question of compensation cannot be settled by negotiation. The law to be applied, and the measure of compensation are governed by the controversial article XII, according to which the matter is to be determined 'in accordance with international law and the principles of justice and equity', compensation being that which is required to restore the victim of damage to the condition which would have existed if the damage had not occurred.

Reference should also be made in this connection to article 5, paragraph 4 of the 1968 Astronauts Agreement, under which a launching state receiving notification of the locating of one of its space objects, believed to be of a hazardous or deleterious nature, is immediately to take steps to eliminate possible danger or harm.

It is nevertheless a moot question whether the provisions of the 1967 Space Treaty and of the Liability Treaty of 1972 are adequate to cover comprehensively all problems caused by nuclear-powered satellites, more particularly in the event of their disintegration with consequent earth-bound scattering of debris, as occurred, for example, in the case of the Soviet nuclear-powered satellites 'Cosmos 954' in February 1978 and 'Cosmos 1402' in January 1983. There may be difficulties in locating all radio-active fragments, which unless deactivated can harm the environment. Although a new convention may not be necessary, there should perhaps be pre-agreed guidelines governing the precautions to be observed in the design, launching, and guidance, etc of such satellites, and providing for the co-ordination of emergency action and deactivation measures. Restrictions as to design may be of particular importance so far as

2. Eg, liability would be excluded in case of vis major, such as lightning striking a space vehicle upon re-entry.

concerns the prevention of fragmentation in outer space, and ensuring recoverability without damage to the earth and its environment. The matter was considered in a joint 15-Power working paper submitted in 1978 to the United Nations Committee on the Peaceful Uses of Outer Space.

One suggestion of some interest has been made, namely, that there be so-called 'crimes in space'; for example, the wilful disregard by a launching state of a patent risk of grave injury to the environment of the earth.

Fifth, communication by means of communication satellites should be freely available to all states upon a global and non-discriminatory basis.[3] This principle was laid down in the above-mentioned General Assembly Resolution of 20 December 1961, and was reaffirmed by the General Assembly in a Resolution of 16 December 1969. The arrangements for INTELSAT (ie International Telecommunications Satellite Consortium), constituting a global communications satellite system, which was first established in 1964,[4] are founded upon the principle that all states have the right of non-discriminatory access to the use of the system. The subject of direct satellite broadcasting, which has been under examination by a Working Group of the Committee on the Peaceful Uses of Outer Space,[5] involves a number of other legal implications. Although it is contemplated by the United Nations General Assembly that an international agreement should be concluded, formulating principles to govern direct satellite broadcasting,[6] it will be a long, hard haul towards the conclusion of such an international treaty or convention. The subject is bedevilled by technical problems and by thorny issues of state sovereignty. One difficulty is that of 'spillover'; current technology does not enable transmissions from satellites to be beamed with precision into most countries without spilling over into contiguous or adjacent countries. There seems to be a consensus that direct satellite broadcasting should be subject to the United Nations Charter, and the 1967 Space Treaty,

3. Copyright problems, inter alia, were raised by the advent of communication satellites. This is due to the ease with which signals can be received from the satellites, and be rebroadcast by the use of terrestrial transmission distribution systems. In order to prevent, so far as possible, unauthorised rebroadcasting of signals received from communication satellites a Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite was signed at Brussels on 21 May 1974. In essence, the Convention binds the states parties to it by undertakings on their part (see article II) to prevent by adequate measures any ground station on its territory from picking up and redistributing, without authority, signals received from satellites, being signals not intended for such ground stations.
4. For a summary-outline of the principal features of INTELSAT, see *Department of State Bulletin* 3 May 1971, pp 569–572.
5. See Report of the Working Group on its Fifth Session (1974) for a survey of the legal and other problems involved.
6. See, eg, para 4 of the General Assembly's Resolution of 18 November 1975.

that there should be an equitable sharing of radio frequencies, that transmission should be conducted within the limitations of the technical parameters and procedures established by the International Telecommunication Union (ITU) and its Radio Regulations, and that no country should have a monopoly in the launching or operation of broadcasting satellites, or preferential rights to the use of a geo-stationary orbit, or of frequency bands. Among the areas of controversy are the extent to which a receiving state is entitled to protect its sovereignty, its right to be consulted and to consent beforehand to transmissions, and its right to take counter-measures against allegedly illegal broadcasts.

Sixth, each state launching an object into outer space retains its sovereign rights over the object, no matter where it may be and where it may land. Correspondingly, the launching state remains responsible for damage done by its space objects to the extent set out above, while correlatively non-launching states are, under article 5 of the 1968 Astronauts Agreement, bound according to the circumstances to give notice of the location of space objects returned to earth, or to recover them, or to restore them to, or hold them at the disposal of the launching authority.

Seventh, states are under a duty to facilitate the passage of objects intended for the exploration for peaceful purposes of outer space,[7] and to give aid to space ships making forced landings on their territory.[8] It is questionable whether the duty of facilitation requires a state to make available its cosmodromes for use by another launching state. A further difficult point is whether a state which has granted tracking station facilities to one state should be bound to make these available to other states. In regard to rescuing astronauts, the principle of all possible assistance in the event of accident, distress, or emergency landing is laid down in article V of the 1967 Space Treaty, coupled with provision for their safe and prompt return to the state of registry of the space vehicle. Astronauts are to be deemed 'envoys of mankind' in outer space, and as between themselves, astronauts of one state party are to render all possible assistance to astronauts of other states parties so far as concerns activities in outer space and on celestial bodies. Although the obligations of non-launching states in this connection have been set out more specifically in the 1968 Astronauts Agreement, it may still be necessary to rely upon the width of the provisions in article V of the 1967 Space Treaty, particularly for astronauts in distress in space itself, as distinct from their being in a plight upon their return to earth. The Astronauts Agreement imposes duties upon states parties of notification or public announcement regarding any plight or emergency landing of astronauts, of rescue and assistance

7. See Bin Cheng (1960) CLP 252–254, on the general duty of facilitation.
8. This was referred to by Chairman Kruschev of the Soviet Union in his letter of 20 March 1962, in reply to a letter by President Kennedy of the United States, dated 7 March 1962.

where astronauts land in territory under the jurisdiction of the state concerned,[9] of contributing assistance to search and rescue operations in the event of their landing on the high seas or places not under the jurisdiction of any state, and of assuring the safe and prompt return of the astronauts to representatives of the launching authority.

As at the present date, no specific principles of international law concerning astronautical navigation, as such, have been formulated. It has been reasonably claimed that the freedom of the seas doctrine is applicable by analogy to outer space. To some extent, the analogy has already been applied, for under article VIII of the 1967 Space Treaty, the state of registry of a space object is to retain jurisdiction and control over the object, and over any personnel aboard while the object is in outer space or on a celestial body.[10] The Treaty does not however provide for the grant of nationality to spacecraft (contrast article 5 of the Geneva Convention of 1958 on the High Seas and article 91 of the United Nations Convention on the Law of the Sea of 10 December 1982). As more is known of the factors governing the paths and speeds of space vehicles, and the scientific forces operating in the cosmos, it may become necessary to impose restrictive rules for navigational safety and to prevent interference by space vehicles with each other, as well as to ensure that no damage be done to the earth itself or its environment. The successful development and possible uses of re-employable space shuttles during the last five years have pointed to the necessity for such rules, especially rules for the definition or identification of orbit paths. Another need has also been demonstrated, namely the participation of states other than the United States and the Soviet Union in space shuttle programmes of greater magnitude so that mankind can more speedily reap the benefits of accelerated space exploration and exploitation.

It has been sought to denuclearise and demilitarise outer space. Absolute denuclearisation appears almost impossible to achieve. The Legal Sub-Committee of COPUOS has under consideration the elaboration of principles to regulate the use of nuclear power sources in outer space which would ensure safety assessment and due notification of such sources, and govern, as well the responsibility of user-states. As regards demilitarisation, under the first paragraph of article IV of the 1967 Space Treaty, states are under a duty not to place in orbit objects carrying nuclear or mass destruction weapons, or to install or station these on celestial bodies or in outer space. It is notorious that there has been no demilitarisation, strictly speaking, of outer space, as satellites have

9. In this case, the rescuing state is to have direction and control of the necessary operations, but acting in close and continuing consultation with the launching authority (article 2).
10. There would necessarily have to be subsidiary rules concerning the manner of identification of spacecraft. To some degree the subject of identification, primarily for purposes of registration, is covered in the Registration Convention of 1975.

continued to be used for purposes of espionage and surveillance. Recently, also, the possibility of the use of laser weapons, based in space and with global capacity to attack a wide range of targets, has received attention. The demilitarisation of outer space was the subject of discussion at the Conference of 1982, UNISPACE 82 (see above). Administration of outer space by the United Nations has not been universally favoured by the states.[11] Nevertheless, the United Nations can, in line with the belief expressed by the General Assembly in its Resolution of 20 December 1961, reaffirmed in its Resolution of 18 November 1975, 'provide a focal point for international co-operation in the peaceful exploration and use of outer space'.

Apart from the matters of space law, referred to above, the United Nations has been concerned with the practical applications of space technology for the benefit of mankind, and the result of the United Nations Conference on the Exploration and Peaceful Uses of Outer Space, held in Vienna in 1968, was to promote certain steps for the transfer of space technology to the developing nations. In addition to the transfer of technology, these latter nations feel that they are entitled to reap the benefits of outer space developments, eg, those of an economic and medical nature, much to the same extent as in the case of the high seas beyond national jurisdiction (see chapter 9, below). Such space applications have a high priority in the view of the United Nations General Assembly (see, for example, its Resolution of 24 November 1975). The General Assembly has also attached high priority to the elaboration of an international agreement covering direct satellite broadcasting. As the discussions at the Conference of 1982, UNISPACE 82 (see above), showed, future problems are of infinite variety;[12] among these are the necessity or minimisation of 'space debris' (eg, dead satellites, spent rocket motors, etc) which, inter alia, may in outer space collide destructively

11. In 1959, the ad hoc United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) reported to the General Assembly that it did not favour the establishment of an international agency to assume an over-all responsibility for space matters. As Professor Taubenfeld has pointed out (see Review of International Commission of Jurists, December 1969, p 30), the current régime of space law is 'one of self-denial and is self-policed; the nations have firmly resisted creating any comprehensive, overall régime which would include the placing of authority and control for outer space activities in any international organisation'. The Conference of 1982, UNISPACE 82 (see above), likewise did not support specifically the creation at that stage of a new general international space agency, although the possibility of a Centre for Outer Space (which would not be such a major international agency) was noted.
12. The particular problem of the geostationary orbit above the equator (due to the orbital speed being the same as that of the earth) calls for special mention. This is the only orbit capable of providing continuous contact with ground stations via a single satellite, but can accommodate only a limited number of satellites. This creates problems of radio frequencies, and COPUOS and its two Sub-Committees are endeavouring to frame principles for the rational and equitable use of the orbit without prejudice to the role of the International Telecommunication Union (ITU). See also n 18, above.

with space vehicles or duly operating satellites, the use of space solar power systems, and international controls over aerospace scientific research. Space law cannot be static; through the very nature of its subject-matter, it is evolutionary.

Reference should be made finally to the impact of the Convention of 1986 on Early Notification of a Nuclear Accident and the Convention of 1986 on Assistance in the Case of a Nuclear Accident, both of which Conventions were concluded as a consequence of the Chernobyl nuclear reactor accident (see below, pp 417–418); these Conventions could be applicable to the consequences on Earth of accidents involving space objects carrying nuclear power sources.

Rights less than sovereignty—spheres of influence and spheres of interest

On many occasions, states have claimed in regard to certain regions or territories, rights less than territorial sovereignty, and falling short even of those exercised over a dependent territory or vassal state. Such inchoate rights were known in diplomatic terminology as 'spheres of influence' or 'spheres of interest', and were most commonly asserted in the late nineteenth century when international rivalry for the exploitation of weak or backward countries was historically at its peak. Although in view of such international engagements as those contained in the United Nations Charter to respect the territorial integrity of other countries it would not be politic today to use these terms, it is hardly open to question that the concrete conceptions underlying them are still applied by the Great Powers.

Perhaps the best definition of a 'sphere of influence' is that of Hall:[13]

> '... an understanding which enables a State to reserve to itself a right of excluding other European powers from territories that are of importance to it politically as affording means of future expansion to its existing dominions or protectorates, or strategically as preventing civilised neighbours from occupying a dominant military position.'

A 'sphere of interest' differs only in direction of emphasis from a 'sphere of influence'. A state asserts a sphere of interest in a particular region when it claims to possess in that region exclusive economic or financial concessions or exclusive rights of exploitation, which it will not allow other Powers to exercise.

2. BOUNDARIES AND RIVERS

Boundaries

Boundaries are one of the most significant manifestations of state territorial sovereignty. To the extent that they are recognised expressly

13. Hall *International Law* (8th edn, 1924) p 153.

by treaty, or generally acknowledged without express declaration, they constitute part of a state's title to territory.

A boundary is often defined as the imaginary line on the surface of earth, separating the territory of one state from that of another. This is perhaps too artificial. As one writer says:[14]

> 'A boundary is not merely a line but a line in a borderland. The borderland may or may not be a barrier. The surveyor may be most interested in the line. To the strategist the barrier, or its absence, is important. For the administrator, the borderland may be the problem, with the limit of his authority.'

Where the borderland is of such a character that, notwithstanding the boundary line running through it, the territory itself and its inhabitants are fused for all practical purposes, the two or more states concerned may tolerate (either by treaty or by conduct) the existence in the borderland of administrative and other practices, for example the free movement of officials throughout the borderland, which would otherwise be in derogation of each other's sovereignty. The exceptional de facto relations between states and their citizens, arising out of such special conditions in a borderland area, are sometimes said to constitute relations of 'voisinage'.[15] Such relations could embrace arrangements between adjoining states for the joint exploitation of resources which straddle land boundaries (cf the use of the expression 'share-access zones' in boundary areas in the 1977 Joint Report by the Chief Negotiators on Canada–United States Maritime Boundaries and Related Resource Issues[16]).

Boundary disputes have occasioned many important international arbitrations; for example, the *Alaska Boundary Arbitration* (1903), between the United States and Great Britain. Such disputes were also the subject of two early instructive decisions of the International Court of Justice in 1959 and 1962 respectively, in the *Frontier Lands Case* (Belgium-Netherlands)[17] and in the *Case Concerning the Temple of Preah Vihear* (Merits) (Cambodia-Thailand).[18] In the former case, the Court gave effect to allocations of territory in a Boundary Convention of 1843,[19] thus deciding that Belgium was entitled to certain frontier lands; it refused to accept the contentions of the Netherlands that the Convention was viti-

14. Jones *Boundary-Making* (1945) p 7. As to the use of maps in boundary disputes, see Alastair Lamb *Australian Year Book of International Law* 1965, p 51. See also generally J. R. V. Prescott *The Geography of Frontiers and Boundaries* (London, 1965), and V. Adami *National Frontiers in Relation to International Law* (London, 1927).
15. See N. A. Maryan Green *International Law; Law of Peace* (1973) pp 190–191.
16. See United States *Department of State Bulletin*, 21 October 1977, pp 896–897.
17. ICJ 1959, 209.
18. ICJ 1962, 6. Note also the *Argentina-Chile Arbitration Award*, given 14 December 1966; see p 190 below.
19. Actually in a 'Descriptive Minute' annexed to the Convention, which had the same force as though inserted in the Convention.

ated by mistake, and that acts of sovereignty performed by local Netherlands officials in the disputed areas could displace Belgium's title, holding that these acts were only of a routine and administrative character.[20] In the latter case, the disputed area was the region of a certain Temple sanctuary (Preah Vihear), and there was a conflict between the frontier according to a Treaty of 1904, whereby it was to follow a watershed line, and the frontier according to boundary maps completed in 1907, and communicated in 1908 to the Siamese (now Thai) Government. As the Siamese Government and later the Thai Government had by their conduct apparently accepted the map frontier line, and had not shown that any special importance was attached to the watershed line, the Court held that the map line should be preferred, and that the Temple area was under the sovereignty of Cambodia (now Kampuchea).[1] Following on these two early decisions of the International Court of Justice, there were, inter alia, three important arbitral awards in boundary disputes, that made in 1966 in regard to a boundary in the Andes area between Argentina and Chile,[2] that given in 1968 in the *Rann of Kutch Arbitration* between India and Pakistan,[3] and so far as concerns a maritime area and the islands located therein, that given in 1977 in the *Beagle Channel Arbitration*,[4] between Argentina and Chile.

More recently, in 1986, a special chamber of the International Court of Justice delivered another instructive judgment[5] in the frontier dispute between Burkina Faso (formerly Upper Volta) and the Republic of Mali—both African states. The importance of the decision lies in the principles relied upon by the chamber Judges and in the degree of weight attached to the materials before them. Due regard was paid to the principle of uti possidetis (see earlier in this chapter, p 157), to the role of equitable principles, to the prior history of the administrative organisation as to the relevant area, and to the extent to which the alleged acquiescence of one party might be taken into account. The materials treated as significant included legislative and regulatory texts, administrative orders and decrees, cartographic documentation and geographical contour features.

In the terminology of the subject of boundaries, there is a firmly established distinction between 'natural' and 'artificial' boundaries. Natural boundaries consist of mountains, rivers, the seashore, forests,

20. The Court also attached importance to the fact that, in 1892, the Netherlands did not repudiate a Belgian assertion of sovereignty in an unratified convention.
1. It was incidentally held that Thailand should withdraw forces stationed in the Temple area and restore to Cambodia certain objects removed from the temple.
2. For text of award, see HMSO publication 1966, bearing title, *Award of H.M. Queen Elizabeth II for the Arbitration of a Controversy between the Argentine Republic and the Republic of Chile, etc.*
3. For an article on this Arbitration, see Wetter 65 AJIL (1971) 346–357.
4. For the material terms of the award in this Arbitration, see Wetter *The International Arbitral Process* (1979) Vol 1, pp 307 et seq.
5. ICJ 1986, 554.

lakes and deserts, where these divide the territory of two or more states. But used in a political sense, the term 'natural boundary' has a far wider significance; it denotes the line defined by nature, up to which a state considers its territory should be extended or delimited at the expense of, or as protection against, other states. Artificial boundaries consist either of signs purposely erected to indicate the course of the imaginary boundary line, or of parallels of longitude or latitude.

Most difficulty as regards boundary delimitation has arisen in the case of water boundaries. And of such water boundaries, undoubtedly the most troublesome have been river boundaries, the problem being to decide what line in the river should be the boundary, and how it should be defined. In the case of a non-navigable river, the boundary line in the absence of contrary treaty provision runs down the middle of the river or down its principal arm if it has more than one, following all turnings of both banks. This line is known as the 'median line', and was adopted for non-navigable rivers by the Peace Treaties of 1919–1920. Where the river is navigable, the boundary line as a rule runs through the middle line of the deepest navigable channel, or as it was technically called—the *Thalweg*. In the Peace Treaties of 1919–1920, the expression employed was 'the median line of the principal channel of navigation' (see, eg, Treaty of St Germain) which is more or less the same as the *Thalweg*.[6]

Sometimes a boundary line lies along one bank of the river, while the whole bed is under the sovereignty of the other riparian state. This is an exceptional case arising under treaty or by long established peaceable occupation.

In the case of lakes and land-locked seas, the choice of the suitable boundary line depends on the depth, configuration, and use of the particular lake or sea concerned. In a shallow lake or sea, the navigable channel, if any, may be taken as a convenient boundary. More generally, the boundary line will be the 'median line', as in the case of a river. Many special apportionments have been made by treaty, but these have been of the most arbitrary character, and have followed no definite pattern or principle.

As to bays or straits, no general rules for boundary delimitation can be given, as considerations of history and geography come into play. On many occasions, however, the 'median line' has been accepted as the boundary.

Rivers

Where a river lies wholly within the territory of one state, it belongs entirely to that state, and generally speaking no other state is entitled to rights of navigation on it. Also where a river passes through several states,

6. As to the *Thalweg*, see the judgment of Mr Justice Cardozo in *New Jersey v Delaware* 291 US 361 (1934).

each state owns that part of the river which runs through its territory, but controversy has centred round the question of the rights of riparian and other states to navigate along the whole length of the river. Several writers on international law, commencing with Grotius, have been of opinion that there is a general right of passage for all states along such international rivers, but this view has never been generally accepted in practice, and is certainly not recognised as a customary principle of international law. Even writers who hold that there is freedom of navigation differ in their interpretation of the extent of this right:

a. some writers hold that such right of passage is confined to time of peace only;
b. others assert that only countries through which an international river passes have a right of passage;[7]
c. a third group maintains that the freedom of passage is without any limitation, subject only to the right of each state to make necessary and proper regulations in respect to the use of the river within its boundaries.

In principle, the interpretation (b) is a reasonable one, as states located on the upper portion of a river should not be debarred from access to the sea.

However, such measure of freedom of navigation as became established on international waterways was almost entirely the creation of treaty. The process began with the Treaty of Paris 1814, and the Vienna Congress of 1815,[8] and continued with the Peace Treaties of 1919–1920, and the subsequent general conventions concluded under the auspices of the League of Nations. As a result, there was, before the Second World War, a limited freedom of navigation on most of the great river systems of Europe, while river systems in other continents[9] came under special regional agreements, or had been opened for navigation, subject to varying restrictions, by the states having sovereignty over them. Also, as the necessary framework for a free right of passage, international authorities had been set up to administer particular river systems. An outstanding example of a European river subject to such international control and regulation was the Danube. Under the Treaty of Paris 1856, a body called the European Commission of the Danube consisting of rep-

7. The Permanent Court of International Justice stressed the principle of 'community of interest' of riparian states in an international river; see the *River Oder Case* (1929) Pub PCIJ Series A, No 23, at 27.
8. The Final Act of the Congress proclaimed the principle of freedom of navigation along the rivers of Europe, but in the events which happened, this principle did not receive full application.
9. For a brief account of the position in regard to river systems in other continents, see Fenwick *International Law* (4th edn, 1965) pp 459 et seq. As to rivers in the Middle East, see Hirsch 50 AJIL (1956) 81–100. As to the Moselle, see André Philippe *Le Port de Mertert et la Navigation de la Moselle* (1966).

resentatives both of riparian and non-riparian states was established to regulate navigation on the most important sector—the lower Danube, and on it were bestowed wide powers of administration. Under a 1921 convention which came into force in 1922, a Definitive Statute of the Danube was adopted confirming the powers of the Commission but setting up two Commissions in lieu thereof to manage the upper and lower portions of the river. These arrangements stabilised the situation on the river for many years, but were completely upset by the Second World War.

In 1946, the Paris Peace Conference caused to be inserted in the peace treaties with Bulgaria, Hungary and Roumania a clause that navigation on the Danube, other than traffic between ports of the same state, should be free and open on a footing of equality. In 1948, a conference to work out a new convention to govern navigation on the Danube met at Belgrade. This conference by a majority and against the wishes of the delegations of France, Great Britain, and the United States adopted a new convention providing for a Commission composed entirely of representatives of riparian states. These three countries claimed that the new statute was invalid as displacing the acquired rights of non-riparian states under the earlier treaties. It should be added that by its article 1, this convention provided for freedom of navigation on the Danube.[10]

The Peace Treaties of 1919–1920 internationalised certain European rivers, and also laid the foundations of the work of the League of Nations through its Communications and Transit Organisation, whose avowed object was to achieve freedom of navigation on all rivers. The League sought to accomplish this by sponsoring the adoption of international conventions providing for freedom of passage, such as the Convention on the Régime of Navigable Waterways of International Concern, and the Convention on Freedom of Transit,[11] both adopted at Barcelona in 1921.

The League of Nations also endeavoured to unify river law by sponsoring the conclusion in 1930 of conventions dealing, for this purpose, with collisions between inland river vessels, the registration of inland shipping, and the flags of such vessels. More recent conventions on the same lines are the Bangkok Convention of 22 July 1956, for facilitating inland navigation between Asian countries, and the Geneva Convention of 15 March 1960, relating to the Unification of Certain Rules concerning Collisions in Inland Navigation.

10. But omitted the provision in art 1 of the 1921 Convention that there should be no differentiation of treatment as between riparian and non-riparian states.
11. The principle of international freedom of transit by the most convenient routes was again proclaimed in the General Agreement on Tariffs and Trade (GATT) of 30 October 1947 (see art V).

Yet, these treaties have neither singly nor cumulatively established general right of passage along international rivers.

If general freedom of fluvial navigation appears too Utopian an ideal for international law to achieve, there is at least room for rules of more limited scope, tempering the restrictive practices followed by riparian states. Thus it might well be generally recognised that such states should not impose arbitrary or excessive dues and should not treat non-riparian states in a discriminatory or unequal manner, that access to fluvial ports should be free and equal, and that all navigable channels in internationally used waterways should be properly maintained, with due warning of dangers where necessary. Subject to this, the necessity for regional agreements dealing separately with the problems peculiar to each international river system cannot be gainsaid. As an example of regional co-operation, there may be cited the United States–Canada arrangements of 1954 for the St Lawrence Seaway, opened in 1959, as well as the International Joint Commission established by these two countries under their Boundary Waters Treaty of 1909.

So far as the injurious use of river waters. or the diversion of and interference with the free flow of rivers is concerned, international law has not advanced to the stage of settled rules in either domain.[12] It is believed that there is a general readiness of states to admit that any such use or diversion or interference by one riparian state injuring the free navigability of a navigable international waterway to the detriment of a co-riparian state is a breach of international law. Short of this, it is perhaps only possible to say that there is a duty on a riparian state not, by any use of the river waters under its control to cause grievous or irreparable damage of an economic character to other riparian states, for example pollution,[13] which might reasonably have been prevented. In 1957, it was decided by the Arbitral Tribunal in the *Lake Lanoux Arbitration* (France–Spain)[14] that there was no duty on a riparian state under customary international law to consult, or obtain the prior agreement of a co-riparian, as a condition precedent of its right to begin new river works, although in carrying out the project it must take into account, in a reasonable manner, the interests of that co-riparian. Where the rivers concerned form part of a drainage basin, each riparian state is entitled to a reasonable and equitable share in the beneficial uses of the waters of the basin, a principle applied in numerous treaties. Essentially, such problems of the utilisation of rivers by one state to the injury of other

12. Cf Hyde *International Law* (2nd edn, 1947) Vol I, pp 565 et seq.
13. A new problem of pollution has arisen in regard to navigation, through the recent more intensive use of tourist vessels plying in international rivers.
14. See 53 AJIL (1959) 156–171; [1957] International Law Reports 101.

states are a matter for treaty arrangement, or for settlement by arbitration or conciliation in the most equitable manner.[15]

For some time now the idea has been mooted of a general convention on the law of international watercourses, analogous to the Geneva Conventions of 1958 on the law of the sea. It has been justly claimed that the customary law on the subject of international rivers is inadequate to deal with the newer technological uses of rivers, the problems of pollution, and the trend towards systematic development of river basins as one unit. On the other hand, it is an equally cogent objection to such a proposal that to attempt to draft a universal text, encompassing the various regional, local, and other aspects, peculiar to certain international rivers and certain international drainage basins, is not practicable, and that regional or local régimes are preferable to a universal régime, which in the nature of things can only consist of highly general, if not abstract rules.

At its 52nd Conference at Helsinki in 1966, the International Law Association approved a set of draft articles on the uses of waters of international rivers, and resolved that these should bear the title of the 'Helsinki Rules on the Uses of Waters of International Rivers'.[16] These Rules, which have commanded a large degree of approval, adopted the basic principle of the equitable utilisation of the waters of an international drainage basin, and broke new ground in certain respects, for example in the proposed rules to deal with water pollution and floating timber.[17] At least, the draft articles reflect an enlightened appreciation of the new problems connected with regulations for the waters of international rivers and drainage basins, and could well serve as a basic draft for a proposed general convention. Generally speaking, there is a movement to lay more stress on matters such as irrigation, hydro-electric power, flood control and pollution rather than on navigation simpliciter.

The law of the non-navigational uses of international watercourses has been one of the subjects under study or consideration by the International Law Commission. The use of the expression 'international watercourses' represents a shift of emphasis from concentration on rivers only to the wider subject of all trans-national waterways, whether these be

15. For the application of principles of equity in a case concerning a disputed use of river waters, see judgment of Judge Manly O. Hudson in the *Diversion of Water from the Meuse Case* (1937) Pub PCIJ Series A/B, Fasc No 70, at pp 73 et seq. In past water disputes, the so-called principle of 'equitable apportionment' has been applied. Some such principle underlies the Agreement signed on 19 September 1960, by India, Pakistan, and the International Bank for Reconstruction and Development, in settlement of the dispute since 1948 relating to the Indus, Chenab, and Jhelum Rivers. Pakistan had claimed that Indian activities were interfering with its measures for flood control, irrigation, and developing hydro-electric power.
16. See Report of the 52nd Conference of the Association 1966, pp 484–533 for text of the Rules, and commentary thereon.
17. See Chapters 3 and 5, respectively, of the Rules.

rivers, on the one hand, or, on the other hand, lakes, canals, dams, reservoirs, and other surface waters, and as well underground waters. The International Law Commission gave consideration to waters flowing into mainstream rivers, and recognised that rules for the regulation of river systems could not serve, without more, to iron out inequalities in resources between states or to contribute to the solution of questions of the sovereign control of states over their natural territorial resources.[18] An international drainage basin is embraced in the expression 'international watercourses'; it involves the concept of an integrated area drained by a single river system passing through two or more states, and has been defined as 'a geographical area extending to or over the territory of two or more States ... bounded by the watershed extremities of the system of waters, including surface and underground waters, all of which flow into a common terminus'.[19] Each international drainage basin would in principle seem to require its own, peculiar, workable set of rules for co-basin states, rather than the application of global rules formulated in the abstract, or in an absolute manner for all international watercourses. Semble, there is at least a duty on a riparian state to consider the effect of its activities on co-riparian or co-basin states.[20] Finally, there is the problem of trans-border pollution of rivers and lakes, adding to the complexity of the whole subject.

3. SERVITUDES AND TERRITORIAL FACILITIES

Under present practice, an international servitude[1] may be defined as an *exceptional* restriction imposed by treaty on the territorial sovereignty of a particular state whereby the territory of that state is put under conditions or restrictions serving the interests of another state, or non-state entity. A well-known example is the condition that the frontier town of Hüningen in Alsace should in the interests of the Swiss Canton of Basle never be fortified.

Servitudes must be rights in rem, that is attached to the territory under restriction, and involving something to be done or something that the state bound by the servitude must refrain from doing on that territory,[2] for example, fishery rights in the maritime belt, the right to build a railway through a territory, the use of ports, rivers, and aerodromes, etc. Since

18. See pp 125–127 above.
19. See Garretson, Olmstead and Hayton *The Law of International Drainage Basins* (1968) p 4, and passim, B. R. Chauhan *Settlement of International Water Law Disputes in International Drainage Basins* (1981).
20. Cf the Report of the International Law Commission on the Work of its 31st Session, 1979, para 130.
1. For a treatise on the subject, see Väli *Servitudes of International Law* (2nd edn, 1958).
2. An illustration is art 7 of the Lateran Treaty of 1929 (restriction upon construction in adjacent Italian territory of new buildings that may overlook the Vatican City).

the right is one in rem, it follows that the servitude remains in force whatever happens to the territory of the state bound by the servitude; for example, if it be annexed or merged in another state.

So far as government practice is concerned, the doctrine of international servitudes is relatively modern. In the *North Atlantic Coast Fisheries Arbitration* (1910),[3] the Permanent Court of Arbitration stated that there was no evidence that the doctrine was one with which either American or British statesmen were conversant in 1818.

Servitudes were, however, frequently referred to in books by writers on international law acquainted with the Roman and Civil law. In the late nineteenth and early twentieth century, there was some evidence that government advisers were becoming more familiar with the notion, and in 1910 in the *North Atlantic Coast Fisheries Arbitration* the argument was advanced that certain fishery rights granted to the United States by Great Britain constituted a servitude, but the Permanent Court of Arbitration refused to agree with this contention.

In a later case before the Permanent Court of International Justice, namely *The Wimbledon* (1923),[4] it was claimed that the right of passage through the Kiel Canal was a state servitude, but the majority of the Court did not accept this contention, although it found favour with Judge Schücking. In the *Right of Passage over Indian Territory Case* (1960),[5] the International Court of Justice gave recognition to a customary right of passage for Portuguese private persons, civil officials, and goods over Indian territory between Daman and certain Portuguese enclaves, but inasmuch as it was held that such right was not general, being inapplicable to armed forces, armed police, and arms or ammunition, and was also subject to regulation and control by India, the right was hardly a servitude stricto sensu.

Initially, the doctrine of international servitudes was imported from the private law, and many authorities are of opinion that its translation to the international field has not been a success. There are cogent grounds for suggesting that the doctrine is not really a necessary one, and that international law can quite well dispense with its application. This view is at least supported by the rejection in the two cases mentioned of particular claims to servitudes.

If the term 'servitude' be inappropriate or legally inexact, there ought nevertheless to be some convenient expression to embrace the rights given to states under the numerous arrangements of recent years for the granting of air, naval, or military bases,[6] or for the establishment of satellite, space

3. *United Nations Reports of International Arbitration Awards* vol XI, 167.
4. (1923) Pub PCIJ Series A, No 1.
5. ICJ 1960, 6.
6. A matter of controversy is the extent to which such bases may be contrary to international law. This turns, inter alia, on the point whether art 51 of the UN Charter ('inherent right of individual or collective self-defence' against armed attack) permits

vehicle or missile tracking stations (for example the Exchange of Notes at Washington of 15 March 1961, between the British and United States Governments concerning the Establishment for Scientific Purposes of a Space Vehicle Tracking and Communications Station in Bermuda), or for permitting the installation of trans-border or trans-national pipelines.[7] Perhaps the expression 'territorial facilities' would be apt to cover these.[8] In regard to satellite and spacecraft tracking facilities, the point has been raised whether the grantor state is bound to extend the benefit of these to launching states other than the grantee state. This is certainly open to question.

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prior preparations and co-ordination for the contingency that an armed attack should occur against one state member of a collective defence grouping.

7. See article by J. B. Ballem QC 'International Pipelines: Canada–United States' in (1981) 18 Can YIL 146–160.
8. The word 'facility' is in fact used, apparently in this sense, in art 7 of the Treaty of 27 January 1967, on the Principles Governing the Activities of States in the Exploration and use of Outer Space, including the Moon and other Celestial Bodies (launching base of space objects).

PART 3

Rights and duties of states

CHAPTER 8

Jurisdiction

1. GENERAL OBSERVATIONS

The practice as to the exercise by states of jurisdiction[1] over persons, property, or acts or events varies for each state, and these variations are due to historical and geographical factors which are nonetheless coming to play a less important role in measure as, by reason of technological developments, countries have become geographically more knit together. Historically, states, such as Great Britain, in which sea frontiers predominated, paid primary allegiance to the *territorial* principle of jurisdiction, according to which each state might exercise jurisdiction over property and persons in, or acts or events occurring within its territory;[2] this was because the free or unrestricted movement of individuals or of property to or from other countries did not in the past occur so readily or frequently as between states bounded for the most part by land frontiers. On the other hand, most European states took a much broader view of the extent of their jurisdiction precisely because the continent is a network of land or river frontiers, and acts or transactions of an international character were more frequent owing to the facility and rapidity of movement across such frontiers.

However, with the increasing speed of communications, the more sophisticated structure of commercial organisations or enterprises with trans-national ramifications, and the growing international character of criminal activities (eg, in the fields of narcotic drugs and currency transactions) there has been a noticeable trend towards the exercise of jurisdiction on the basis of criteria other than that of territorial location.

International law sets little or no limitation on the jurisdiction which a particular state may arrogate to itself. It would appear to follow from

1. See Judge Philip Jessup's study 'Jurisdiction', in U.S. Naval War College International Law Studies (1980) 303–318, and Mann 'The Doctrine of Jurisdiction in International Law' (1964) Hague Recueil 9. The three principal domains of jurisdiction are those of judicial process, administrative or other enforcement of laws and orders, and the so-called 'prescriptive' jurisdiction, ie amenability to legislation, regulations and judicial orders.
2. For affirmations of the territorial principle, see *Board of Trade v Owen* [1957] AC 602 at 625, 626, [1957] 1 All ER 411 at 416, and *Treacy v DPP* [1971] AC 537 at 561–564.

the much discussed *Lotus Case* (1927),[3] decided by the Permanent Court of International Justice, that there is no restriction on the exercise of jurisdiction by any state unless that restriction can be shown by the most conclusive evidence to exist as a principle of international law. In that case the Permanent Court did not accept the French thesis—France being one of the parties—that a claim to jurisdiction by a state must be shown to be justified by international law and practice. In the Court's opinion, the onus lay on the state claiming that such exercise of jurisdiction was unjustified, to show that it was prohibited by international law.

There is one practical limitation on the exercise of wide jurisdiction by a particular state. To quote a distinguished Judge,[4] 'no State attempts to exercise a jurisdiction over matters, persons or things with which it has absolutely no concern'. As, generally, persons or things actually in the territory of a state and under its sovereignty must affect that state, it will be found that the territorial basis of jurisdiction is the normal working rule.

2. TERRITORIAL JURISDICTION

The exercise of jurisdiction by a state over property, persons, acts or events occurring within its territory is clearly conceded by international law to all members of the society of states. The principle has been well put by Lord Macmillan:[5]

> 'It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits.'

According to the British practice, the mere physical presence of any person or thing within the territory is sufficient to attract jurisdiction without the necessity for either domicile or residence.[6] Indeed, under the so-called principle of 'transient jurisdiction', a British court may exercise jurisdiction in regard to a person, based on the service of proceedings on him during a mere fleeting visit to British territory.[7] Furthermore, the

3. Pub PCIJ (1927), Series A, No 10.
4. Mr Justice H.V. Evatt in (1933) 49 CLR at 239.
5. *Compania Naviera Vascongado v Cristina SS* [1938] AC 485 at 496–7.
6. *Bank of Toronto v Lambe* (1887) 12 App Cas 575 at 584.
7. Cf *Carrick v Hancock* (1895) 12 TLR 59. Under the Supplementary Protocol of 15 October 1966 to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 26 April 1966 (Hague Conference on Private International Law), a judgment based on the exercise of such jurisdiction is not to be recognised or enforced by the courts of another state if the defendant so requests. Criminal jurisdiction may also be legitimately exercised, notwithstanding that the accused has been brought within British territory by illegal means; see *R v Plymouth Justices ex p Driver* [1986] QB 95.

legislature is presumed to intend that its legislation shall be restricted in its application to persons, property and events in the territory over which it has territorial jurisdiction, unless a contrary intention appears, and statutes are construed with reference to this presumed intention.[8] A similar rule of construction is applied in the United States.[9]

For the purposes of the exercise of territorial jurisdiction, it has been customary to assimilate to state territory: (a) the maritime coastal belt or territorial sea; (b) a ship bearing the flag of the state wishing to exercise jurisdiction; and (c) ports. The nature and extent of the jurisdiction permissible in the territorial sea, and by the flag state over ships of its nationality, are dealt with in Chapter 9, below, on the Law of the Sea, so that in the present chapter, discussion will be confined to jurisdiction in respect to ports.

Ports

A port is part of internal waters, and therefore is as fully portion of state territory as the land itself. Nevertheless, ships of other states are subject to a special régime in port which has grown from usage, and varies according to the practice of the state to which the port belongs.

The general rule is that a merchant *vessel* enters the port of a foreign state subject to the local jurisdiction. The derogations from this rule depend on the practice followed by each state. There is, however, an important exception which belongs to the field of customary international law, namely, that a vessel in distress has a right to seek shelter in a foreign port, and on account of the circumstances of its entry is considered immune from local jurisdiction, subject perhaps to the limitation that no deliberate breaches of local municipal law are committed while it is in port. On the other hand, some authorities concede only a qualified immunity to such vessels.

As we shall see below,[10] foreign *public vessels* are subject to special rules of jurisdiction and their status in port is considered in connection with these rules.

Where offences or misdemeanours are committed on board vessels berthed in foreign ports, jurisdiction depends on the practice followed by the territorial state of the port concerned.

According to the British practice, foreign merchant vessels in British ports and British merchant vessels in foreign ports are subject to the complete jurisdiction and police regulations of the state of the port.[11] But in criminal matters, it is not usual for British authorities to intervene and enforce the local jurisdiction unless their assistance is invoked by or on

8. *Blackwood v R* (1882) 8 App Cas 82 at 98; *MacLeod v A-G for New South Wales* [1891] AC 455.
9. *United States v Bowman* 260 US 94 (1922).
10. See below, pp 224–226, 285.
11. See Smith *Great Britain and the Law of Nations* (1935) Vol II, pp 253–4.

behalf of the local representative—for example, a consul—of the flag state of the vessel, or those in control of the vessel, or unless the peace or good order of the port is likely to be affected. British practice maintains that in each case it is for the authorities of the territorial state to judge whether or not to intervene.

The practice of the United States and of France is somewhat different from that of Great Britain, a distinction being drawn between: (a) matters of internal discipline or internal economy of the vessel, over which the authorities of the flag state, including consuls, are considered to have primary jurisdiction; and (b) matters affecting the peace or good order of the port, which are reserved for the jurisdiction of local courts and local authorities. Thus, in *Wildenhus' Case*,[12] the United States Supreme Court held that the stabbing and killing of one Belgian seaman by another on board a Belgian ship in an American port was subject to local prosecution, and was excluded from jurisdiction by the Belgian Consul.

The differences between the various state practices are far more a question of form than of substance, and it would appear possible by international agreement to bridge these artificial gaps (cf in this connection the Convention and Statute of 9 December 1923, on the International Régime of Maritime Ports).

Technical extensions of the territorial jurisdiction

Apart from the assimilation to territory of the territorial sea, of ships at sea, and of ports, certain technical extensions of the principle of territorial jurisdiction became necessary in order to justify action taken by states in cases where one or more constituent elements of an act or offence took place outside their territory. These extensions were occasioned by the increasing facilities for speedy international communication and transport, leading to the commission of crimes in one state which were engineered or prepared in another state. Some states in whose territory such ancillary acts took place, declined to prosecute or punish the offenders responsible on the ground that, as the acts were accessory to a principal offence committed elsewhere, the territorial jurisdiction did not apply.[13]

12. (1887)120 US 1.

13. See in this connection, the House of Lords decision in *Board of Trade v Owen* [1957] AC 602, [1957] 1 All ER 411, to the effect that a conspiracy in England to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie before an English court. More recently, it was held in the *A-G's Reference (No 1 of 1982)* [1983] 2 All ER 721, [1983] QB 751, that a conspiracy to defraud, to be carried out abroad, is not indictable in England, even if its performance would damage the property interests of a company within the English jurisdiction and even if its performance would injure a person resident in England or a company located in England by causing that person or company damage or loss abroad. See also *R v Cox* [1968] 1 All ER 410 (alleged conspiracy to commit fraud in France), *Treacy v DPP* [1971] AC 537, [1971] 1 All ER 110 (offence of blackmail may be committed through the posting in England of a letter with menaces, and which is received in a foreign state), and p 206, n 16, below.

But several states met the new conditions by technically extending the territorial jurisdiction:

a. Applying the *subjective territorial principle*, these states arrogated to themselves a jurisdiction to prosecute and punish crimes commenced within their territory, but completed or consummated in the territory of another state. Although this principle was not so generally adopted by states as to amount to a general rule of the law of nations, particular applications of it did become a part of international law as a result of the provisions of two international conventions, the Geneva Convention for the Suppression of Counterfeiting Currency (1929), and the Geneva Convention for the Suppression of the Illicit Drug Traffic (1936).[14] Under these conventions, the states parties bound themselves to punish, if taking place within their territory, conspiracies to commit and intentional participation in the commission of counterfeiting and drug traffic offences wherever the final act of commission took place, as also attempts to commit and acts preparatory to the commission of such offences, and in addition agreed to treat certain specific acts as distinct offences and not to consider them as accessory to principal offences committed elsewhere (in which case these specific acts would not have been punishable by the state in whose territory they took place).

b. Pursuant to the *objective territorial principle*, certain States applied their territorial jurisdiction to offences or acts commenced in another state, but: (i) consummated or completed within their territory; or (ii) producing gravely harmful consequences to the social or economic order inside their territory. The objective territorial theory was defined by Professor Hyde as follows:

> 'The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein justifies the territorial sovereign in prosecuting the actor when he enters its domain.'

Illustrations of the theory were given in an official League of Nations report concerned with the criminal jurisdiction of states over offences committed outside their territory;[15] these were:

a. a man firing a gun across a frontier and killing another man in a neighbouring state;

14. This Convention has continued to remain in force as between its parties notwithstanding the penal repression provisions of the Single Narcotic Drugs Convention of 1961. A recent example of the application of the subjective territorial principle is the Australian case of *R v Nekuda* (25 February, 1988 unreported); accused sentenced for sending poisoned chocolates from Australia to West Germany with intent to cause grievous bodily harm).
15. Report of Sub-Committee of League of Nations Committee of Experts for the Progressive Codification of International Law (1926), on Criminal Competence of States in respect of Offences committed outside their Territory.

b. a man obtaining money by false pretences by means of a letter posted in Great Britain to a recipient in Germany.[16]

The objective territorial principle was applied in the provisions of the two international conventions just referred to, and has also been recognised in decisions of English, German, and American courts.[17] But the most outstanding example of its application has been the decision of the Permanent Court of International Justice in 1927 in the *Lotus Case*.[18] The facts in that case were shortly, that a French mail steamer, the *Lotus*, collided on the high seas with a Turkish collier, due allegedly to the gross negligence of the officer of the watch on board the *Lotus*, with the result that the collier sank and eight Turkish nationals on board perished. The Turkish authorities instituted proceedings against the officer of the watch, basing the claim to jurisdiction on the ground that the act of negligence on board the *Lotus* had produced effects on the Turkish collier, and thus according to the rule mentioned above, on a portion of Turkish territory. By a majority decision, the Permanent Court held that the action of the Turkish authorities was not inconsistent with international law.

The objective territorial principle plays a recognised role in respect to the exercise of jurisdiction as to multi-national corporations, sometimes called 'trans-national corporations'. The sociological and economic problems created by such corporations have for some time been under examination by certain international organisations, including the United Nations and the International Labour Organisation, which were responsible respectively for two pioneering studies published in 1973, namely, *Multinational Corporations in World Development* (UN), and *Multinational Enterprises and Social Policy* (ILO). In 1976, the Organisation for Economic Co-operation and Development (OECD) established a

16. Cf now *R v Baxter* [1972] QB 1, [1971] 2 All ER 359 (attempt to obtain property by deception by posting letters in Northern Ireland to England; offence committed in England, and subject to jurisdiction of English courts). As to a conspiracy entered into outside jurisdiction of English courts to commit an offence in England, see *DPP v Doot* [1973] AC 807, [1973] 1 All ER 940. The objective territorial principle applies a fortiori where the person committing the relevant offence *intends* to produce, and actually does produce detrimental consequences in the territory of the state seeking to exercise jurisdiction; see *United States v Fernandez* 496 F (2d) 1294 (1974) (cashing in Mexico of stolen United States social security cheques drawn on the American Treasury).

17. See, for example, *R v Nillins* (1884) 53 LJMC 157; *R v Godfrey* [1923] 1 KB 24; *Ford v United States* 273 US 593 (1927); and *DPP v Stonehouse* [1978] AC 55; and for a discussion of the principle in the context of 'comity', the speech of Lord Diplock in *Treacy v DPP* [1971] AC 537 at 561–562. United States courts have exercised extra-territorial jurisdiction under anti-trust legislation in respect to such arrangements between foreign corporations as have or may have monopoly-producing effects or repercussions in the United States; and see also p 208 below. In the German Federal Republic, an alien may be rightfully convicted of an offence, committed abroad, of disclosing official secrets, if the result of such disclosure be to endanger the security of forces stationed in the Republic's territory; see 52 AJIL (1958) 799.

18. Pub PCIJ (1927) Series A, No 10. The case no longer applies; see p 40, n 16 above.

Committee on International Investment and Multinational Enterprises, which has continued since then to meet and examine the relevant problems of multinational corporations, and to secure wider recognition and acceptance of the Guidelines for Multinationals adopted by OECD governments in the same year, which Guidelines contained recommendations about such areas as the disclosure of information, competition, taxation, employment and industrial relations. However, consideration of the general international and trans-national problems related to multinational corporations and their extra-territorial ramifications lies beyond the scope of this book. The difficulties in applying to these enterprises traditional notions of jurisdiction have been well expressed[19] as follows:

> 'The multi-national corporation, by definition, is established and has activities in more than one State. If a strict territorial approach is adopted, each State may regulate only those activities within its borders. Such an approach could have serious effects. It might make it impossible for the corporation to do business by subjecting it to contradictory or confusing legal régimes, or on the other hand, it might allow the corporation to escape liability for conduct whose components are legal in each of the States in which they take place but which, taken as a whole, is illegal under the laws of some or all of the States concerned.'

One approach for which there is authority is that the country in the territory of which the effects or results are felt of action taken by the head office (in another country) of the multinational corporation is entitled to exercise jurisdiction, eg against the servants or assets of branches or subsidiaries locally situated.[20] It is true that the head office's action may have concurrent effects in a large number of countries, the jurisdiction of all of which could then be attracted without being debarred by international law, so that ultimately it will be necessary to work out some appropriate code for the exercise of jurisdiction under international law over multinational corporations in order to avoid jurisdictional conflicts.

Apart from the application of the objective territorial principle, another possibility has been to treat the subsidiary as notionally an alter ego of the foreign parent corporation, so that jurisdiction may be exercised over

19. By John R. Stevenson in *Department of State Bulletin*, 12 October 1970, p 429. There have been endeavours (eg, by the United Nations) to circumvent such problems of jurisdiction by establishing codes of conduct for multinationals, such as the above-mentioned OECD Guidelines; see Horn (ed) *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980); Feld *Multinational Corporations and U.N. Politics: The Quest for Codes of Conduct* (1980); Wells *Technology and Third World Multinationals* (Working Paper No 19, ILO, 1982); C. D. Wallace *Legal Control of the Multinational Enterprise: National Regulatory Techniques and the Prospects for International Controls* (1982); and F. E. Nattier 'Regulation of Transnational Corporations: Latin American Actions in International Fora' (1984) 19 *Texas International Law Journal* 265–283.

20. See, eg, *United States v Aluminium Co of America* 148 F (2d) 416 (1945).

the parent corporation by the state where the subsidiary is located, this being deemed the same as the exercise of jurisdiction over the subsidiary.[1] This, of course, is an extension of the nationality principle of jurisdiction considered below in this chapter, involving the attribution of what may be described as a 'notional' nationality to the subsidiary, thus allowing the exercise of extra-territorial jurisdiction over it; as applied by the Court of Justice of the European Communities, the approach is based on the doctrine of a 'single enterprise' theory of the nationality of related trans-national corporations, therefore discarding for this purpose the concept of separate identity of each member corporation of an integrated group of these.

Reference should be made to what apparently purports to be an extension by way of degree of the objective territorial principle, namely, the 'effects' doctrine adopted by American federal courts under which, especially in anti-trust proceedings, jurisdiction is exercised extra-territorially on the basis of the effects or consequences, however remote, within the United States and which are deemed to be of so reprehensible a nature (provided that they are *direct*), economic or otherwise, as to attract or necessitate such jurisdiction. Having regard to the possible serious results for their trading interests which the awards of American federal courts may involve (triple damages may be awarded), this 'effects' jurisdiction has been objected to by the United Kingdom,[2] Australia and other countries, and has led to the passage of local legislation to preclude the enforcement in the objecting countries of any element, evidentiary, procedural or otherwise of the American proceedings or judgments.[3] It is claimed that the 'effects' jurisdiction, as asserted by American courts, is contrary to international law, and that the local protective legislation is validly opposable to such American extra-territorial process.

1. Cf the decisions of the Court of Justice of the European Communities in Case 48/69: *Imperial Chemical Industries Ltd v EC Commission* [1972] CMLR 557 at 629, and Case 27/76: *United Brands Co v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429.
2. But cf *DPP v Stonehouse* [1978] AC 55 at 59. For illustrations of the principles governing the application of the 'effects' doctrine, see *Grunenthal GmbH v Hotz* 511 F Supp 582 (1981), and *Schoenbaum v Firstbrook* 405 F (2d) 200 (1968), revsd on other grounds, 405 F (2d) 215. The 'effects' doctrine, as followed by American federal courts, is discussed in Buergenthal and Maier *Public International Law* (1985) pp 171 et seq, with references to leading United States decisions. The United States case law is not all one way on two points, namely: (i) whether or not the alleged 'effect' necessary to support extra-territorial jurisdiction must be substantial; and (ii) whether or not an intent to affect trade in the United States is alone sufficient for such jurisdiction.
3. Examples of such legislation are the United Kingdom Protection of Trading Interests Act 1980, and the Australian Foreign Proceedings (Prohibition of Certain Evidence) Act 1977. The disputed jurisdiction led to an Australia-United States Agreement of 29 June 1982, providing for consultation, inter alia, in respect to conflicts arising out of the extra-territorial application of anti-trust laws. The subject of the 'blocking' legislation is discussed by A.V. Lowe in 75 AJIL (1981) 257, and by D.L. Jones in (1982) 8 Commonwealth Law Bulletin 353.

Territorial jurisdiction over aliens

Territorial jurisdiction is conceded by international law as much over aliens as over citizens of the territorial state. As Judge J. B. Moore pointed out in the *Lotus Case*, no presumption of immunity arises from the fact that the person against whom proceedings are taken is an alien; an alien can claim no exemption from the exercise of such jurisdiction except so far as he may be able to show either: (i) that he is, by reason of some special immunity, not subject to the operation of the local law; or (ii) that the local law is not in conformity with international law.

Territorial jurisdiction over criminals

Great Britain (by long tradition), the United States, and several other countries, adhere for the most part to a territorial theory of criminal competence. Indeed, the British theory, which has been modified as a result of the two international conventions mentioned above,[4] goes so far as to deny to states the right to assume over non-nationals a criminal jurisdiction which is not properly territorial.[5] But the practice of most other states departs from an exclusive territorial theory.

The territorial criminal jurisdiction is founded on various principles. Its normal justification is that, as a matter of convenience, crimes should be dealt with by the states whose social order is most closely affected, and in general this will be the state on whose territory the crimes are committed.[6] Important considerations also are that the territorial state has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes whether committed by subjects or citizens, or by aliens resident or domiciled within its territory.[7]

Although, as we have seen above, the territorial principle has been extended in several ways, it would appear from the *Cutting Case* (1887)[8] that such principle alone does not of itself justify a state prosecuting a non-national temporarily within its territory for an alleged offence against its laws, committed abroad on a prior occasion. The United States Government maintained this position in its exchanges with the Mexican Government over this case, which concerned the arrest in Mexico of an American citizen, Cutting, for having published in Texas an article alleged to constitute a libel on a Mexican citizen. The objections formulated by

4. See above, p 205.
5. According to Lord Diplock in *Treacy v DPP* [1971] AC 537 at 561: 'It would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no harmful consequences there'.
6. See Report of Sub-Committee of League of Nations Committee of Experts for the Progressive Codification of International Law (1926), on Criminal Competence, etc, cited above, p 205, n 15.
7. Harvard *Research on International Law* (1935), Jurisdiction with respect to Crime, pp 483 et seq.
8. Moore's *Digest of International Law* (1906) Vol II, p 228.

the United States against the application of the territorial principle to such a case, have subsequently been widely supported.

Exemptions from and restrictions upon the territorial jurisdiction
A degree of immunity from the territorial jurisdiction may be enjoyed by:

a. Foreign states and heads of foreign states.
b. Diplomatic representatives, and consuls of foreign states.
c. Public ships of foreign states.
d. Armed forces of foreign states.
e. International institutions.

In the case of categories (a) and (c), viz. foreign states and heads of foreign states, and public ships of foreign states, respectively, whatever may have been the position historically before the developments in the weight of state practice in the 1970s, and also in the case of category (d), viz. armed forces of foreign states, it would be now difficult completely and exhaustively to express the extent of their jurisdictional immunity in terms of recognised principles of international law,[9] except to say that international law permits or has been permitting to states a wide area of discretion in the degree to which jurisdictional immunity may be conceded to these categories, and in the manner in which limits may be set on the extent of such jurisdictional immunity. International law certainly does not now prohibit states from prescribing restrictions on the scope of such immunity from jurisdiction of these categories. So far as category (d), viz. armed forces of foreign states, is concerned, it is difficult to extrapolate from the domestic legislation of states and from the welter of treaties and agreements concerning the status of foreign visiting forces located in the territory of host states any clear-cut general principles of international law binding states to concede a specific measure, if any, of jurisdictional immunity.

a. Foreign states and heads of foreign states
Historically, it was perhaps true to say that, save and except in the case of the involvement of states in transactions of a commercial or non-governmental nature, there was a general weight of practice supporting the existence of a principle of international law that foreign states and heads of foreign states might sue in territorial courts, but could not as a rule be sued there unless they voluntarily submitted to the jurisdiction of those courts either ad hoc or generally by a treaty or treaties. As pointed out in Chapter 6, above, such immunity was normally dependent on recognition by the state in the forum of which proceedings were brought

9. The topic of jurisdictional immunities of states and of their property is one that the International Law Commission has been studying since 1978. The Commission adopted a set of draft articles on the subject in 1985–1986, and governments have been requested to submit observations thereon to the Secretary-General of the United Nations.

against the foreign state or foreign head of state. In English courts, as distinct from the courts in a number of continental countries, the rule of absolute jurisdictional immunity prevailed, without exception, for the case of involvement of foreign states in transactions of a commercial or non-governmental nature.

The same principles were applicable to foreign states as to the Sovereigns of such states, but it was a curious fact that the rule of jurisdictional immunity used to be stated—as for example by Chief Justice Marshall of the United States Supreme Court in 1812 in the classical case of *Schooner Exchange v M'Faddon*[10]—in terms which applied only to foreign Sovereigns. The explanation perhaps was that the idea of the state as a juristic personality, distinct from its Sovereign, was of recent origin only. Thus, as late as 1867, doubt existed in England whether a foreign state under a republican form of government could sue in English courts, although this right had always been conceded to foreign Sovereigns.[11]

Several principles were suggested as the basis of this immunity:

i. Par in parem non habet imperium. One sovereign power could not exercise jurisdiction over another sovereign power, but only over inferiors.
ii. Reciprocity or comity.[12] In return for a concession of immunity, other states or Sovereigns of such states made mutual concessions of immunity within their territory.
iii. The fact that in general the judgment of a municipal court could not be enforced practically against a foreign state or Sovereign thereof, or that the attempt to do so would be regarded as an unfriendly act.
iv. An implication from the circumstances; the very fact that a state allowed a foreign state to function within, or a foreign Sovereign to visit, its territory, signified implicitly a concession of immunity, as no foreign state or foreign Sovereign could be supposed to enter on any other terms. One judge well described this as 'an implied obligation not to derogate from a grant'.[13]
v. The merits of a dispute involving the transactions or policy of a foreign government ought not to be canvassed in the domestic courts of another country.[14]

The rule of jurisdictional immunity of foreign states and foreign heads

10. (1812) 7 Cranch 116.
11. *United States of America v Wagner* (1867) 2 Ch App 582.
12. But this was said by Lord Porter in *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582 at 613 to be not a basis of, nor to limit the immunity of a state.
13. Jordan CJ of the New South Wales Supreme Court, in *Wright v Cantrell* (1943) 44 SRNSW 45 at 52 et seq.
14. Per Lord Denning in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 422, [1957] 3 All ER 441 at 463, 464.

of states, as previously applicable in English courts and in the courts of certain other countries, had two aspects of significance:

1. An immunity as to process of the court.
2. An immunity with respect to property belonging to the foreign state or foreign Sovereign.

Aspect (1) may best be considered in the light of the British practice. The English authorities laid it down that the courts would not by their process 'implead' a foreign state or foreign Sovereign; in other words, they would not, against its will, make it a party to legal proceedings whether the proceedings involved process against its personality or aimed to recover from it specific property or damages. In the *Cristina*,[15] it was held that a writ in rem for the recovery of possession of a vessel, requisitioned by a government, impleaded that government since it commanded the defendants to appear or to let judgment go by default, thus imposing a clear alternative of submitting to jurisdiction or losing possession of the ship and ancillary rights. The writ and subsequent proceedings were accordingly set aside.

This aspect of the rule of immunity was so strictly applied that process even *indirectly* 'impleading' a foreign state or foreign Sovereign was treated as to that extent bad. It was consistent with such strict application that British and American courts should hold state-owned commercial ships to be immune from all territorial process.[16]

As to aspect (2) of the rule of immunity, the courts applied the principle that they would not by their process, whether the foreign state or foreign Sovereign was a party to the proceedings or not, allow the seizure or detention or judicial disposition of property which belonged to such state or Sovereign, or of which it was in possession or control. If the foreign state or foreign Sovereign had no title to the property alleged to be impleaded, it should at least show rights to possession or control in order to claim immunity. Aspect (2) was applied in the case mentioned above, the *Cristina*, in addition to aspect (1), the House of Lords ruling that a writ in rem issued in Admiralty against a vessel in the control of a foreign government for public purposes, imported process against the possessory rights of a foreign Sovereign. As a condition of obtaining immunity, the foreign government needed only to produce evidence showing 'that its claim is not merely illusory, nor founded on a title, manifestly defective'.[17] It was not bound to give complete proof of its proprietary or possessory title.

The rule of immunity was not confined to proceedings in rem, for immunity could be claimed even if the proceedings were in personam but

15. *Compania Naviera Vascongado v SS Cristina* [1938] AC 485.
16. See below, pp 224–226.
17. See *Juan Ysmael & Co Inc v Government of Republic of Indonesia* [1955] AC 72, [1954] 3 All ER 236. Cf *Republic of Mexico v Hoffman* 324 US 30 (1945).

would if successful have the indirect effect of depriving the foreign state or foreign Sovereign of proprietary or possessory rights, or of any rights of control.[18]

The immunity of a foreign state or foreign Sovereign from jurisdiction was not in all cases an absolute one, as sometimes, depending on the nature of the remedy sought,[19] there was no exemption from process.[20] Thus the following proceedings appeared to be exceptions to the rule of immunity:

i. Suits relating to the title to land within the territorial jurisdiction, not being land on which legation premises were established. The principle which was applied here was that the local state had too vital an interest in its land, to permit of any derogation from its jurisdiction over suits concerned with the title thereto.
ii. A fund in court (a trust fund) was being administered in which a foreign state or foreign Sovereign was interested, but not if the alleged trustee happened also to be a foreign sovereign government.[1]
iii. Representative actions, such as debenture holders' actions, where a foreign state or foreign Sovereign was a debenture holder.
iv. The winding-up of a company in whose assets the foreign state or foreign Sovereign claimed an interest.

State practice also showed that not all states were ready to concede a full extent of immunity from jurisdiction. First, some states followed what was called a 'restrictive', as opposed to an 'absolute' theory, by applying the distinction mentioned above between state-like activities of foreign states or Sovereigns (jure imperii) and their purely commercial activities (jure gestionis), allowing immunity only in the former instance.[2]

18. See *United States and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582, [1952] 1 All ER 572 where the doctrine of immunity of a foreign Sovereign state was applied to a claim to recover property in the hands of a bailee for a foreign Sovereign state. In *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, [1957] 3 All ER 441, the House of Lords held that immunity might be claimed if an action brought against an agent of a foreign state, with legal title to a local debt, was calculated or intended to displace such title to the debt, nor could the action proceed against the debtor holding the moneys in question.
19. *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 494.
20. It was expressly declared in the House of Lords decision, *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318 at 343, that there was no 'absolute rule that a foreign independent Sovereign cannot be impleaded in our courts in any circumstances'.
1. See *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 401, [1957] 3 All ER 441 at 450.
2. In *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 422–424, [1957] 3 All ER 441 at 463, 464, such a distinction was also favoured by Lord Denning, but Viscount Simonds, Lord Reid, Lord Cohen, and Lord Somervell expressed their reservations as to Lord Denning's views. For illustrations of the 'restrictive' theory, see *The Philippine Admiral* [1977] AC 373, [1976] 1 All ER 78, a decision of the Privy Council (no immunity for an action in rem in respect to a state-owned vessel engaged in commerce), and for a contrary case *Heaney v Government of Spain* 445 F (2d) 501 (1971) at 503–504

Second, the municipal courts of certain states followed a practice of closely examining the nature and object of each particular transaction, in respect to which immunity was claimed, to determine whether or not the transaction really pertained to the functions of the foreign state. Third, there was no clear practice as regards the immunity of foreign governmental agencies or instrumentalities, and of foreign semi-public corporations. Some states were prepared here to follow the municipal law of the foreign state concerned, other states had regard to circumstances other than that municipal law, in order to ascertain whether the agency or corporation was part of the foreign state.

As to foreign semi-public corporations, in particular if they were not of the character of departments of state, but simply separate juridical 'entities', the privilege of jurisdictional immunity did not attach. It would seem from *Krajina v Tass Agency*[3] and *Baccus SRL v Servicio Nacional del Trigo*[4] that it was a question of degree whether separate juridical incorporation had proceeded so far as to deprive an agency or entity of its character as a department of state, or whether notwithstanding its incorporation, it still possessed that character. A separate, incorporated legal entity might, by reason of the degree of governmental control over it, nonetheless be an organ of the state.

A decisive criterion was whether the corporate entity was in effect the alter ego of a government.[5]

The immunity from process covered conduct by the foreign state or foreign Sovereign which was a breach of local municipal law. In such case, if the territorial state felt aggrieved by the breach of its laws, the only course open to it was to seek diplomatic redress. The immunity extended also in respect of personal acts such as a promise of marriage, and even if the foreign Sovereign was living incognito.[6]

As mentioned above, the immunity might be waived by express or implied consent. If express, the waiver had to be made with full knowledge of its consequences, and with the full authority of the sovereign government in question.[7] What amounted to an implied waiver depended on all

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(contract by a government for propaganda against another government is a state transaction, in respect to which there is immunity). Article 5 of the European Convention on State Immunity of May 1972, provides that immunity does not attach to proceedings relating to a contract of employment between a state and an individual where the work is to be performed on the territory of the state of the forum. See also further, below, pp 216–217.

3. [1949] 2 All ER 274.
4. [1957] 1 QB 438, [1956] 3 All ER 715. Where the major business of a bank is business of the state, the bank is to be considered as a department of state entitled to sovereign immunity; cf *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529, [1977] 1 All ER 881.
5. *Mellenger v New Brunswick Development Corpn* [1971] 2 All ER 593 at 596.
6. *Mighell v Sultan of Johore* [1894] 1 QB 149.
7. See *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438, [1956] 3 All ER 715.

the circumstances of the case, and the courts showed themselves extremely reluctant to infer a waiver of immunity. Thus it was held that the following acts did not amount to a submission to jurisdiction:

a. A submission to arbitration proceedings preceding action, or even a subsequent application to set aside these proceedings.[8]
b. Living in the jurisdiction and entering into contracts there.[9]
c. Seizure by the agents of a foreign state of a vessel within the jurisdiction.[10]
d. A clause in a contract,[11] to which the foreign Sovereign was party, whereby it was agreed that the Sovereign would submit to the jurisdiction of the territorial courts in matters arising out of the contract.

Nothing short of an undertaking given in face of the court at the time when the court was asked to exercise jurisdiction would suffice as a submission to jurisdiction.[11]

In this connection may be considered the matter of *set-offs* or *counter-claims* against a state which had begun suit in the courts of the territorial state. The principle was that a foreign state suing as aforesaid submitted itself to the ordinary incidents of the suit, so that, for instance, a defendant might set up a set-off or counter-claim arising out of the same matter in dispute, but not an independent and unrelated cross-claim, the test being whether the cross-claim was sufficiently connected with or allied to the subject-matter of the foreign state's claim as to make it necessary in the interests of justice that it should be disposed of along with that claim.[12] The justification of this principle was that if a foreign state or foreign Sovereign voluntarily chose to litigate, it has to abide by all the rules like any other litigant and ultimately take all the consequences of its decision to sue. The decisive test was, in effect, whether there had been on the part of the plaintiff state a definitive election to submit, for all purposes, to the court in which the suit was instituted. These principles applied mutatis mutandis to proceedings by diplomatic representatives and consuls (see below, and cf also article 32, paragraph 3 of the Vienna Convention on Diplomatic Relations of 18 April 1961).

8. *Duff Development Co v Kelantan Government* [1924] AC 797.
9. *Mighell v Sultan of Johore* [1984] 1 QB 149.
10. *Compania Naviera Vascongado v SS Cristina* [1938] AC 485. Yet a foreign Sovereign who waived jurisdiction by instituting proceedings, was not immune from jurisdiction in respect to a continuation of such proceedings (see *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318, [1952] 1 All ER 1261).
11. *Kahan v Pakistan Federation* [1951] 2 KB 1003, especially at 1016. Contrast art 2 (b) of the European Convention on State Immunity of May 1972.
12. See *High Comr for India v Ghosh* [1960] 1 QB 134, [1959] 3 All ER 659 (claim substantially for money lent; counterclaim for slander held inadmissible). Cf art 32, para 3 of the Vienna Convention on Diplomatic Relations of 18 April 1961, and art 1, para 2(a) of the European Convention on State Immunity of 24 May 1972.

Statutory and other developments in sovereign immunity

It is apparent from the analysis, above, of the English case law prior to the 1970s that for all practical purposes the United Kingdom was a country adhering to the 'absolute' doctrine of immunity, by contrast with a number of states which followed the 'restrictive' doctrine in this area (see above).

As at the present time, consistently with developments in the 1970s, the position in the United Kingdom is governed by the provisions of the State Immunity Act 1978, considered below in this chapter,[13] and which have served to alter radically in a number of respects the former 'absolute' doctrine applied by English courts. The passing of the Act had been preceded by a number of developments, even before the 1970s, that paved the way for the statutory erosion of the 'absolute' doctrine. Some, if not all, of these may be briefly mentioned. One early significant development was the notable 'Tate letter' sent in May 1972 by the Acting Legal Adviser to the United States Department of State (Mr Jack Tate) to the Acting United States Attorney-General (Mr Philip Perlman), containing, inter alia, a declaration that, having regard to the small support for the absolute doctrine of immunity, it would thereafter be the policy of the Department of State to follow the restrictive theory in the consideration of requests by foreign governments for the grant of sovereign immunity. The letter accordingly rejected the doctrine of absolute immunity.

Subsequently, in *Rahimtoola v Nizam of Hyderabad*,[14] as mentioned above, Lord Denning indicated his opposition to the granting of immunity to foreign governments in respect to commercial transactions. In May 1972 the European Convention on State Immunity and Additional Protocol were adopted at Basle, and opened for signature; this was, of course, a purely regional convention. To a significant extent, it gave effect to a concept of 'relative' immunity as distinct from that of 'restrictive' immunity; thus, it enumerated a list of cases and situations in which jurisdictional immunity could not be claimed (see articles 1–14), while upholding as a basic precept that, otherwise, there should be absolute jurisdictional immunity for sovereign states and governments. In 1976, the Foreign Sovereign Immunities Act of 1976 was passed in the United States, following years of work on the subject of sovereign immunity by the Department of State and the Department of Justice.[15] This was a complex piece of legislation, one of the aims of which was to establish in statutory form principles of restrictive immunity, by way of exception to those of absolute immunity. Inter alia, foreign states were not to be immune from the jurisdiction of United States courts in any case in which the relevant proceedings were based upon a commercial activity carried on in the

13. See pp 217–219.
14. [1958] AC 379 at 422, [1957] 3 All ER 441 at 463.
15. As to this Act, see Buergenthal and Mair *Public International Law* (1985) pp 216 et seq.

United States by the foreign state in question, or based upon an act performed in the United States in connection with a commercial activity of that foreign state elsewhere, or based upon an act performed outside the United States territory in connection with a commercial activity of the foreign state elsewhere and that act caused a direct effect in the United States.

Following the enactment of the United States statute, there were two decisions of English courts in which the question of the applicability of the restrictive immunity doctrine were raised, namely *The Philippine Admiral (Owners) v Wallerm Shipping (Hong Kong) Ltd*[16] and *Trendtex Trading Corpn v Central Bank of Nigeria*.[17] In the former case, the Judicial Committee of the Privy Council held in effect that a foreign state could not claim absolute immunity from jurisdiction when an action in rem was brought against a vessel, if that vessel was being put to commercial use by either the government of that state or a third party. In the latter case, the Court of Appeal held that the Central Bank established by Nigeria was not a government department, but a legal 'entity' of its own right, and therefore not entitled to jurisdictional immunity; but beyond this point, two members of the court, Lord Denning and Shaw LJ were prepared to hold that even if the Bank had been a government department, it would not have been entitled to immunity in proceedings in personam, because the letter of credit on which the plaintiff had sued the Bank was a commercial document. Lord Denning formulated obiter the principle that a foreign Sovereign had no immunity when it entered into a commercial transaction with a trader in the United Kingdom and a dispute arose which *otherwise* was properly within the territorial jurisdiction of English courts.[18]

In 1978, as mentioned above, the State Immunity Act 1978 of the United Kingdom was passed. In a manner similar to that followed in the above-mentioned European Convention of 1972 on State Immunity, this Act reaffirmed essentially the general principle of absolute jurisdictional immunity of foreign states and governments, while listing in detail and with some elaborateness the statutory exceptions to the granting of immunity by English courts. The Act did not therefore necessarily supersede the principles laid down by previous English case law concerning the scope of operation of the doctrine of absolute immunity where it continued to apply by reason of the provisions of the Act, and where such operation was otherwise unaffected by the Act. It is beyond the scope of a book on international law to deal in detail with what is

16. [1977] AC 373, [1976] 1 All ER 78.
17. [1977] QB 529, [1977] 1 All ER 881.
18. On the point whether a matter, involving questions of sovereign immunity, is within the territorial jurisdiction, see the judgment of Lord Denning in *Thai-Europa Tapioca Service Ltd v Government of Pakistan* [1975] 3 All ER 961.

primarily a piece of domestic legislation, albeit the provisions thereof are largely in harmony with those of the European Convention of 1972 on State Immunity. Nevertheless, brief reference should be made to a number of significant points. First, English courts are required to give effect ex proprio motu to the absolute immunity of a foreign state, if such immunity is unaffected by provisions otherwise in the Act, even although the foreign state itself does not appear in the relevant proceedings (see section 1(2)). Second, there is no immunity if the state submits to the jurisdiction of English courts, ie if it waives immunity (see section 2(1)). Third, immunity is inapplicable in the case of, inter alia, proceedings in respect to the following:

a. A commercial transaction as defined elaborately in subsection (3) of section 3.[19]
b. An obligation of a foreign state falling to be performed wholly or partly in the United Kingdom.
c. A contract of employment between the state and an individual where the contract was made in the United Kingdom or the work is wholly or partly performed there.
d. Death or personal injury, or damage to or loss of property caused by an act or omission in the United Kingdom.
e. Any interest of the state in, or its possession or use of, immovable property in the United Kingdom (section 6(1) (a)).
f. Any obligation of the state arising out of its interest in, or its possession or use of property in the United Kingdom[20] (section 6 (1) (b)).
g. Any patent, trade mark, design or plant breeders' rights belonging to the state and registered or protected in the United Kingdom, an alleged infringement by the foreign state in the United Kingdom of any patent, trade mark, design, plant breeders' rights or copyright, or the right to use a trade or business name in the United Kingdom.
h. The foreign state's membership of a body corporate, an unincorporated body or a partnership which has members other than states, and is incorporated or constituted under the law of the United

19. In the light of this definition, it may still be necessary in some instances to determine whether the relevant transaction is one of jure gestionis or jure imperii. Semble, there would appear to be a presumption that a transaction which is, in the first instance, 'commercial' within the meaning of s 3 of the State Immunity Act 1978, does not necessarily lose that character vis-à-vis the parties dealing initially with the foreign state by reason of subsequent political or governmental action by that state; cf *Playa Larga v I Congreso del Partido* [1983] 1 AC 244, [1981] 2 All ER 1064, HL. As to the garnishee orders on a foreign government's London bank account, see *Alcom Ltd v Republic of Colombia* [1984] AC 580, [1984] 2 All ER 6, HL.
20. This would apply to the case of premises used as a private dwelling, and not part of the actual legation, where the proceedings are for damages for breaches of covenant in respect to the occupation of the premises; see *Intpro Properties (UK) Ltd v Sauvel* [1983] 2 All ER 495, CA.

Kingdom or is controlled from or has its principal place of business in the United Kingdom.

i. The foreign state's liability for value added tax, any customs or excise duty, any agricultural levy, or rates in respect of premises occupied by it for commercial purposes.

Apart from these points, special references should be made to certain other provisions of the Act. Under section 9, where a state has agreed in writing to submit a dispute, which has arisen or may arise, to arbitration, the foreign state is not immune as respects proceedings in English courts that relate to the arbitration; this provision is to have effect subject to any contrary provision in the arbitration agreement, and does not apply to any arbitration agreement between states. Section 14 is of particular importance, particularly to the extent that it alters the prior law as to separate, non-governmental 'entities';[1] the section provides that the relevant immunities and privileges apply to any foreign or Commonwealth State, to the Sovereign or other head of state in his public capacity, the government of that state, and any department of that government, but any entity which is distinct from the executive organs of the state and capable of suing or being sued (ie a separate entity) is jurisdictionally immune if, and only if, the relevant proceedings against it relate to anything done by it in the exercise of sovereign authority, and the circumstances are such that a state would have been so immune.

Section 10 of the Act, dealing, inter alia, with Admiralty proceedings and actions in rem against ships, will be considered below in connection with the jurisdictional immunity of state-owned commercial ships.[2]

It should be added finally that the examples of the United States and of the United Kingdom in enacting sovereign immunity legislation have been followed by other countries (eg, Canada, with the State Immunity Act 1981 and Australia with the Foreign States Imunities Act 1985).

b. Diplomatic representatives and consuls, of foreign states

The jurisdictional immunities of diplomatic agents are set out in articles 31–32 of the Vienna Convention on Diplomatic Relations of 18 April 1961.[3] They enjoy absolute immunity from the criminal jurisdiction of the receiving state, and immunity from its civil and administrative jurisdiction[4] except in three special cases specified in article 31, namely:

1. See p 214 above.
2. See pp 226–228 below.
3. Under art 29, the person of a diplomatic agent is inviolable, and he is not liable to any form of arrest or detention.
4. A person who acquires diplomatic status after proceedings have been instituted against him, becomes entitled to immunity, notwithstanding that he has previously taken steps in the action; see *Ghosh v D'Rozario* [1963] 1 QB 106, [1962] 2 All ER 640.

a. Actions for recovery of purely private immovable property.
b. Actions relating to succession in which they are involved in a purely private capacity.
c. Actions relating to any private, professional or commercial activity exercised by them.

In Great Britain, the immunity of diplomatic envoys rests partly on the common law, embodying the approved rules of custom of international law, and partly on statutes, namely, the Diplomatic Privileges Act 1708, the International Organisations (Immunities and Privileges) Act 1950, the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952, dealing with the privileges of High Commissioners from the Commonwealth and of the Ambassador of Ireland, and their staffs and families, the Diplomatic Immunities Restriction Act 1955[5] the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act 1961, the Diplomatic Privileges Act 1964,[6] replacing the previous common law and statutory law, and the Diplomatic and Other Privileges Act 1971. Under the 1708 Act, which has always been regarded as merely declaratory of the common law, all writs whereby the person of an ambassador might be arrested or his goods seized, were null and void. The 1950 Act, replacing prior statutory provisions, extended the privileges of immunity from diplomatic representatives proper to a wider class, including officers of approved international organisations, members of organisations or Committees thereof, and persons on special missions relating thereto. The 1964 Act was passed to give effect to the provisions of the Vienna Convention of 1961, above, and so to underpin ratification of the Convention.

This immunity of diplomatic envoys extends not merely to their own persons, but to their suite, and members of their family forming part of their household, provided that they are not nationals of the receiving state (see article 37 of the Vienna Convention).[7] Usually, the practice in most countries is to deposit periodically with the Foreign Office or similar government department a list of personnel for whom exemption from the

5. See p 223 below.
6. S 4 of the Act provides: 'If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under this Act a certificate issued by or under the authority of the Secretary of State stating *any fact* relating to that question shall be conclusive of that fact'; cf the reliance on such a certificate in *Empson v Smith* [1966] 1 QB 426, [1965] 2 All ER 881.
7. For the special conditions governing the immunity of administrative and technical staff, and members of their families, members of the service staff, and private servants of members of the mission, see paras 2–4 of art 37 of the Vienna Convention. See also *Re C (an infant)* [1959] Ch 363, [1958] 2 All ER 656 (a son of a diplomatic agent, ordinarily resident with him, cannot be made a ward of court without the latter's consent).

territorial jurisdiction is claimed. In this list will be found the names of first, second, and third secretaries, counsellors, attachés, etc.[8]

In Great Britain, statements of the Foreign Office as to the diplomatic status of a particular person are accepted as conclusive by British courts in the same way as with foreign states and foreign sovereigns.[9] This was emphatically laid down by the House of Lords in the leading case of *Engelke v Musmann*.[10]

The immunity from jurisdiction is subject to waiver, which must be express (see article 32, paragraph 2 of the Vienna Convention). If the person claiming privilege is of lesser rank than the head of the legation, the waiver must be made by or on behalf of the superior envoy or his government, and must be made with full knowledge of the circumstances and of that person's rights; a waiver merely by a solicitor as such for that person is insufficient.[11] British courts usually insist on strict proof of waiver.

If the Ambassador or other head of mission waives the privilege of a subordinate diplomatic official, then that privilege ceases irrespective of the desire of that official to retain his immunity.[12]

A waiver of immunity from jurisdiction does not imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver is necessary (see article 32, paragraph 4 of the Vienna Convention).

When the mission terminates, immunity continues for a reasonable time to enable the envoy to leave the receiving country, and in any event, as to acts performed by him in the exercise of his functions (see article 39, paragraph 2 of the Vienna Convention). This extension of the period of immunity does not apply to a diplomatic agent who has been dismissed, and whose immunity has been waived by the Ambassador or head of the mission.[13]

The principle on which the jurisdictional immunity of a diplomatic envoy is based is that he should be free to perform official business on behalf of his country, without disturbance, interference, or interruption.[14]

8. The mere possession of a diplomatic passport or visa, without actual membership of a diplomatic mission accredited to the territorial or any other state, is insufficient to confer immunity; see *United States v Coplon and Gubitchev* 88 F Supp 915 (1950), and *United States v Melekh* 190 F Supp 67 (1960) (United Nations employee with Soviet diplomatic passport). Cf *United States v Kostadinov* 734 F 2d 905 (1984). The publication of lists is provided for, in respect of persons covered by the International Organisations (Immunities and Privileges) Act 1950, by s 2 of that Act.
9. See Chapter 6 above, at pp 148–150. Cf *United States v Lumumba* 741 F 2d 12 (1984).
10. [1928] AC 433.
11. See *R v Madan* [1961] 2 QB 1, [1961] 1 All ER 588.
12. *R v AB* [1941] 1 KB 454, and see Diplomatic Privileges Act 1964, Sch 1, art 32.
13. *R v AB* [1941] 1 KB 454.
14. See *Engelke v Musmann* above, at 449–450. This is the so-called *functional* conception of immunity of diplomatic envoys. Cf the judgments of the International Court of Justice in the cases of *United States Diplomatic and Consular Staff in Tehran* ICJ 1979, 7 and ICJ 1980, 3.

This principle applies so as to cast a shield of inviolability over the legation premises (unless used for subversive purposes), all property held for the better fulfilment of the envoy's mission, and means of transport (see article 22 of the Vienna Convention).

It seems that if a diplomatic agent engages in espionage against the state to which he is accredited, that state is not bound to respect his jurisdictional immunity.[15]

If a diplomatic envoy passes through or is in the territory of a third state which has granted him a passport visa, if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third state must accord him inviolability and such other immunities as may be required to ensure his transit or return (article 40, paragraph 1 of the Vienna Convention).

Immunity from jurisdiction should not be confused with immunity from liability, for once the exemption from jurisdiction is effectively waived, liability may arise. The immunity, if any, is from suit, not from liability. The comments of Lord Hewart CJ in the case of *Dickinson v Del Solar*[16] are in point:

> '... Diplomatic agents are not, in virtue of their privileges as such immune from legal liability for any wrongful act. The accurate statement is that they are not liable to be sued in the English Courts unless they submit to the jurisdiction. *Diplomatic privilege does not import immunity from legal liability, but* only *exemption from local jurisdiction.*'

The new international organisations established during and immediately after the Second World War brought into being a class of international officials, such as the members of the Secretariat of the United Nations Organisation, and of delegates to meetings of international organs, whose duties and functions clearly required immunity from local jurisdiction of a similar kind to that enjoyed by diplomatic representatives of foreign states.

Accordingly, legislation was enacted both in the United States and in Great Britain to extend immunity to these persons, as well as to the international organisations of which they were members.[17] In Great Britain, this was effected by the above-mentioned International Organisations (Immunities and Privileges) Act 1950,[18] replacing earlier enactments, and the various Orders-in-Council pursuant to the Act, while in

15. See Canadian decision of *Rose v R* [1947] 3 DLR 618. Cf *R v AB* [1941] 1 KB 454. Whether mere suspicion of espionage would justify the arrest of a diplomatic agent is a moot question. On the alleged Soviet 'harassment' of foreign diplomats, see United States *Department of State Bulletin* (1952) Vol 27, pp 786–8.
16. [1930] 1 KB 376 at 380. See to the same effect the judgment of Diplock LJ in *Empson v Smith* [1966] 1 QB 426, [1965] 2 All ER 881.
17. See also Ch 20 below, pp 620–623.
18. Other examples of enactments of this kind are the European Coal and Steel Community Act 1955, and the German Conventions Act 1955.

the United States there was passed the Federal International Organisations Immunities Act of 1945. The detailed provisions of the two Acts lie beyond the scope of this book, but in general it can be said that their effect is not as wide as is suggested by their titles. A limited but reasonably liberal immunity is conferred on international officials and delegates to international organs, which may, as in the case of diplomatic representatives, be waived by higher authority.[19] The extent of the immunity, where it exists, varies with the grade or category to which the particular official or delegate belongs. Thus, as with diplomatic envoys, the immunity is one not from legal liability but from jurisdiction.

Finally, it should be emphasised that the immunity of diplomatic envoys is applicable in respect of acts in their private, as well as in their official capacity. Such immunity for private acts has not been conceded to all classes of international officials under the new British and American legislation just referred to. In this connection, there was a novel enactment in Great Britain, the Diplomatic Immunities Restriction Act 1955, providing for the withdrawal by Order-in-Council of the immunity for private acts of foreign diplomatic envoys, their servants and staff, where British envoys are not accorded the same degree of immunity for private acts by the accrediting foreign states concerned.

Consuls

Consuls are not diplomatic agents, and in respect of private acts, are not immune from local jurisdiction, except where this has been specially granted by treaty. But apart from treaty provisions, as to official acts[20] within the limits of consular powers under international law, they are exempt from the jurisdiction of judicial or administrative authorities of the receiving state, unless the immunity is waived by the sending state. The rules applicable to the waiver of the immunity of diplomatic envoys apply mutatis mutandis. The justification of this limited consular immunity is that the consul is received by the country where he resides as an officer of a foreign state charged with the performance of consular duties, and to carry out these duties properly he obviously requires immunity from local process.

Consuls who are at the same time diplomatic representatives of their states, are entitled to general immunity even in respect of private matters.[1]

The subject of consular immunities is now dealt with in detail in the

19. Cf *The Ranollo Case* 67 NYS (2d) 31 (1946), where the Secretary-General of the United Nations did not press the immunity of his chauffeur.
20. See *Waltier v Thomson* 189 F Supp 319 (1960) (consular immigration officer immune from suit for allegedly false representations concerning prospects for immigrants).
1. See *Parkinson v Potter* (1885) 16 QBD 152; *Engelke v Musmann* [1928] AC 433, and *Afghan Minister (Consular Activities) Case* (1932) Annual Digest of Public International Law Cases 1931–1932, p 328. A consul who later acquires diplomatic status is immune from process as to acts outside the scope of his duties, committed while he was consul, so long as he retains his new status; see *Arcaya v Paez* 145 F Supp 464 (1956).

Vienna Convention on Consular Relations, signed on 24 April 1963,[2] and is covered by legislation enacted subsequent to the Vienna Convention, such as the Consular Relations Act 1968 in the United Kingdom.

(c) Public ships of foreign states

Warships and public vessels of foreign states, while in the ports or internal waters of another state, are in a great measure exempt from the territorial jurisdiction. For this purpose, a private vessel chartered by a state for public purposes, for example, the transport of troops, transport of war materials, is a public vessel. Proof of character as warships or as public vessels is supplied by the ship's flag in conjunction with the ship's documents, for example, the commission issued and signed by the authorities of the state to which she belongs. Under article 29 of the United Nations Convention on the Law of the Sea of 10 December 1982, a 'warship' is defined as 'a ship belonging to the armed forces of a state bearing the external marks distinguishing ships of its nationality, under the command of an officer duly commissioned by the government of the state and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed force discipline'.

There are two theories as to jurisdiction in the case of public ships of a foreign state:

a. The 'floating island' theory according to which a public ship is to be treated by other states as part of the territory of the state to which she belongs. By this theory, the jurisdiction of the territorial court is excluded for all purposes where any act is done, or offending party found on board the ship.
b. The territorial court accords to the ship and its crew and contents certain immunities depending not on an objective theory that the public ship is foreign public territory, but on an implication of exemption granted by the local territorial law. These immunities conceded by local law are conditional and can in turn be waived by the state to which the public ship belongs.

In *Chung Chi Cheung v R*,[3] a case of a crime committed on board a Chinese public vessel in the territorial waters of Hong Kong, that is, British territory, the Judicial Committee of the Privy Council rejected the former and approved the latter theory. On the particular facts of the case, it held that the Chinese Government had waived immunity, and that the Hong Kong Court had jurisdiction. It pointed out that theory (b) alone was consistent with the paramount necessity for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. In support of its views, it cited the classical judgment of Marshall CJ, of the United States Supreme Court, in *Schooner Exchange*

2. See pp 429–432 below.
3. [1939] AC 160.

v M'Faddon,[4] where the immunity of public vessels was based on an 'implied licence' to enter a port, the licence containing an exemption from the jurisdiction of the state which granted the rights of hospitality.

Where a public vessel is in port, no legal proceedings will lie against it, either in rem for recovery of possession, or for damages for collision or in respect of members of its crew. But the jurisdictional immunity extends only so far as necessary to enable such public vessel to function efficiently as an organ of the state and for state purposes.

> 'The foreign Sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service, by local jurisdiction.'[5]

Therefore such vessel is bound to observe the ordinary laws of the port such as quarantine and sanitary regulations, and not to assist in breaches of local revenue laws. Any failure to respect these laws and regulations would be a ground for diplomatic representations, and possibly for expulsion, while the coastal state would be legitimately justified in requiring the vessel to leave the port.

Crimes committed on board the vessel while in port, except against a local subject, remain within the exclusive jurisdiction of the authorities of the vessel's flag state, including the commander of the vessel itself. Furthermore, some authorities maintain that individuals who do not belong to the crew, and who, after committing a crime on shore, board the vessel in order to take refuge, cannot be arrested by the local authorities and removed from the vessel if consent to this course is refused by the commander of the ship. Where such consent is refused, the local authorities have their remedy through the diplomatic channel against the government of the flag state. On the other hand, several authorities[6] have expressed the view that such fugitive criminals should be given up to the local police. Possibly, asylum may be granted on grounds of humanity, in cases of extreme danger to the individual seeking it. If members of the crew break the local laws while ashore, they are not protected, although normally the local police would hand them over to the ship's authorities for punishment or other action, but if the breaches were committed ashore while on duty, or in the course of official duties, the members of the crew concerned would, it appears, enjoy complete immunity from local jurisdiction.[7]

So far as concerns the innocent passage of a warship through the territorial sea (maritime belt), article 30 of the United Nations Convention on the Law of the Sea of 10 December 1982, provides that if any warship does not comply with the laws and regulations of the coastal state

4. (1812) 7 Cranch 116.
5. *Chung Chi Cheung v R* [1939] AC 160 at 176.
6. Eg, Cockburn CJ, cited in *Chung Chi Cheung v R* [1939] AC 160 at 172.
7. See *Triandafilou v Ministère Public* (1942) 39 AJIL (1945) 345–347.

concerning such passage and disregards any request made to it for compliance therewith, the coastal state may require it to leave the territorial sea immediately. Moreover, under article 31 of the Convention, the flag state is to bear international responsibility for any loss or damage to the coastal state resulting from the non-compliance by a warship or other government vessel operated for non-commercial purposes with such laws and regulations, or with the provisions of the Convention, or other rules of international law.

State-owned commercial ships

For some time, foreign governments have embarked in trade with ordinary ships, and have been competing with shippers and ship-owners in the world's markets. The question has therefore arisen whether the ordinary principles as to immunity of public vessels should apply to such ships, and this has involved much the same considerations as touch the issue of the jurisdictional immunity of foreign states or foreign heads of state (see above in this chapter). The argument for the affirmative has been based on the government ownership of these vessels, and on the risk of 'impleading' a foreign state when exercising jurisdiction in respect of the ship. It has also been put that through trade conducted by way of shipping the 'maintenance and advancement of the economic welfare of a people in time of peace' is no less a public purpose than the maintenance and training of a naval force.[8]

On the other hand, severe criticism has been levelled at this modern development of the immunity of public vessels. The objections to the concession of immunity were two principally:

1. The doctrine of the immunity of the property of foreign Sovereigns is a concession to the dignity, equality, and independence of foreign sovereign powers and arises by virtue of the comity of nations. But it is not consistent with the dignity of sovereign states that they should enter the competitive markets of foreign commerce, and ratione cessante, the privilege of immunity should be withheld.
2. There is injustice to nationals of the territorial state when a foreign government may sue these nationals for matters arising out of its commerce by way of shipping, while at the same time enjoying absolute immunity should actions in rem or in personam be brought against it.

It has been said in answer to these objections that the remedy to a person injured is by diplomatic representations through his government. Lord Maugham's observations, made more than fifty years ago, on the uncertain value of diplomatic redress have continued to represent a trenchant but justifiable commentary on this argument:[9]

8. *The Pesaro* 271 US 562 (1926) at 574.
9. *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 515.

> 'In these days and in the present state of the world, diplomatic representations made to a good many States afford a very uncertain remedy to the unfortunate persons who may have been injured by the foreign government.'

As mentioned earlier in this chapter, with reference to the jurisdictional immunity of foreign states and foreign heads of state, there have been developments since 1972 paving the way for the restriction of the doctrine of absolute immunity in cases where states engage in commercial or non-governmental activities, and the proceedings are otherwise within the scope of the local territorial jurisdiction. What has been said in that connection is applicable mutatis mutandis to public ships of foreign states operated for commercial or non-governmental purposes. The developments referred to have included the European Convention of 1972 on State Immunity, the United States Foreign Sovereign Immunities Act of 1976, the decision of the Judicial Committee of the Privy Council in *The Philippine Admiral*,[10] and the dicta of two members of the English Court of Appeal in *Trendtex Trading Corpn v Central Bank of Nigeria*,[11] and the United Kingdom State Immunity Act 1978.

In this connection, it is also worthy of mention that under articles 27 and 28 of the United Nations Convention on the Law of the Sea of 10 December 1982, government ships operated for commercial purposes are not exempt from criminal and civil process by the coastal state if they are proceeding in passage through the territorial sea or are in course of such passage after leaving the internal waters of the coastal state. The extent to which the coastal state may exercise such criminal and civil process under these articles of the Convention is set out in Chapter 9, below.[12]

Apart from this, it is to be recalled after the First World War, a number of international conferences discussed the subject of jurisdiction over commercial ships owned by foreign governments. There was an almost unanimous opinion that the same legal remedies and actions should apply as in the case of any other ship-owner. In April 1926, a large number of states, including Great Britain, signed at Brussels an International Convention for the Unification of Certain Rules concerning the Immunities of Government Vessels, as supplemented by a protocol of 1934. This Convention came into force in 1937, but was ratified or acceded to by only a small number of states. Its general effect was that ships and cargoes owned or operated by states were, in respect of claims relating to the operation of the ships or the carriage of cargoes, to be subject to the same rules of liability as privately-owned vessels. From these provisions, there were excepted ships of war, or government patrol vessels, hospital ships,

10. [1977] AC 373, [1976] 1 All ER 78.
11. [1977] QB 529, [1977] 1 All ER 881.
12. See pp 264–266 below.

and ships used exclusively on governmental and non-commercial service although even in regard to these, certain claims (for example, of salvage) were permissible. The International Law Commission has favoured the rules laid down in this Convention. Article 30 of the European Convention on State Immunity of May 1972, has provided that the Convention 'shall not apply to proceedings in respect of claims relating to the operation of seagoing vessels owned or operated by a Contracting State or to the carriage of cargoes and of passengers by such vessels or to the carriage of cargoes owned by a Contracting State and carried on board merchant vessels'. The United Kingdom ratified the Brussels Convention in 1979.

So far as concerns the position in the United Kingdom in respect to foreign government vessels operated commercially, that is now covered by section 10 of the State Immunity Act 1978, which section applies to Admiralty proceedings, and also proceedings on any claim which could be made the subject of Admiralty proceedings. It goes on to provide that a state is not immune as respects:

a. an action in rem against a ship belonging to that state; or
b. an action in personam for enforcing a claim in connection with such a ship, if at the time when the relevant cause of action arose, the ship was in use or intended for use for commercial purposes.

Also, where an action in rem is brought against a ship belonging to a state for enforcing a claim in connection with another ship belonging to that state, the territorial courts will not have jurisdiction unless at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes. It is further provided that a state is not immune as respects:

a. an action in rem against a cargo belonging to that State, if both the cargo and the ship carrying it, were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or
b. an action in personam for enforcing a claim in connection with cargo if the ship carrying it was then in use or intended for use as aforesaid.

The above-mentioned provisions are not to apply to proceedings where the foreign state concerned is a party to the Brussels Convention of 1926 and the claim relates to the operation of a ship owned or operated by that state, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that state on any other ship.

d. Foreign armed forces

Armed forces admitted on foreign territory enjoy a limited, but not an absolute, immunity from the territorial jurisdiction.

The extent of the immunity depends upon the circumstances in which the forces were admitted by the territorial Sovereign, and in particular upon the absence or presence of any express agreement between the host

and the sending state regulating the terms and conditions governing the entry of the forces in the territory.

In the absence of such an express agreement, the bare fact of *admission* of the forces produces certain generally recognised consequences of international law. The principle here applying was stated in classical terms by Marshall CJ of the United States Supreme Court in *Schooner Exchange v M'Faddon*[13] and were condensed by a very learned judge[14] into the following doctrine:

> 'A State which admits to its territory an armed force of a friendly foreign Power impliedly undertakes not to exercise any jurisdiction over the force collectively or its members individually which would be inconsistent with its continuing to exist as an efficient force available for the service of its sovereign.'

In other words, the principle is that the territorial or host state impliedly undertakes not to exercise any jurisdiction over members of the visiting force in such a way as to impair the integrity and efficiency of the force.[15]

Applying this principle, it follows that by implied grant or licence from the territorial state:

1. The commander of the visiting force, and the courts of such force, have *exclusive* jurisdiction over offences committed by the members within the area in which the force is stationed, or in relation to matters of discipline, or over offences committed outside the stationing area, but while the members concerned were actually on duty.
2. The visiting force and its members are immune from the local jurisdiction, whether civil or criminal, in regard to matters of internal administration of the force, or necessarily involved in the performance by such force of its duties (for example, the bearing of arms, use of motor transport, etc). On the other hand, if the members of the force commit offences outside their area and while engaged on non-military duties, for example, recreation or pleasure, the territorial state may claim that they are subject to local law.

It follows further from the above principle that there is no complete waiver of jurisdiction by the territorial state when granting a licence or permission to an armed force to enter its territory; as one learned judge[16]

13. (1812) 7 Cranch 116. Note that in terms Marshall CJ's remarks were addressed to the *passage* of troops through foreign territory, and not to their sojourn.
14. Jordan CJ, of the New South Wales Supreme Court, in *Wright v Cantrell* (1943) 44 SRNSW 45 at 52–3.
15. Also, although normally entitled to exercise jurisdiction, the receiving State may, on the grounds of comity or courtesy, allow the authorities of the visiting force to deal with the alleged offenders; cf advice of Professor Yokota in connection with the arrest and prosecution of British naval ratings in Japan for robbery, London Times 9 October 1952.
16. *Chow Hung Ching v R* (1949) 77 CLR 449 at 463, per Latham CJ.

has put it, 'the extent of the licence does not correspond with the extent of the waiver'.

Normally, the authorities or courts of the visiting force will, at least in matters of discipline or internal administration, be immune from the supervisory jurisdiction of the local courts by the exercise of the prerogative writs (for example, habeas corpus), unless perhaps there has been a clear case of exceeding their competence, such as a sentence passed upon a person who was not a member of the armed force.[17]

It is clear that opinions may differ as to how far immunity should be conceded to foreign visiting forces in order that military efficiency should be preserved. United States judicial pronouncements[18] and practice generally favour absolute immunity for this purpose; not so the British practice. Differences of opinion have indeed arisen with reference to the exercise of civil jurisdiction over members of a visiting force. In the case of *Wright v Cantrell*[19] an Australian court held as regards American forces on Australian territory for the purpose of the Pacific War, that the existence or efficiency of those forces would not be imperilled if an individual member were subject to a civil suit in the territorial courts for an injury caused to a local citizen even in the course of that member's duties.

The above principles apply if there is no express agreement between the state admitting and state sending the armed forces. If, however, there is such an agreement, then semble its terms will govern the jurisdiction of the courts; for example, if the admitting state agrees that the visiting forces shall be exempt from local jurisdiction in all civil and criminal matters, the courts are bound by the exemption so conceded.[20]

The exemption from jurisdiction is conceded only to visiting armed forces, and not a visiting band of men without armed organisation and unconnected with military operations, although they may take orders from persons of military rank; nor is it to be conceded if the members of the visiting band mix freely with the local inhabitants and are not a body subject to proper military discipline and organisation.[1]

During the Second World War, Great Britain and other countries in the British Commonwealth enacted legislation conferring on certain (but not all) Allied forces within their territories, notably the United States forces, complete jurisdiction over the respective members of these forces

17. For an attempt to invoke this jurisdiction, see *Ex p Ortoli* (1942) 59 Weekly Notes (New South Wales) 146. Cf also *Re Amand* [1941] 2 KB 239.
18. See, eg, *Tucker v Alexandroff* 183 US 424 (1901), and cf Canadian decision, *Reference Re Exemption of United States Forces from Canadian Criminal Law* [1943] 4 DLR 11.
19. (1943) 44 SRNSW 45.
20. See *Chow Hung Ching v R* (1949) 77 CLR 449, where it was so held by the High Court of the Commonwealth of Australia.
1. See *Chow Hung Ching v R* above.

and a correlative exemption from local criminal jurisdiction except where the visiting force waived its exclusive right of jurisdiction.[2]

In the post-war period, states have had to meet the impact of an important new development, the stationing of troops and of accessory civilian or depot personnel in foreign territory in pursuance of regional security arrangements such as the North Atlantic Security Pact of April 1949, or of international forces, including peacekeeping forces, under the United Nations Charter. A solution in this connection was adopted by the North Atlantic Powers in an Agreement signed in London on 19 June 1951, relative to the status of the forces of such Powers.[3] This provides that the sending and receiving states are to exercise concurrent jurisdiction over members of a visiting force of a North Atlantic Power and civilian component personnel, subject to:

a. exclusive jurisdiction being exercised by each State respectively in regard to offences which are punishable only by its laws;
b. the sending state having the primary right to exercise jurisdiction, in cases of concurrent jurisdiction, in relation to offences solely against the property or security of such sending state, or against the person or property of members of the force or civilian component personnel, or offences arising out of any act or omission in performance of official duty, with the receiving state entitled to the primary right to exercise jurisdiction as to other offences.

As to civil jurisdiction, no claim of immunity is to be pressed by the sending state except where members of the force act within the scope of their official duties. Other provisions in the Agreement enable review and modification of the subject of jurisdiction in the event of hostilities, and lay down certain minimum standards to be observed by the courts of the receiving state. This has been followed by a number of other status and stationing agreements, coupled with de facto practices and arrangements, sometimes not governed by any defined guidelines or sometimes not the subject of any uniform or consistent application. Most of these agreements or treaties are of a bilateral character.

The ultimate effect, however, may be to cut down the general principle

2. Jurisdiction was waived in 1944 by the American authorities in England in the celebrated case of *R v Hulten and Jones* (1945) Times, 20–21 February.
3. This is discussed in an article by Rouse and Baldwin 51 AJIL (1957) 29–62. Somewhat similar principles have been followed in the stationing of forces agreements concluded by the Soviet Union; for texts, see 52 AJIL (1958) 210–227. Note also the Tokyo Agreement of 19 February 1954, regarding the Status of United Nations Forces in Japan. The subject of jurisdiction over armed forces stationed abroad is covered in three contributions in Vol 62 (1980) of the *U.S. Naval War College International Law Studies*, namely, Gordon B. Baldwin 'The International Law of the Armed Forces Abroad' (ibid, pp 667–675), Wilfred A. Hearn 'Status of Armed Forces Abroad' (ibid, pp 676–682), and Robert C. Grabb 'The Status of Armed Forces Abroad' (ibid, pp 683–689).

that the sending state has exclusive jurisdiction over offences by servicemen within the limits of their quarters, or while on duty.[4]

e. International institutions

International institutions such as the United Nations and the International Labour Organisation have been conceded immunity from the territorial jurisdiction both under international agreements (see the Conventions on the Privileges and Immunities of the United Nations and of the 'Specialised Agencies' adopted by the United Nations General Assembly in 1946 and 1947) and under municipal law (see, for example, the British International Organisations (Immunities and Privileges) Act 1950, and the United States Federal International Organisations Immunities Act of 1945).[5]

The subject of their general privileges and immunities is dealt with in Chapter 20 below.

3. PERSONAL JURISDICTION

Personal, as distinct from territorial jurisdiction, depends on some quality attaching to the person involved in a particular legal situation which justifies a state or states in exercising jurisdiction in regard to him. Practically, the jurisdiction is only employed when the person concerned comes within the power of the state, and process can be brought against him. This will occur generally when such person enters the territory of the state either voluntarily or as a result of successful extradition proceedings.

According to present international practice, personal jurisdiction may be exercised on the basis of one or other of the following principles:

(*a*) *Active nationality principle.* Under this principle, jurisdiction is assumed by the state of which the person, against whom proceedings are taken, is a national. The active nationality principle is generally conceded by international law to all states desiring to apply it.[6] There is indeed a correlative principle of the law of extradition that no state is bound to extradite from its territory a national guilty of an offence committed abroad.

(*b*) *Passive nationality principle.* Jurisdiction is assumed by the state of which the person suffering injury or a civil damage is a national.

4. Nevertheless, the trend in the case of United Nations peacekeeping forces, of an international composition, is towards absolute immunity from the jurisdiction of the receiving state.

5. Note also the various Headquarters Agreements concluded by the United Nations and the specialised agencies, referred to below, p 622.

6. The active nationality principle has been extended 'notionally' in some instances to cover the foreign subsidiaries of a local principal corporation; see above in this chapter, at pp 207–208.

International law recognises the passive nationality principle only subject to certain qualifications. Thus it would appear from the *Cutting Case*[7] that a state which does not admit the passive nationality principle is not bound to acquiesce in proceedings on this basis brought against one of its nationals by another state. The justification, if any, for exercising jurisdiction on this principle is that each state has a perfect right to protect its citizens abroad, and if the territorial state of the locus delicti neglects or is unable to punish the persons causing the injury, the state of which the victim is a national is entitled to do so if the persons responsible come within its power. But as against this, it may be urged that the general interests of a state are scarcely attacked 'merely because one of its nationals has been the victim of an offence in a foreign country'.[8] The passive nationality principle is embodied in several national criminal codes, in particular the codes of Mexico, Brazil, and Italy. Great Britain and the United States, however, have never explicitly admitted the propriety of the principle.

In the *Lotus Case*,[9] Judge J. B. Moore, an American judge on the Permanent Court of International Justice, declared that an article of the Turkish Penal Code whereby jurisdiction was asserted over aliens committing offences abroad 'to the prejudice' of a Turkish subject was contrary to international law, but it is not clear to what extent other members of the court shared or differed from this view.

4. JURISDICTION ACCORDING TO THE PROTECTIVE PRINCIPLE

International law recognises that each state may exercise jurisdiction over crimes against its security and integrity or its vital economic interests. Most criminal codes contain rules embodying in the national idiom the substance of this principle, which is generally known as the *protective* principle.

In *Joyce v DPP*,[10] the House of Lords seems to have held that the English common law recognises a principle of jurisdiction akin to the

7. See above, p 209.
8. See Report of Sub-Committee of League of Nations Committee of Experts for the Progressive Codification of International Law, *Criminal Competence of States etc* (1926) p 5.
9. See above, p 206.
10. [1946] AC 347. Cf American decision of *United States v Chandler* 72 F Supp 230 (1947). Also in *United States v Rodriquez* 182 F Supp 479 (1960), the protective principle was used to justify the prosecution of aliens for false statements in immigration applications, and in *Rocha v United States* 288 F (2d) 545 (1961), the prosecution of defendants for being engaged in a 'war brides racket', ie conspiracy abroad to arrange sham marriages between aliens and American citizens, so as to gain preferential immigration status, thereby evading American immigration laws. See also *Stegeman v United States* 425 F (2d) 984 (1970) (jurisdiction held to be exercisable in respect to debtors guilty of

protective principle, namely that an alien owing some kind of allegiance to the Crown may be tried by British courts for the crime of treason committed abroad. Underlying the House of Lords decision is the consideration that such a crime is one directly against the security and integrity of the realm, and its reasoning is applicable to other statutory offences of similar scope (for example, against the Official Secrets Acts).

The rational grounds for the exercise of this jurisdiction are two-fold:

i. the offences subject to the application of the protective principle are such that their consequences may be of the utmost gravity and concern to the state against which they are directed;
ii. unless the jurisdiction were exercised, many such offences would escape punishment altogether because they did not contravene the law of the place where they were committed (lex loci delicti) or because extradition would be refused by reason of the political character of the offence.[11]

The serious objection to the protective principle is that each state presumes to be its own judge as to what endangers its security or its financial credit. Thus in many cases, the application of the protective principle tends to be quite arbitrary.

5. JURISDICTION ACCORDING TO THE UNIVERSAL PRINCIPLE: PIRACY

An offence subject to universal jurisdiction is one which comes under the jurisdiction of all states wherever it be committed. Inasmuch as by general admission, the offence is contrary to the interests of the international community, it is treated as a delict jure gentium and all states are entitled to apprehend and punish the offenders. Clearly the purpose of conceding universal jurisdiction is to ensure that no such offence goes unpunished.

There are probably today only two clear-cut cases of universal jurisdiction,[12] namely the crime of piracy jure gentium, and war crimes.[13] Other cases do not necessarily involve the exercise of universal jurisdiction by *all* states. All states are entitled to arrest pirates on the high seas, and

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fraudulent concealment of assets abroad, in breach of the Federal Bankruptcy Act of the United States, upon the ground that the Act was designed to serve important interests of government, related to national commerce and credit).

11. The principle of non-extradition for political crimes is now securely established; see pp 354–356 below.
12. The transport of slaves is not such a case; a state may prevent and punish the transport of slaves only in ships authorised to fly its flag, or prevent the unlawful use of its flag for that purpose (see article 13 of the Geneva Convention of 1958 on the High Seas, and article 99 of the United Nations Covention on the Law of the Sea, of 10 December 1982).
13. See pp 555–558.

to punish them irrespective of nationality, and of the place of commissior of the crime. The subject of piracy is dealt with in Chapter 9, below. Th principle of universality of punishment of war crimes was affirmed by th Geneva Conventions of 1949 relative to prisoners of war, protectior of civilians, and sick and wounded personnel, as supplemented by the Protocols I and II adopted in 1977 by the Diplomatic Conference at Geneva on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (see Chapter 18, below). In the *Eichmann Case* (1962),[14] the Supreme Court of Israel, sitting as a Court of Appeal, relied in part upon the principle of universal jurisdiction in upholding the conviction by a court in Israel of Eichmann, a war criminal, for war crimes and crimes against humanity under an Israeli Law of 1951, thereby overruling objections that Eichmann's actions occurred in Europe during the Second World War before the state of Israel was actually founded, and that his offences were committed against people who were not citizens of that state.

Crimes or delicts jure gentium,[15] other than piracy and war crimes, raise somewhat different considerations. Thus the offences of drug trafficking, trafficking in women and children, and counterfeiting of currency have been brought within the scope of international conventions, but have been dealt with on the basis of *aut punire, aut dedere*, that is, the offenders are either to be punished by the state on whose territory they are found or to be surrendered (extradited) to the state which is competent and desirous of exercising jurisdiction over them.[16] This is so even with the international crime of genocide under the Genocide Convention of 1948 (see article VI, which provides for a trial by the courts of the state in the territory of which the crime was committed, or by an international tribunal, and hence not by the courts of all states). As for the provisions of the conventions considered below in section 6 of the present chapter, providing for international co-operation in the repression and punishment of certain crimes committed in or against aircraft, these may be said to have initiated a first phase in the process whereby such offences may ultimately be subject to universal jurisdiction, but the final point in such process is still far from being reached.

14. *Eichmann v A-G of Israel* (1962) 36 ILR 277 (judgment of court below reported in (1961) 36 ILR 5).
15. As to which, see *Historical Survey of the Question of International Criminal Jurisdiction* (United Nations Secretariat, 1949) pp 1 et seq.
16. A recent example is that of article 8 of the International Convention against the Taking of Hostages, adopted by the United Nations General Assembly on 17 December 1979.

6. PROBLEMS OF JURISDICTION WITH REGARD TO AIRCRAFT[17]

One consequence of the increase in the volume, range, and frequency of the international air traffic, coupled with the growing number of countries in which the aircraft of regular airlines are registered, has been the emergence of difficult problems of jurisdiction in respect to offences committed on board aircraft in flight. If this were not enough, another development has been the grave menace to the safety and reliability of international civil aviation due to the multiplication of hijacking incidents, and of terrorist acts against aircraft about to take off or land, and against airline passengers.

The first major attempt to deal with these problems was made by the Tokyo Convention of 14 September 1963, on Offences and Certain Other Acts Committed on Board Aircraft. The main objects of the Convention were:

a. to ensure that persons committing crimes aboard aircraft in flight, or on the surface of the high seas, or any area outside the territory of any country, or committing acts aboard such aircraft to the danger of air safety, would not go unpunished simply because no country would assume jurisdiction to apprehend or try them;
b. for protective and disciplinary purposes, to give special authority and powers to the aircraft commander, members of the crew. and even passengers.

Aircraft used in military, customs, or police services were excluded from the scope of the Convention. Normally, it is the subjacent state which exercises jurisdiction over offences committed in its airspace, but an over-flying aircraft may not have landed or been called upon to land, with the result that the subjacent authorities are deprived of the opportunity of taking police action, or the commission of the offence may not have been noticed until the aircraft reaches a destination outside the territory of the country in whose airspace the offence was committed. Object (a) was achieved principally by providing that the country of registration of the aircraft is competent to exercise jurisdiction over the offences and acts mentioned, and by obliging states parties to the Convention to take the necessary measures to establish their jurisdiction as the country of registration (see article 3). Coupled with this was the provision in article 16 that offences committed aboard an aircraft are for purposes of extradition to be treated as if they had occurred also in the territory of the country of registration; hence, if the offender takes refuge

17. See generally on the subject Abramovsky (1974) 13 Columbia Journal of Transnational Law 381, and (1975) 14 Columbia Journal of Transnational Law 296.

in a country which is party to the Convention and also party to an extradition treaty with the country of registration, making the alleged offence an extradition crime, the offender can be duly extradited. The convention did not exclude the criminal jurisdiction of countries which exercise this according to the active nationality principle or passive nationality principle.

The Convention contained detailed provisions giving effect to object (b), and enabling the aircraft commander to disembark an offender and deliver him, if necessary, to the competent authorities of a state party to the Convention. However, these provisions are not to apply in the airspace of the country of registration of the aircraft, and they apply to overflights across the high seas or territory outside the territory of any country only where:

i. the last point of take-off or next point of intended landing is situated in a country, not the country of registration; or
ii. the aircraft subsequently flies into the airspace of a country not that of registration, with the offender still on board.

With regard to hijacking, it is fair to say that the Tokyo Convention made no frontal attack upon this offence, but dealt in only a limited manner with hijackers; for example, by enabling hijackers to be taken into custody or subjected to restraint in the same manner as other offenders, and by providing for restoration of control of the hijacked aircraft to the lawful commander, and for the continuance of the journey of passengers and crew.

A more ambitious, more elaborate effort to deal with hijacking was made in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature on 16 December 1970. By this date, hijacking had assumed the proportions of a world-wide problem, which threatened to undermine international aviation. The Convention was confined to hijacking, leaving the matter of armed attacks, sabotage, and other forms of violent action directed against civil aviation and aviation facilities to be dealt with by a later diplomatic conference. The Convention did not fully apply the *aut punire, aut dedere* principle (ie the country where the offender might happen to be should prosecute him, or extradite him to a country having jurisdiction to try him for the offence), but provided a reasonably adequate framework for the exercise of jurisdiction, with obligations of extradition or rendition according to the existence of an extradition treaty or of a reciprocal practice of rendition.

The key provisions in the Convention are article 1, defining the offence of hijacking, although not calling it such, article 2, obliging each state party to make the offence punishable by severe penalties, and article 4, providing that states parties are to take measures to establish jurisdiction

over the offence and related acts of violence against passengers of air crew. The offence is defined as unlawfully, by force or threat, or by any other form of intimidation, seizing or exercising control of an aircraft 'in flight', or attempting to commit such an act, or being the accomplice of any person performing or attempting to perform such an act. Under article 3, paragraph 1, an aircraft is considered to be 'in flight' at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing—and experience has shown this may be an important point—the 'flight' is deemed to continue until the competent authorities take over responsibility for the aircraft and for persons and property on board. Under article 4 (see above), jurisdiction is to be established by contracting states in the following cases:

a. when the offence is committed on board an aircraft registered in the contracting state;
b. when the hijacked aircraft lands in a contracting state's territory with the alleged hijacker still on board;
c. when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business in the contracting state, or—if no business—his permanent residence there.

The Convention applies only to civil aircraft, and not to aircraft used in military, customs, or police services, but it is immaterial whether the aircraft is engaged in an international or domestic flight. However, for general purposes, the Convention is only operative if the place of take-off, or the place of actual landing of the hijacked aircraft be situated outside the territory of the state in which the aircraft is registered. This restriction does not affect the far-reaching provisions in article 6 for taking custody of a hijacker or alleged hijacker present in a contracting state's territory, in article 7 for the obligatory prosecution of non-extradited alleged hijackers, in article 8 for the inclusion of hijacking as an extraditable offence in extradition treaties or the treatment of the offence as an extraditable one in the relations between states which surrender alleged offenders on a basis other than that of an extradition treaty, and in article 10 for mutual co-operation between states in relation to criminal proceedings against alleged hijackers, for these provisions in articles 6 to 10 are to apply whatever the place of take-off or the place of actual landing of the hijacked aircraft, if the hijacker or alleged hijacker is found in the territory of a state other than the state of registration of that aircraft.

The Hague Convention is not as stringent as it should be, and throughout reflects a compromise between different approaches to criminal law

and to the rendition of offenders,[18] but its prompt conclusion, in the surrounding circumstances, did meet an urgent need.

The Hague Convention was supplemented nine months later by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971. In the period 1968–1971 there had not only been hijackings, but the related aircraft crimes of armed attacks, sabotage, and other forms of violence and intimidation directed against civil aviation, including the appearance of bomb-hoax extortion as a new kind of menace undermining public confidence in the security of international air transport and prejudicing the administrative and financial conduct of air services. The objective of covering unlawful acts other than hijacking was reflected in article 1, the key article of the Montreal Convention, which was designed to cover those multiple forms of violence and intimidation which had occurred in the past as well as those which might emerge in the future. Because these aviation crimes might not necessarily be restricted to aircraft in flight, the draftsmen of the Montreal Convention were obliged to introduce the concept of an aircraft 'in service', in addition to that of an aircraft 'in flight', as in the Hague Convention. Instead of a single, comprehensive formula, article 1 enumerated as offences for the purposes of the Convention, five categories of unlawful acts:

a. acts of violence against a person on board an aircraft 'in flight', if that act is likely to endanger the safety of that aircraft;
b. destroying or causing damage to an aircraft 'in service' so as to render it incapable of flight, or which is likely to endanger its safety 'in flight';
c. placing or causing to be placed on an aircraft 'in service' any device or substance which is likely to have this effect;
d. the destruction or damage of air navigation facilities, or interference with their operation, if any such act is likely to endanger the safety of aircraft 'in flight';
e. the communication of information which is known to be false, thereby endangering the safety of an aircraft in flight, a category intended to cover bomb-hoax extortions.

As in the case of the Hague Convention, an aircraft is deemed to be 'in flight' at any time from the moment when all external doors are closed following embarkation until the moment when any such door is opened for disembarkation, or during the period of a forced landing pending the exercise of control by the authorities. 'In service' means the period from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until 24 hours after any landing.

18. Cf Shubber 'Aircraft Hijacking under the Hague Convention 1970—A New Régime?' 22 ICLQ (1973) 714.

So far as aircraft are concerned, the Montreal Convention applies only in the case of an 'international element', consisting of a place of take-off or landing, actual or intended, outside the territory of the state of registration, or if the offence committed against the aircraft is committed in a state other than the state of registration. The Convention may apply if the alleged offender is found in the territory of a non-registration state.

Under other provisions of the Convention, countries parties to the Convention undertake to establish jurisdiction over certain categories of offences under the circumstances set out in article 5 (inter alia, if the offence is committed in the territory of that country, or against or on board an aircraft registered there); and they also bind themselves, in accordance with international law and national law, to take all practicable measures for the purpose of preventing the offences set out in article 1, and to co-operate with each other by communicating relevant information, and otherwise. Broadly speaking, the provisions of the Hague Convention regarding the taking into custody of alleged offenders, as to extradition and prosecution, and as to the reporting to the International Civil Aviation Organisation of offences and of action taken, are reproduced in the Montreal Convention; it was not found possible to adopt a more stringent, more far-reaching text.

It will be evident that the law of aviation crimes cannot under these Conventions of Tokyo, The Hague, and Montreal be efficacious in the absence of full co-operation between all states. Certain governments favour the provision of sanctions, or if not sanctions, means for bringing pressure to bear, where countries afford shelter to hijacked aircraft or are otherwise considered to be in breach of their obligations in that connection[19]. Moves and proposals to this effect have since 1971 been made or mooted at meetings within the framework of the International Civil Aviation Organisation and elsewhere. There are some almost insuperable obstacles to such moves and proposals bearing fruit in the shape of an international convention which will come into force with the necessary participation of a wide spread of countries. Alternatives to a multilateral convention or multilateral conventions are bilateral treaties,

19. Joint declarations of co-operation against hijacking and aircraft crimes were made in 1978 and 1988 at their summit meetings in West Germany, respectively, by the seven chief industrial powers, viz. the United States, the United Kingdom, Japan, Canada, the Federal Republic of Germany (West Germany), France and Italy. Thus, under the 1978 declaration, 'where a country refuses ... the prosecution of those who have hijacked an aircraft' (emphasis added), immediate action was to be taken by those powers to cease all flights to that country, and to initiate action to halt all incoming flights therefrom. However, as was demonstrated, in particular in 1988, these measures apparently cannot be activated without the seven governments concerned being completely satisfied that the country to be subjected to these measures did in point of fact 'refuse' to prosecute the alleged hijacker or hijackers.

or domestic legislation enabling the suspension of flights to or from countries sheltering hijackers, or not cooperating in the prevention of aircraft crimes. Such treaties and such domestic legislation are not prohibited by international law.

CHAPTER 9

The law of the sea and maritime highways

1. GENERAL AND HISTORICAL INTRODUCTION

No branch of international law has undergone more revolutionary changes during the past four decades, and especially during the immediate past decade and a half, than has the law of the sea and maritime highways. The final signature on 10 December 1982, at Montego Bay, Jamaica, by the great majority of the states (no less than 118) represented at the Third United Nations Conference on the law of the Sea 1973-1982 (UNCLOS) of a comprehensive code of rules of international law on the sea under the title, the United Nations Convention on the Law of the Sea, represented perhaps the most momentous development in the whole history of the rules of international law concerning the high seas. At this point, it need only be said that the greater part of the Convention, containing the more significant rules therein enunciated, however much the previous law was thereby changed, appear now to command the general consensus of the international community.[1]

This being said, it must be appreciated that one cannot just leap, without more discussion, into an analysis of this 1982 Convention as if it were self-explanatory of the present international law régime of the sea, the seabed, and maritime areas. To quote the eminent historian, Dr A. L. Rowse,[2] 'the bed out of which all the social sciences spring is history; there they find, in greater or lesser degree, subject-matter and material, verification or contradiction'. This observation applies with special force to the law of the sea. Leaving aside internal waters, such as, for example, ports, harbours, roadsteads and closed-in bays, it was historically the open sea or the high seas which primarily concerned statesmen and rulers of nations in the medieval and post-medieval periods, and writers on international law from the sixteenth century onwards. Initially, navigation on the high seas was open to everybody as were also fisheries, but in the fifteenth and sixteenth centuries—the periods of great maritime discovery by European navigators—claims were laid by the powerful

1. The subject generally, including the impact of the 1982 Convention, is comprehensively covered in O'Connell *The International Law of the Sea* Vol I (ed I. A. Shearer, 1982) and Vol II (ed I. A. Shearer, 1984).
2. See his General Introduction to the Series, 'Teach Yourself History', in Christopher Hill *Lenin and the Russian Revolution* (1947) p v.

maritime states to the exercise of sovereignty, indistinguishable from ownership, over specific portions of the open sea. For example, Portugal claimed maritime sovereignty over the whole of the Indian Ocean and a very great proportion of the Atlantic, Spain arrogated rights to herself over the Pacific and the Gulf of Mexico, and even Great Britain laid claim to the Narrow Seas and the North Sea.

Grotius was one of the first strenuously to attach these extensive claims to sovereignty. His objections were based predominantly upon two grounds:

1. No ocean can be the property of a nation because it is impossible for any nation effectively to take it into possession by occupation.
2. Nature does not give a right to anybody to appropriate things that may be used by everybody and are exhaustible—in other words, the open sea is a res gentium or res extra commercium.

In opposition to the principle of maritime sovereignty, the principle of the 'freedom of the high seas' (or 'freedom of the open sea') began to develop, as Hall has pointed out,[3] in accordance with the mutual and obvious interests of the maritime nations. It was appreciated that too often, and to the great inconvenience of all states, conflicting claims were laid to the same parts of the open sea. Furthermore, it came to be realised that any claims to maritime sovereignty were of little practical value except in time of war when it was useless to assert them without the backing of a powerful navy. The freedom of the open sea was thus seen to correspond to the general interests of all states, particularly as regards freedom of intercourse between nations.

Perhaps, the more correct expression was 'freedoms', rather than 'freedom' of the high seas, because apart from the unrestricted liberties as to navigation and fisheries, the sea might be freely used for other purposes by all states, eg, scientific research. In more modern times the freedoms came to include the 'freedom of immersion' (eg, the laying of submarine cables and of oil pipelines), and the free right of overflight for all aircraft. Nonetheless, these freedoms never warranted a state of unregulated maritime lawlessness, and certain rules for the exercise of jurisdiction over vessels at sea became essential in order to avoid conditions of anarchy. As a measure of necessary control, it was early established that all vessels, public or private, on the high seas were subject to the jurisdiction (in general, exclusive) and entitled to the protection of the state under the maritime flag of which they might sail.[4] From this, there logically followed a number of corollary rules, namely, that in general no state might

3. Hall *International Law* (8th edn, 1924) p 189.
4. For 'flag' purposes, the nationality of a vessel was determined by the state of registration. It was for each state to determine under its own law which ship had the right to fly its flag; see the *Muscat Dhows Case* (Permanent Court of Arbitration, 1905) UN Reports of International Arbitral Awards Vol IX, p 83.

exercise jurisdiction over ships at sea not bearing its flag, that no ship might sail under a particular flag without proper authority from the flag state, nor under a flag other than the one which it was duly authorised to raise. Vessels sailing under an unauthorised flag were liable to capture and confiscation by the state whose flag had been wrongfully raised, and the warships of any state might call on suspicious vessels to show their flag.[5] If there was reasonable suspicion for suspecting that a vessel was engaged in piracy[6] or the slave trade,[7] it might be boarded, and, if necessary, searched.

It is necessary now to refer to the rights which came to be exercised by maritime states over a strip of waters immediately adjoining to their coastlines, being such as was considered necessary to the safety of the state concerned, or which that state had power to dominate. This strip, named then more often as the 'maritime belt', and which for at least the past 30 years has been universally known as the 'territorial sea' since its designation as such in the Geneva Convention of 1958 on the Territorial Sea and Contiguous Zone, was treated as being under the sovereignty of the coastal state, subject to a right of innocent passage by the vessels of other nations. By the beginning of the eighteenth century, this principle of the coastal state's sovereignty over the maritime belt had become completely established. It was indeed in 1702 that Bynkershoek[8] published his work, *De dominio maris dissertatio* (Essay on Sovereignty over the Sea), in which he adopted the rule that the littoral state could dominate only such width of coastal waters as lay within the range of cannon shot from shore batteries: *Terrae potestas ubi finitur armorum vis* (territorial sovereignty extends as far as the power of arms carries). Bynkershoek appears to have been the first notable jurist to enunciate the cannon shot rule in these terms, although there is historical evidence that the rule was already well-known and invoked in practice before the publication of his book. At a subsequent stage, an attempt was made to express the cannon shot range as a definite figure in nautical miles. It is controversial and far from clear when precisely, as a matter of history, this did occur. At all events the cannon shot rule became blended—some might say confused—with a three-mile limit, although it is possible that the three-mile limit had an independent historical origin. As will appear, the point is now purely academic.

In the nineteenth century, the three-mile limit received widespread recognition by the jurists, as well as by the courts,[9] and obtained adoption

5. A vessel, which was not sailing under the identifiable maritime flag of a state, was not entitled to protection, and might be seized in suspicious circumstances; see *Naim Molvan, Owner of Motor Vessel 'Asya' v A-G for Palestine* [1948] AC 351.
6. See pp 275–278 below.
7. See p 275 below.
8. See pp 12–13, 23 above.
9. Eg, by Lord Stowell in *The Anna* (1805) 5 Ch Rob 373.

in the practice of important maritime states. This continued too in the twentieth century, with two great maritime Powers, the United States and Great Britain, firm protagonists of the three-mile limit. Yet it failed to gain acceptance as a universal rule of international law. Numerous states adopted a wider breadth for the maritime belt, and as will be referred to later in the present chapter,[10] an increasing number of states became prompted during the last fifteen years to favour a limit as extensive as twelve miles, and even greater distances.

As a matter partly of customary international law and partly of certain conventions and treaties, maritime states acquired certain rights in regard to vessels not sailing under their flag. A major important right, initially of a customary nature, was the so-called right of 'hot pursuit', signifying that if the coastal state concerned had good reason to believe that a foreign ship had infringed its laws and regulations while passing through the maritime belt, that ship might be pursued and apprehended even on the high seas, provided:

a. such pursuit were commenced *immediately* while the alleged infringing vessel or its accessory boats were still within the coastal state's internal waters or maritime belt;
b. the pursuit was continuous and uninterrupted;[11]
c. a visual or auditory signal to stop had been given from such distance as to be seen or heard by the fugitive ship, ie a mere sighting would be insufficient; and
d. the pursuers were warships or other government ships specially authorised to that effect, although the craft making the arrest need not be actually the one which commenced the pursuit. Such right of hot pursuit ceased as soon as the vessel pursued entered the maritime belt of its own country, or of a third state.

Another more controversial right of the coastal state was that of the exercise of jurisdiction over foreign vessels outside the limits of the maritime belt where there was a grave suspicion that such vessels were a source of imminent danger to the sovereignty or security of the adjacent coastal state. This jurisdiction was permitted solely on the basis of, and as a measure of, self-protection.[12] The scope of this jurisdiction was at all times a debatable matter.[13]

10. See pp 248 et seq below.
11. According to the standard work, Poulantzas *The Right of Hot Pursuit in International Law* (1969) p 43, the two most important elements of a valid hot pursuit are its conduct without interruption, and its immediate commencement.
12. See the case of the *Virginius*, Moore *Digest of International Law* Vol II, pp 895 et seq.
13. Thus in the 1960s, the question came to be raised in that connection whether a coastal state was, upon grounds of self-defence, entitled in peace-time to arrest a foreign naval vessel in waters beyond the maritime belt for the reason that such vessel was conducting offshore electronic intelligence operations or other forms of sophisticated surveillance, as distinct from mere visual observation. The issue was raised, in particular, in 1968,

The coastal state's sovereignty over the maritime belt itself was qualified to the extent that foreign vessels had a right of innocent passage through the waters of the belt.[14]

States were also permitted to exercise jurisdiction on the high seas by reason of certain international conventions, whereby the states parties conceded to one another rights, in time of peace, of visiting and searching foreign vessels at sea. These rights were granted for limited purposes only, which are suggested by the title of the particular conventions concerned, for example, two such instruments concluded during the nineteenth century, namely the Convention for the Protection of Submarine Telegraph Cables of 1884, and the General Act of Brussels of 1890 for the Repression of the African Slave Trade.[15] Moreover, in time of war, the rights of jurisdiction of belligerent maritime states on the high seas were considerably extended, inasmuch as a belligerent state enjoyed a general right of visit and search of neutral shipping in order to prevent breaches of neutrality, such as the carriage of contraband. As has been pointed out in an earlier chapter,[16] rival parties in a civil war might obtain these powers of search as the result of the recognition of belligerency and the consequent grant of belligerent rights.

Beyond that, all states became bound to observe certain regulations relative to the safety of navigation at sea, and to ensure, by legislation or otherwise, that vessels flying their flags should act in conformity with these regulations. In the relevant historical period now under consideration, the practice of states as to the exercise of jurisdiction in the field of collision cases on the high seas could be described only as fluid. Some states claimed jurisdiction where the damaged vessel was under their flag; other states,

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in the case of the arrest by a North Korean patrol boat of the American electronic intelligence vessel, the *Pueblo*, then operating in North Korean coastal waters. However, a number of facts surrounding the *Pueblo* affair are the subject of dispute.

14. Doubts had existed whether foreign vessels that were merely in transit through the maritime belt were subject for all purposes to the jurisdiction of the littoral state. In *R v Keyn* (*The Franconia*) (1876) 2 Ex D 63, it was held that, in the absence of an applicable statute, an English Criminal Court had no jurisdiction over a crime committed by an alien on a foreign vessel in passage less than three miles from the coast. This decision surprised many English legal authorities, and was nullified by the enactment of the Territorial Waters Jurisdiction Act 1878, giving the courts jurisdiction over offences within a three-mile maritime belt; prosecutions could however be instituted only by leave of the Secretary of State. For discussion of the effect of *R v Keyn*, see the judgments of members of the High Court of Australia in *New South Wales v The Commonwealth of Australia* (1975) 135 CLR 337. As to the exercise of criminal jurisdiction over vessels in transit in the belt, according to the provisions now of the 1982 United Nations Convention on the Law of the Sea, see below, pp 264–266.
15. A much later example is that of the Interim Convention of 9 February 1957, for the Conservation of North Pacific Fur Seal Herds. For other instances of such conventions and treaties, see *Laws and Regulations on the Regime of the High Seas* (United Nations) (1951) Vol I, pp 179 et seq.
16. See pp 151–153 above.

where the vessels involved in the collision consented to the exercise of jurisdiction by such states; and certain other states where the ship primarily responsible for the collision was in one of their ports at the time that proceedings were instituted. In 1927 in the *Lotus Case*,[17] the Permanent Court of International Justice held, by a majority, that in collision cases on the high seas there was no rule of international law attributing exclusive penal jurisdiction to the flag state of a ship involved in the collision as regards an offence committed on that ship, and that jurisdiction could be as well exercised by the flag state of the ship on which the offence had produced its effects in the course of the collision. The decision in the *Lotus Case* was not received with enthusiasm by international lawyers, and subsequently was in effect overruled, not by any decision of an international tribunal, but by the consensus generally of states acting officially and of international jurists.[18]

Considerations of space preclude detailed reference to other rules affecting the rights and duties of states in respect to the pre-1930 régime of the high seas and maritime belt. The relevant rules are now comprehensively covered in the United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982 (see above), and the precise nature of the former rules is now of minimal historical significance.

It is nevertheless important to mention that at the Hague Codification Conference of 1930, the question of what should be the maximum breadth of the territorial sea was considered without agreement being reached, although there was such firm opposition to the general acceptance of the three-mile limit as a maximum that to quote Professor Gidel,[19] this limit emerged as the 'chief victim' of the Conference, as an 'idol dethroned and not restored'. At the same time the Conference did not generally support the concept of a 'contiguous zone',[20] that is to say, a belt of waters adjacent to the limits of the maritime belt, not subject to the sovereignty of the littoral state, but within which the littoral state could exercise certain rights of control for the purpose of its health or other regulations. As will be seen below, the concept of the contiguous zone was one which did however find favour subsequently.

Two important developments following the end of the Second World

17. Pub PCIJ (1927), Series A, No 10.
18. The rule in the *Lotus Case* was disapproved by the International Law Commission (the Commission's Report on the work of its *8th session* (1956)), and by the Conference at Brussels in 1952, which adopted the Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and other Incidents of Navigation. See now article 11 of the Geneva Convention of 1958 on the High Seas. See also p 274 below.
19. Gidel *Le droit international public de la mer* (1934) Vol 3, p 151.
20. The concept of the contiguous zone appears to have been first enunciated by the noted French jurist, M. Louis Renault; see Riesenfeld *The Protection of Coastal Fisheries under International Law* (1949) p 105.

War now need to be considered, first, the evolution and general acceptance of the doctrine of the continental shelf, and second, the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*[1] upholding the method in certain special cases of drawing baselines at some distance from the coastline of the littoral state concerned, from which baselines the breadth of the maritime belt was to be measured, instead of the low-water mark constituting the linear edge of the maritime belt.

Dealing with the first development, the general recognition of the continental shelf principle represented the culmination of a trend which began in 1945–1951 when, by unilateral declarations, a number of maritime states laid claim to exclusive jurisdiction, control or sovereign rights (as distinct from sovereignty) over the resources of the continental shelf and associated offshore areas.[2] What is commonly meant by the 'continental shelf' or the 'continental platform' is the submerged bed of the sea, contiguous to a continental land mass, and formed in such a manner as to be really an extension of, or appurtenant to this land mass, but not situated in general at a greater depth beneath the sea level than 200 metres. At approximately this depth there occurs, as a rule, the first substantial 'fall-off' to the vastly greater ocean depths. Beyond such outer edge or declivity of the continental shelf, the deep seabed descends by further stages, known in accordance to accepted nomenclature[3] as the 'continental slope', and the 'continental rise', before sinking into the deeper ocean floor, or 'abyssal plain'. The expression 'continental margin' is in general use to encompass collectively the shelf, slope, and rise, the outer limit of such continental margin being the commencement, so far as it can be defined geomorphologically, of the abyssal plain. In the *North Sea Continental Shelf Cases*,[4] it was this geological context which persuaded the International Court of Justice, when seeking to rationalise the basis of shelf claims, to attach primary importance to the consideration that the shelf was a natural prolongation or continuation of the land domain, and therefore appurtenant to territory over which the coastal state already had dominion.

When initially claims over the continental shelf were laid by proclamation or other formal statement, the justification was usually by

1. ICJ 1951, 116–206.
2. In regard to the historical background of the continental shelf doctrine, see Anninos *The Continental Shelf and Public International Law* (1953) pp 11–34, and the *North Sea Continental Shelf Cases* ICJ 1969, 3 at 32–36. In 1916 and 1927 respectively, it was urged by De Buren and by Professor Suarez that the maritime belt should be extended to cover the continental shelf.
3. For the nomenclature adopted by the International Committee on Nomenclature of Ocean Bottom Features, Monaco, in 1952, see A.L. Shalowitz *Shore and Sea Boundaries* (1964) Vol II, pp 342–343.
4. ICJ 1969, 3 at 30–31.

reference to, inter alia, considerations of geographical continguity and of security. While the obvious purpose of the littoral states concerned was to reserve to themselves such oil and minerals as might lie in the seabed of shelf area, the exploitation of which had been rendered possible by advances in technology, the claims were expressed in terms sufficient to cover non-mineral resources. The actual extent of the claims varied; the Proclamation of the President of the United States in September 1945 reserved only rights of 'jurisdiction and control' over the natural resources of the subsoil and seabed of the shelf, expressly leaving intact the nature of the shelf waters as high seas and the right of free navigation, but in later declarations of other states, claims were laid to sovereignty over and ownership of the seabed and subsoil of, as well as over the waters of the shelf. Naturally, such claims involved an extension of jurisdiction or sovereignty beyond the maritime belt, even far beyond the width of the contiguous zones to which certain states had laid claim. For instance, the United States continental shelf was officially[5] described as:

> '... almost as large as the area embraced in the Louisiana Purchase, which was 827,000 square miles, and almost twice was large as the original 13 colonies, which was 400,000 square miles. Along the Alaska coastline the shelf extends several hundred miles under the Bering sea. On the Eastern coast of the United States the width of the shelf varies 20 miles to 250 miles, and along the Pacific coast it is from 1 to 50 miles wide.'

Owing to the magnitude of the areas of the continental shelf, there was therefore little analogy between these claims and claims exclusively to control limited areas of the seabed outside the maritime belt for pearl, oyster and other sedentary fisheries. These more limited claims rested upon the occupation of a portion of the seabed as a res nullius, or upon some historical or quasi-historical prescriptive title or upon some regional community of interest (eg, the pearl fisheries in the Persian Gulf). It was a controversial question whether the declaration of jurisdiction or sovereignty made by the littoral states concerned in 1945–51 had contributed to the formation of a customary rule of international law giving coastal states such rights over their shelves.[6] As will be seen, however, the doctrine of the continental shelf was recognised by general consensus in the Geneva Convention of 1958 on the Continental Shelf.

The second major development, that of the delimitation of the maritime belt by reference to the 'baselines' method, was, as mentioned above, the consequence of the decision in 1951 of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*.[7] There the Court held that a

5. *Annual Report* of the United States Secretary of the Interior for 1945, pp ix–x.
6. In 1951, the existence of such a customary rule was denied by Lord Asquith, acting as Arbitrator in the *Arbitration between Petroleum Development and the Sheikh of Abu Dhabi* (1953) 47 AJIL 156–159.
7. ICJ 1951, 116.

Norwegian Decree of July 1935 delimiting an exclusive fishery zone along almost 1000 miles of coastline North of a certain latitude, being in effect a maritime belt of a breadth of four miles (being the breadth followed by the Norwegian Government) extending from straight baselines drawn through 48 selected points on the mainland or islands or rocks at a considerable distance from the coast, was not contrary to international law. It emerged from the Court's judgment that this baselines method, rather than the low-water mark, was admissible where a coastline is deeply indented and cut into, or if there is a fringe of islands in the immediate vicinity, provided that the drawing of the baselines does not depart to any appreciable extent from the 'general direction'[8] of the coast, and that the areas lying within the baselines are sufficiently closely linked to the adjacent land domain as virtually to be akin to internal waters. If these conditions for permitting the drawing of the baselines are met, account may be taken in determining *particular* baselines of economic interests peculiar to the particular region concerned, where such interests are a matter of a long established usage. In other words, in the absence of the requisite geographical conditions referable to the nature of the coastline and adjacent islands, economic interests in the littoral State cannot alone justify recourse to the baselines method. The baselines would have to be duly notified and marked on charts subject of appropriate publicity. Underlying the reasoning of the International Court of Justice in the *Anglo-Norwegian Fisheries Case* was the consideration that the maritime belt was not so much a limited artificial extension of a state's territorial domain as an appurtenant contiguous area wherein for economic, security and geographical reasons the littoral state was entitled to exercise exclusive sovereign rights, subject only to qualifications such as the right of innocent passage of foreign vessels.

Meanwhile, beginning with its first session in 1949, the régime of the high seas and the régime of the maritime belt had engaged the attention of the United Nations International Law Commission as being among the topics in respect to which codification was considered by it as being necessary and feasible. The examination of the two subjects was spread over eight sessions, 1949–1956.[9] In the course of the fourth session in 1952, the Commission expressed a preference for the term 'territorial sea' to denote the maritime belt, and this has since come into universal currency of use, thereby displacing and rendering obsolete the expressions

8. For critical comment on this concept of the 'general direction' of the coast, see Shalowitz *Shore and Sea Boundaries* (1962) Vol I, pp 74–75.
9. For a summary of the work of the Commission on these subjects see the United Nations publication, *The Work of the International Law Commission* (3rd edn, 1980) pp 36–38.

'maritime belt' and 'territorial waters'[10] to denote the coastal strip subject to the sovereignty of the littoral state. At its eighth session in 1956 the Commission drew up a final set of draft articles on the territorial sea, incorporating changes based on communications from governments, and adopted a final report on the law of the high seas, containing a set of 73 draft articles, designed to constitute a single co-ordinated and systematic body of rules. These came before the United Nations General Assembly in 1956, and in accordance with the recommendation of the Commission, the Assembly by resolution of 21 February 1957, decided to convene an international conference of plenipotentiaries 'to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international Conventions or such other instruments as the conference may deem appropriate'.

The First United Nations Conference on the Law of the Sea met in Geneva from 24 February 1958 to 27 April 1958, and its labours resulted in the adoption of four conventions, namely the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf.[11] These conventions came into force on, respectively, 10 September 1965, 30 September 1962, 20 March 1966 and 10 June 1964, and at the end of the year 1979 had, respectively, as parties, 45, 56, 35 and 53 states. The Conference had in addition adopted an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes which subsequently came into force on 30 September 1962, and to which 37 states were parties by the end of 1979. Notwithstanding the large measure of agreement at the Conference on so many important points, two questions had been left unsettled by it, namely, the breadth of the territorial sea and fishery limits. After the conclusion of the 1958 Conference, the General Assembly by resolution adopted on 10 December 1958, asked the Secretary-General of the United Nations to convene a Second United Nations Conference on the Law of the Sea to consider further these two unsettled questions. Over 80 states were represented at this Second United Nations Conference, which was held in Geneva from 16 March 1960 to 26 April 1960 with inconclusive results as to the two questions, although the Conference did approve a resolution expressing the need for technical assistance to fishing.

One question which had not been covered in the report of the Inter-

10. The Commission preferred the expression 'territorial sea', because 'territorial waters' may include internal waters; see *Report Concerning the Work of the Fourth Session of the Commission* (1952).

11. The texts of the four conventions are conveniently reproduced in the United Nations publication, *The Work of the International Law Commission* (3rd edn, 1980) Annex V, pp 140–165.

national Law Commission submitted to the General Assembly in 1956 (see above) was that of the free access to the sea of land-locked states. However, this question was dealt with in a memorandum submitted to the First United Nations Conference on the Law of the Sea by a preliminary conference of land-locked states which met in Geneva from 10 February 1958 to 14 February 1958, that is to say, little more than a week before the commencement of the United Nations Conference. This memorandum led to the latter Conference establishing as one of its main Committees a Fifth Committee with the mandate of considering the question of access to the sea of land-locked states. In the result, no separate convention on the subject was adopted by the United Nations Conference, but in the wording of certain provisions of the Convention on the Territorial Sea and the Contiguous Zone and of the Convention on the High Seas due regard was had to the problem of access of land-locked countries, and article 3 of the latter convention dealt with the question explicitly and specifically.

Apart from this, pursuant to a resolution adopted by the First United Nations Conference on Trade and Development convened at Geneva in June 1964, the General Assembly decided, on 10 February 1965, to convene an international conference of plenipotentiaries to consider the subject of the transit trade of land-locked countries, and to embody the results of its work in a convention and such other instruments as the conference might deem appropriate. The United Nations Conference on the Transit Trade of Land-Locked Countries met in New York from 7 June 1965 to 8 July 1965, with a participation of the representatives of 58 states, and adopted the Convention on the Transit Trade of Land-Locked States.

Beyond the fact that the four conventions of 1958 and the convention of 1965 provided collectively a régime which governed the use of, and rights as to the open sea and the territorial sea, these instruments also in effect paved the way for, and provided basic foundations for the comprehensive United Nations Convention on the Law of the Sea signed at Montego Bay on 10 December 1982 (see above). In the 8th edition, 1977) of this book, detailed reference was made to the relevant provisions of the four conventions of 1958, but as the substance of these have been embodied, with generally accepted changes, in the above-mentioned convention of 1982, to the extent that it can be said that the amended rules now really represent, by common consensus, the current law, it was felt that no practical end and little historical purpose would be served by again examining these in detail. However, when the relevant provisions of the convention of 1982 are examined in the present chapter, below, so far as may be significant, some cross-reference will be made to the corresponding article or articles of the 1958 conventions on which such provisions of the Convention of 1982 may be based, and, if necessary, the discussion of these in the eighth edition of this book may be consulted.

It is nevertheless necessary in the present edition to consider the problem of the division of a common continental shelf which came before the International Court of Justice in 1969 in its landmark decision in the *North Sea Continental Shelf Cases*.[12] In that connection, article 6 of the Geneva Convention of 1958 on the Continental Shelf had made provision for the manner of division of a shelf common to states with opposite coastlines (see paragraph 1), or common to states adjacent to each other (see paragraph 2). Paragraph 1 laid it down that, 'in the absence of agreement, and unless another boundary line is justified by special circumstances', the median line was to be the boundary in the former case, while, in the latter case, the matter, according to paragraph 2, was to be governed by the principle of equidistance from the nearest points of the baselines (see below) of the territorial sea. The Court held that in respect to the division of the common shelf of the German Federal Republic, the Netherlands and Denmark, paragraph 2 was not binding upon the German Federal Republic, a non-party to the Convention, inasmuch as:

a. that country had not accepted the rule in paragraph 2 in the manifest manner required for provisions in a multilateral Convention to bind a non-party to that instrument; and
b. the equidistance principle had not through its application by a certain number of countries become thereby a settled rule of customary international law, in the absence of evidence that in applying it those countries had considered that they were legally bound to follow it (opinio juris sive necessitatis[13]).

The Court also ruled that, in the absence of the application to the instant cases of article 6 of the 1958 Convention, the governing principles of international law concerning delimitation of a common continental shelf were first, that such delimitation should be the object of agreement between the countries specially concerned, and second, that any arrangement for division should be arrived at in accordance with 'equitable principles'.

It was in relation to the judicial determination of such 'equitable principles' that the Court's judgment is of such additional significance. According to the Court, it was in this connection fundamental, above all, that the means for effecting the delimitation should be carried out in such a way as to be *recognised as equitable*.[14] Therefore, it ruled that the

12. ICJ 1969, 3.
13. See pp 38–39 above.
14. Equitable principles were also treated as fundamental by the Court of Arbitration on 30 June 1977, in its award in the United Kingdom–France arbitration as to the delimitation of the boundary in their common continental shelf in the English Channel area. However, in the *Tunisia–Libya Continental Shelf Case* ICJ 1982, 18, concerning the delimitation of the common shelf boundary in the 'Pelagian Block', the International Court of Justice gave primary attention to the relevant physical structure, while not overlooking altogether equitable principles. Equitable criteria, in close conjunction

delimitation to be made by agreement between the states concerned in the instant cases should take account of all the relevant circumstances, in such a way as to leave, as much as possible, to each party all those parts of the continental shelf that constituted a natural prolongation of its land territory, without encroachment on the natural prolongation of the land territory of the other, provided that if there were any overlap, overlapping areas were to be divided in agreed proportions, or failing agreement, equally, unless they should decide on a régime of joint jurisdiction, user or exploitation of the areas of overlap (eg, if the same deposit of oil or source of gas should lie on both sides of the line of division of the common shelf area[15]). The Court also declared that regard should be had to the general configuration of the coasts of the parties, with provision for reasonable proportionality between shelf areas allocated and the lengths of the corresponding coastlines.

In January 1971, the parties entered into agreements for the purpose of giving effect to the pronouncements of the Court on the principles of delimitation.[16]

Developments since 1960 leading to the United Nations Convention of 1982 on the Law of the Sea

The First and Second United Nations Conferences on the Law of the Sea (see above) left unsettled numerous matters, including in particular:

1. the precise breadth of the territorial sea;
2. the question of innocent passage for warships at all times through straits constituting an international maritime highway, and consisting wholly of territorial sea waters;
3. the right of passage through, and overflight in relation to the waters of archipelagos; and
4. the problem of protection and conservation of species for purely scientific or tourist-amenity reasons.

Beyond these specific points, it had since been claimed that the settlement achieved in the four Geneva Conventions of 1958 proved in the passage of time to be inadequate in the context of later conditions. These criticisms of the régime established by the 1958 Conference referred on the whole to matters of a more general nature than the technical legal questions left unsettled in 1958 and 1960. It was said, for example, that fishing grounds

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with the relevant geographical and coastal configurations were also applied by a special chamber of the International Court of Justice in the case of *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (United States-Canada) ICJ 1984, 246.

15. The unity of deposit criterion was adopted in the agreements concluded in January 1971 by the parties for giving effect to the Court's judgment, and also in the Seabed Boundaries Demarcation Agreement of 18 May 1971, between Australia and Indonesia (see art 7). For the Court's discussion of this criterion, see ICJ 1969, 3 at 51–52.
16. For the texts of the Agreements, see *Yearbook of the International Court of Justice* 1970–1971, pp 118 et seq.

were faced with depletion, that the rules as to fisheries unfairly favoured the developed and disadvantaged the underdeveloped countries, that the enforcement of pollution control standards in the marine environment was proving to be unsatisfactory, that uncertainty surrounded the extent of the rights of littoral states over the resources of the continental shelf and areas beyond shelf limits, that land-locked states had inadequate access to the sea and that the 1958 Conventions would fail to halt a scramble by developed states to exploit resources in the seabed beyond national jurisdiction.

At all events, it was clear that taken together the four conventions were not acceptable as a whole to all states. As already indicated (see above) instead of ratifying or acceding to all four instruments en bloc, a number of states elected to become party to one or to some only, in a selective manner. Besides, the exploitability criterion adopted in the 1958 Convention on the Continental Shelf as marking the outer shelf limit was paradoxically viewed as unsatisfactory from two opposing standpoints. On the one hand, post-1958 advances in technology opened the way for mineral exploitation activities in ocean depths far beyond the limits envisaged in 1958. On the other hand, the newly emerged states became concerned that, on the basis of the exploitability criterion, they, without the technical know-how and being financially disadvantaged, would be powerless to prevent exploitation of the ocean floor resources by a monopoly of developed states possessing both finance and technological skills.

Another matter was the recurrence in the 1960s and 1970s of almost catastrophic oil spills from giant oil tankers running aground (eg, the *Torrey Canyon* off the Southern coast of the United Kingdom in March 1967) or otherwise incurring damage. The result was to underscore boldly the deficiences of international maritime law in respect to the possibilities of such oil pollution. This had prompted legislation (eg, the Canadian Arctic Waters Pollution Prevention Act 1970) or administrative action by states for the purpose of establishing controls in pollution zones extending for one hundred miles or more offshore. Far more serious was the possibility that the seabed might be used for the emplacement of nuclear weapons, with incalculable consequences for navigation, fisheries and other uses of the superjacent waters, apart from other hazards of a wide-ranging nature. In the result, in the period 1969–1971, three instruments were adopted which represented a substantial addition to the corpus of the law of the sea.

On 29 November 1969, two conventions were adopted at Brussels to deal with oil pollution casualties of the *Torrey Canyon* genre (see above), namely the International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (which will be referred to as the Intervention Convention), and the International Convention on Civil Liability for Oil Pollution Damage (to be referred to as the Liability

Convention). The Intervention Convention is of limited scope, inasmuch as states parties were given certain rights of taking defensive measures against pollution or threat of pollution only 'following' upon a maritime casualty or acts related to such a casualty; there were no specific provisions entitling coastal states to take preventive measures such as, for example, fixing sealanes or subjecting tankers to surveillance from shore-based stations, although states would not be debarred from making preparations beforehand to take such defensive measures as might conceivably become necessary in the event of a maritime casualty. In any event, the self-defensive measures were to be proportionate to the actual or threatened damage, while there were mandatory requirements for consultation with other states affected. The Intervention Convention was supplemented subsequently by a Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, adopted at London in November 1973; this applied to pollutants and also hazardous or injurious products other than oil, so that the expression 'Marine Pollution' is wider than its literal sense, as it covers injury and harm to humans and marine resources, damage to amenities, and interference with the use of the sea.

The Liability Convention applied exclusively to 'pollution damage caused on the territory including the territorial sea' of the coastal state. The tanker-owner was subjected to a principle of absolute liability, rather than liability based upon fault, but such absolute liability was one of a qualified character, for no liability for pollution damage attached to the owner if he proved (the onus of proof presumably being upon him) that the damage:

a. resulted from war, hostilities, civil war, insurrection or some unavoidable natural phenomenon; or
b. was caused by an act or omission with intent to cause damage by a third party; or
c. was wholly caused by the negligence or wrongful act of a government or authority responsible for maintaining lights or providing navigational aids.

A limit for liability was fixed, and fault came into account to the extent that if the casualty occurred as a result of the owner's actual 'fault or privity', his liability was not restricted to the ceiling fixed by the Convention. Provision was made for the necessity of certificates of insurance or financial security where a tanker registered in a country party to the Convention carried more than 2,000 tons of oil in bulk as cargo.

An instrument of a different nature was the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof, opened for signature on 10 February 1971. For the sake of brevity, this will be referred to as the Seabed Arms Control Treaty. It represented a

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first major step in preventing militarisation of the seabed and ocean floor. Under paragraph 1 of article 1 parties are prohibited from placing nuclear weapons or other weapons of mass destruction on the seabed and ocean floor beyond the limits of a twelve-mile coastal seabed zone, while paragraph 2 provided that this obligation was to apply also to the twelve-mile zone, except that within that zone the undertaking was not to apply either to the coastal state itself, or to the seabed beneath the coastal state's territorial sea. In other articles, provision was made for processes of verification, and for the continuance of negotiations for wider measures to prevent militarisation. The Seabed Arms Control Treaty was an arms control measure, and therefore did not prohibit or limit the use of peaceful nuclear explosive devices in the seabed or ocean floor in order to obtain minerals, or to drill for oil and gas. This consideration must be taken into account when assessing claims that the Treaty made a decisive contribution to the protection of the marine environment.

In 1967, before the adoption in 1969–1971 of the three last-mentioned instruments, the first step on the road to the conclusion of the 1982 Convention was taken when Mr Arvid Pardo of Malta pressed for United Nations action to be taken to have deep seabed resources beyond the continental shelf limits recognised as the common heritage of mankind, and to be developed in the interests of all states, with special regard to the needs of disadvantaged developing countries. This initiative influenced the recourse to far-reaching action within the framework of the United Nations. Mr Pardo had envisaged the adoption of a plan designed not only to avoid an unregulated scramble by developed countries to ravage the mineral wealth of the ocean floor beyond national jurisdiction, but also participation by rival states in an arms race which might ultimately conduce to the militarisation of the deep seabed. In December 1968, the United Nations General Assembly adopted four resolutions relating to the matter, the most important of which declared that the exploitation of the seabed and ocean floor 'beyond the limits of national jurisdiction' should be carried out for the benefit of mankind as a whole, with the United Nations system as the focal point of international co-operation in this domain, and which established a 42-member Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction (hereinafter referred to as the Seabed Committee) to make recommendations upon the related questions.

In 1969–1971, progress in the direction contemplated by the General Assembly resolutions was to a large extent activated by the labours of the Seabed Committee. Further resolutions were adopted by the General Assembly in 1969 after receiving a report from the Seabed Committee. Meanwhile, there had been other developments, including inter-state consultations for a general restructuring of the law of the sea and of oceanic resources, and the radical step taken by President Richard Nixon on 23 May 1970, when he issued a statement of a new United States

Policy on the Oceans,[17] which was compatible with the approach favoured by the United Nations General Assembly, and the principles of which were embodied in a draft convention presented on 3 August 1970 by the United States Government to the Seabed Committee as a working paper for discussion purposes.[18]

The final result of these merging developments was the adoption by the General Assembly of two important resolutions on 17 December 1970, one consisting of a Declaration of Principles Governing the Seabed and Ocean Floor and the Subsoil Thereof beyond the Limits of National Jurisdiction, and the other representing a decision to convene a Third United Nations Conference on the Law of the Sea in 1973, later to be known under the acronym, 'UNCLOS'. The Declaration proclaimed a number of principles and guidelines, including the following among others:

a. that the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area were the 'common heritage of mankind';
b. that the area was not subject to appropriation, or to be the object of claims of sovereignty or sovereign rights by states;
c. that all activities of exploration or exploitation in the area were to be governed by an international régime to be established;
d. that the area should be reserved exclusively for peaceful purposes; and
e. that measures should be taken in co-operation to prevent injury to the marine environment and its ecological balance, to protect and conserve natural resources of the area, and to prevent damage to the flora and fauna.

The terms of reference of the Third United Nations Conference of the Law of the Sea were extremely wide, embracing the establishment of the international régime for the area, a precise definition of the area (ie of its shoreward limit), and 'a broad range of related issues including those concerning the régimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal states), the preservation of the marine environment (including, inter alia, the prevention of pollution) and scientific research'. This implied in fact a complete re-opening of the settlement reached at the First United Nations Conference on the Law of the Sea at Geneva in 1958, with no sanctity for any one of the four conventions then

17. See the United States *Department of State Bulletin* 15 June 1970, p 737.
18. For a summary of the text of the Draft Convention, and for official statements thereon, see the *United States Department of State Bulletin* 24 August 1970, pp 209–218, and 19 April 1971, pp 529–533 (statements by Mr John R. Stevenson, Legal Adviser to the Department of State).

adopted by the Conference. The Seabed Committee was also enlarged to an 86-member body, to serve in effect as a preparatory committee for the Third United Nations Conference on the Law of the Sea.

It took no less than twelve sessions of the Conference, UNCLOS, 1973–1982, for a result to be reached, beginning with an 'organisational' first session in 1973 and ending with the adoption of the final text of the Convention and its signature at Montego Bay on 10 December 1982, by 118 states. The formal story of the procedures adopted, and decisions reached at each stage, is recounted in the Final Act of UNCLOS which was signed also on the same date; a detailed discussion of the matters narrated in the Final Act is beyond the confines of the present chapter. One virtually unprecedented feature of UNCLOS considered as a lawmaking gathering may however be briefly referred to. The Conference at its second session at Caracas, Venezuela in 1974 adopted a declaration that every effort should be made 'to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted'.[19] Throughout the sessions preceding the occasion at Montego Bay, the consensus procedure was followed, and would not of course have been effective but for the work, inter alia, of Conference committees and of inter-sessional consultative gatherings. That the labours of UNCLOS spanned a period of almost exactly nine years (the first session was held at New York from 3 December to 15 December 1973) is not surprising, having regard to the ambitious mandates to be fulfilled by the Conference, which were no less than the creation of complete and comprehensive international régimes for the high seas, the coastal waters and seabed, and the deep ocean floor, such régimes to embrace coverage of all relevant economic and environmental issues. Throughout the course of the Conference sessions, there was evidence of divisions on matters of principle between the developing countries and the developed countries, the latter wishing to retain as much freedom of enterprise as possible, as corresponding to the sophistication of the technology that they possessed, and reluctant to be bound by decisions of bodies in which they might lack representation. This was reflected in the decision, in particular, of the United States Government not to sign the 1982 Convention,[20] although apparently it

19. See Final Act of the Conference (Document A/CONF.62/121) pp 13–14.

20. According to the United Nations background Press Release of 3 December 1982 (Document SEA/498) p 6, the five principal objections of the United States to the Convention were as follows: (1) The seabed mining provisions would deter the exploitation of deep seabed mineral resources. (2) Access to these resources was not assured. (3) The countries most affected did not have a proportionate voice in decision-making on seabed policies, with the result that their interests would not be fairly reflected and effectively protected. (4) The procedure whereby future amendments to seabed provisions could come into force for a state without its consent was incompatible with United States processes for incurring treaty obligations. (5) The provisions as to the mandatory transfer of seabed technology, potential distribution of benefits to national

does not dissent from the provisions of the Convention which do not relate to the establishment of an International Seabed Authority and to controls over the exploitation of the resources of the seabed beyond the limits of national jurisdiction. Only three months later, the United States policy on the subject was apparently confirmed by the terms of the Presidential Proclamation of 10 March 1983 proclaiming an American Exclusive Economic Zone (see p 269 below), and in President Reagan's accompanying statement concerning the reach of his Proclamation. The group of non-signatory states also included the United Kingdom which declared that it would seek improvements in the seabed mining provisions.

Before dealing in the second section of this chapter with the substantive law of the sea it may be convenient to set out what the President of UNCLOS at its final session (Mr T.T.B. Koh) considered were the eight main achievements of the Convention. These, according to him, as set out in the United Nations Press Release on 10 December 1982 (Document SEA/514), were as follows:

1. The Convention would promote the maintenance of international peace and security because, instead of a plethora of conflicting claims by coastal states, there would be universally agreed limits on the territorial sea, on the contiguous zone, on the exclusive economic zone (EEZ) and on the continental shelf.
2. The international community's interest in the freedom of navigation in maritime waters would be facilitated by the important compromises in the Convention on the status of the EEZ, by the régime of innocent passage through the territorial sea, by the régime of transit passage through straits used for international navigation, and by the régime of archipelagic sea-lanes passage.
3. The international community's interest in the conservation and optimum utilisation of the living resources of the sea would be enhanced by the conscientious implementation of the provisions in the Convention relating to the EEZ.
4. Important new rules were laid down for the protection and preservation of the marine environment from pollution.
5. The Convention contained new rules on marine scientific research which struck an equitable balance between the interests of states conducting research and the interests of the coastal states in the EEZs of, or continental shelves of which the research was to be carried out.
6. The international community's interest in the peaceful settlement of disputes and the prevention of the use of force in the settlement of international disputes would be advanced by the mandatory system of dispute settlement provided for in the Convention.
7. The principle that the resources of the deep seabed constituted the

liberation movements, and production limitations posed key problems for the United States Congress.

common heritage of mankind had been translated into fair and workable institutions and arrangements.

8. Elements of international equity were to be found in the Convention, such as revenue-sharing on the continental shelf beyond 200 miles, giving land-locked and geographically disadvantaged states access to the living resources of the EEZs of their neighbouring states, the relationship between coastal fishermen and distant-water fishermen, and the sharing of the benefits derived from the exploitation of the resources of the deep seabed.

2. THE LAW OF THE SEA UNDER THE REGIMES ESTABLISHED BY THE UNITED NATIONS CONVENTION OF 10 DECEMBER 1982[1]

At the outset, it must be stated that it would be beyond the scope of the present chapter to cover in full detail the elements and principles of the régimes established by the United Nations Convention on the Law of the Sea of 10 December 1982. Such a coverage can only be achieved, not in a single chapter, but in a major treatise of some length. The Convention consists of no less than 320 articles spread over 17 Parts, together with 9 Annexes. Apart from the Convention and its Annexes, there would also have to be considered the four important resolutions adopted by the Conference, and the Statement of Understanding Concerning a Specific Method to be Used in Establishing the Outer Edge of the Continental Margin (these are contained in pp 23–35 of the Final Act). Resolution I establishes the Preparatory Commission for the Seabed Authority and the Law of the Sea Tribunal. Resolution II, which is of some length, governs preparatory investment in pioneer activities by states and private consortia relating to polymetallic nodules in the deep sea area. Resolution III deals with the rights and interests of territories which have not attained independence or self-government. Resolution IV grants to recognised national liberation movements the right to sign the Final Act as observers.

The present treatment of the law of sea under the régimes created by the Convention will therefore necessarily be one of a condensed nature. Nonetheless, in its sequence this treatment will follow the arrangement in successive Parts, as employed in the Convention.

Definitions (Part I)

The principal definitions for the purposes of the Convention are contained in article 1, which constitutes Part I. The term 'Area' is defined to mean the seabed and ocean floor and subsoil thereof beyond the limits of

1. The Convention is being dealt with in a comprehensive manner, with annotations and commentary, in a multi-volume series, M. Nordquist (ed) *United Nations Convention on the Law of the Sea, 1982. A Commentary* (1985 and later years).

national jurisdiction. The article also defines 'Authority' (the International Sea-Bed Authority), 'activates in the Area' (exploration and exploitation of resources), 'pollution of the marine environment' (emphasising deleterious effects, the creation of hazards and the impairment of quality), 'dumping' (emphasising the deliberateness of the disposal of wastes, etc), and 'States parties'.

The Territorial Sea and Contiguous Zone (Part II)

Article 2 proclaims that the sovereignty of a coastal state extends beyond its land territory and internal waters, and in the case of an archipelagic state, its archipelagic waters, to the territorial sea, the superjacent air space and the bed and subsoil thereof (cf articles 1–2 of the Geneva Convention of 1958 on the Territorial Sea and Contiguous Zone). The breadths and limits of the territorial seas of states are covered in articles 3–7, under which the limit is not to exceed 12 nautical miles measured from baselines, the normal baseline being the low-water mark as shown on large-scale charts officially recognised by the coastal state. However, in the case of islands situated on atolls or of islands having fringing reefs, the baseline is the seaward low-water mark of the reef as shown by the appropriate symbol on charts officially recognised by the coastal state. Straight baselines are permissible according to the conditions laid down in article 7 (cf article 4 of the 1958 Convention), which to a large extent embodies the principles affirmed in the *Anglo–Norwegian Fisheries Case*.[2] Such lines joining 'appropriate points' may be drawn for 'localities' where the coastline is deeply indented and cut into, or if there is an offshore fringe of islands in the immediate vicinity. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water mark. Lines as drawn must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. The lines are not to be drawn to and from low-tide elevations, unless lighthouses or similar permanent installations above sea level have been built thereon, except where the lines drawn in such circumstances have received 'general international recognition'. If the lines are, in principle, permissible, account may be taken in determining particular lines of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage. The system of such lines is not applicable if the effect is to cut off the territorial sea of another state from the high seas, or an EEZ.

Article 8 is similar to article 5 of the 1958 Convention, but, unlike the latter provision, reserves the position of archipelagic waters; Subject to

2. ICJ 1951, 116; see pp 249–250 above.

that position, waters on the landward side of the territorial sea baseline form part of the internal waters of the coastal state. Moreover, if a baseline has been drawn in compliance with article 7, above, thereby enclosing as internal waters areas not previously considered to be such, there shall exist a right of innocent passage in such waters. Article 9, dealing with the mouths of rivers, is similar to article 13 of the 1958 Convention; where a river flows directly into the sea, the baseline is to be a straight line across the river mouth between points on the low-water mark of the river banks.

Article 10 (cf article 7 of the 1958 Convention) deals with bays, the coasts of which belong to a single state. For the purposes of the Convention, a bay is in effect defined as 'a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast', and the area of the indentation must be as large as, or larger than that of the semi-circle whose diameter is a line drawn across the mouth of that indentation. Where, because of the presence of islands, an indentation has more than one mouth, the relevant semi-circle is to be drawn on a line as long as the sum total of the lengths of the lines across the different mouths, islands within the indentation being included as if they were part of the water area of the indentation. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between the two marks so as to render the enclosed waters internal waters; but if the distance between the marks exceeds 24 nautical miles, a straight baseline of 24 nautical miles is to be drawn within the bay so as to enclose the maximum area of water possible with the line. The above-mentioned principles do not apply to 'historic bays',[3] or in any case where the baselines method under article 7 (see above) has been applied.

Articles 11–13 deal with harbour works, roadsteads and low-tide elevations (cf articles 8, 9 and 11 of the 1958 Convention). Under article 11, for the purpose of delimiting the territorial sea, the outermost permanent harbour works that form an integral part of the harbour system are to be regarded as forming part of the coast, but offshore installations and artificial islands are not to be considered as permanent harbour works. Article 12 provides that roadsteads normally used for the loading, unloading and anchoring of ships are to be included in the territorial sea. A low-tide elevation is defined by article 13 as a 'naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide'. Where such an elevation is situated wholly or partly at a

3. These are bays, the waters of which have come to be regarded as territorial in the course of a long period of acquiescence by non-littoral states, irrespective of the distance between the headlands. See *Yearbook* of the International Law Commission, 1962, Vol II, pp 1–26 and generally G. Westerman *The Juridical Bay* (1986).

distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water mark on that elevation may be used as the baseline for measuring the territorial sea. On the other hand, where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

Article 15 deals with the delimitation of the territorial sea between states with opposite or adjacent coasts (cf article 12 of the 1958 Convention); neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured. This rule is subject to the exception of cases of 'historic title' or other special circumstances of divergent limitation.

The rules concerning innocent passage in the territorial sea are contained in articles 17–32, and are more extensive in range than the corresponding articles 14–23 in the 1958 Convention, while also taking into account technological developments. Such right of innocent passage attaches to ships of all states, whether coastal or land-locked, but there is no provision for innocent overflight by alien aircraft. The expressions 'passage' and 'innocent' are defined in article 18 and article 19 respectively. Normally, passage must be continuous and expeditious, but may include stopping and anchoring only in so far as these are incidental to ordinary navigation or are rendered necessary by force majeure (that is, Act of God), or distress, or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. To be 'innocent', passage must not be prejudicial to the peace, good order or security of the coastal state, nor in breach of the Convention or of other rules of international law. Twelve categories of activities are specified as rendering a passage by a foreign vessel 'prejudicial to the peace, good order or security' of the coastal state, including threats or use of force, weapon exercises, collecting information prejudicial to the defence of the coastal state, pollution, interference with systems of communication, and the launching or landing or taking on board any aircraft. Submarines and other underwater vehicles are required to navigate on the surface and to show their flag.

Article 21 deals with the subject matters of the laws and regulations which a coastal state may adopt in respect to innocent passage; as might be expected, they include the safety of navigation, protection of navigational aids, cables and pipelines, prevention of illegal fisheries, and prevention of customs, fiscal, immigration and health offences. Such laws and regulations are not to apply to the design or construction, etc, of foreign ships unless these were giving effect to accepted international norms. Foreign ships in innocent passage are to comply with duly made laws and regulations of the coastal state. Under article 22, the coastal state may designate sea lanes and prescribe traffic separation schemes,

in particular for tankers, nuclear-powered vessels and ships carrying hazardous substances. These lanes and schemes must be clearly indicated. Foreign nuclear-powered ships and ships carrying nuclear or other hazardous substances must carry documents and observe the special precautionary measures established for such ships by international agreements (article 23). At the same time, duties have been imposed on coastal states by article 24, which prohibits requirements serving to hamper or impair innocent passage, or operate in a discriminatory manner. Nonetheless, article 25 empowers coastal states to take steps to prevent a passage which is not innocent, even to the extent of suspending a right of passage if the suspension is essential to protect the security of the coastal state concerned. No charge may be levied in respect of the exercise of a right of innocent passage, except non-discriminatory charges for services rendered (article 26).

The thorny subject of the exercise of criminal and civil jurisdiction on board foreign ships, whether merchant ships or government ships operated commercially, in passage through the territorial sea, is dealt with in article 27 and article 28, respectively (cf articles 19 and 20 of the 1958 Convention). Under paragraph 1 of article 27, the criminal jurisdiction of a coastal state is not to be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

a. if the consequences of the crime extend to the coastal state concerned;
b. if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
c. if the assistance of the local authorities has been requested by the master of the ship, or by a diplomatic agent or consular officer of the ship's flag state; or
d. if such measures are necessary for the suppression of the illicit traffic in narcotic drugs or psychotropic substances.

Except as provided in the Parts of the Convention dealing with the EEZ or the protection of the marine environment the coastal state may not exercise criminal process or undertake any criminal investigation on board a foreign ship in the territorial sea as to a crime committed before its entry therein. In determining whether or how an arrest is to be made, the authorities are to have regard to the interests of navigation.

Civil jurisdiction is provided for in a different manner. The coastal state is not to stop or divert a foreign ship in the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship. Nor may the coastal state levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the vessel itself in the course of or for the purpose of its voyage through the coastal state's

waters. These prohibitions are, however, without prejudice to the coastal state's right to take measures of civil process against a foreign ship in the territorial sea after leaving internal waters.

Warships are defined and treated in a separate category in articles 29–32 (cf article 23 of the 1958 Convention). A warship not complying with the coastal state's laws and regulations as to passage in the territorial sea and disregarding a request to conform thereto, may be required to leave the territorial sea immediately (article 30). The flag state is to bear 'international responsibility' for damage to the coastal state due to such non-compliance by a warship or other government ship operated for non-commercial purposes, or due to the breach by such vessels of the Convention or other rules of international law (article 31). Leaving aside articles 17–26 (see above) and articles 30–31, nothing in the convention is to affect the immunities of such ships.

The contiguous zone

As to the contiguous zone, article 33 (cf article 24 of the 1958 Convention) lays it down that the coastal state may in such zone exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, and punish any such infringements. However, the contiguous zone is not to extend beyond 24 miles from the baselines from which the breadth of the territorial sea is measured.

Straits used for international navigation

Part III of the Convention (articles 34–45) provides a totally new international régime with regard to straits used for international navigation, representing one of the major achievements of UNCLOS. It begins with general provisions to the effect, inter alia, that the régime of passage through such straits is not to affect the legal status of the waters thereof, or the exercise by countries bordering the straits of their sovereignty or jurisdiction over the waters, the bed, the subsoil and the superjacent air space concerned (article 34), that nothing in Part III is to affect any areas of internal waters within a strait except where the drawing of a baseline has served to enclose as internal waters areas not previously considered as such, the legal status of waters beyond the territorial seas of bordering countries that are of the nature of EEZs or high seas or the legal régime in straits in which passage has been governed by long-standing international conventions (article 35), and that Part III is not to apply to such straits if there exists through the strait concerned a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics, these routes to be governed by other relevant provisions of the Convention (article 36).

The concept of 'transit passage' is introduced in articles 37–44, and is applicable to straits used for international navigation between one part

of the high seas or an EEZ and another part of the high seas or an EEZ (article 37), being defined as the exercise of the freedom of navigation and overflight 'solely for the purpose of continuous and expeditious transit' in the strait, the requirements of 'continuousness' and 'expedition' not precluding passage for the purpose of entering, leaving or returning from a bordering country (article 38). All ships and aircraft are to enjoy, *unimpeded*, this right of transit passage. The right is inapplicable if the strait concerned is formed by an island of a bordering country and its mainland, and there exists seaward of the island a route through the high seas or through an EEZ of similar convenience as to navigational and hydrographical characteristics (article 38). Articles 39–40 impose certain duties on, and set out certain prohibitions to be complied with by ships and aircraft in transit passage; there is nothing surprising about these, inasmuch as ships and aircraft, considered together, are required to proceed without delay, to refrain from the use or threat of force against bordering states and from non-transit activities unless rendered necessary by force majeure, or by distress, while, separately, and respectively, they are to comply with, broadly speaking, the relevant applicable international regulations governing safety at sea or in the air, and non-pollution from ships. There is a special prohibition on foreign vessels, including marine scientific research and hydrographic survey ships conducting any research or survey activities without the prior authorisation of the bordering states.

Articles 41–42 do not call for detailed reference; in a manner to be expected, they contain provisions for the design by bordering states of sea lanes and traffic separation schemes, and for the adoption by such states of laws and regulations to govern transit passage. Under article 43, user states and bordering states are to co-operate by agreement in respect to safety aids and navigational aids and improvements in straits, and for the prevention, reduction and control of pollution from ships. Article 44 prohibits bordering states from hampering or suspending transit passage, and requires them to give due publicity to any danger to navigation or overflight of which they have knowledge.

The right of innocent passage, as defined in articles 17 et seq (see above) is, however, to apply in straits used for international navigation, if the strait concerned is formed by an island of a bordering country and its mainland (see article 38 above), or is one between a part of the high seas or an EEZ and the territorial sea of a foreign state. Such right may not be suspended (article 45).

The waters of archipelagic states

Another new régime, and one which is a major feature of the Convention, is created in Part IV of the Convention (articles 46–54) for archipelagic states and the waters of such states.

Definitions are of crucial importance in this connection. Both the

expression 'archipelago' and the expression 'archipelagic state' had to be meticulously defined. The relevant definition article, article 46, sets out that the term 'archipelago' means 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an *intrinsic* geographical, economic and political entity, or which *historically* have been regarded as such' (emphasis added for the words 'intrinsic' and 'historically'). 'Archipelagic state' is defined to mean 'a state constituted *wholly* [emphasis added] by one or more archipelagos and may include other islands'.

The method of straight baselines is adopted as a solution for the problem of archipelagic waters. The key provisions are contained in articles 47 and 49. An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago, with the consequence that the archipelagic state's sovereignty extends to the waters thus enclosed, to the superjacent air space, the bed and subsoil thereof and the resources therein contained, but the following conditions and requirements must be met:

1. The baselines must include the main islands and an area in which the ratio of the water to the area of land is between 1:1 and 9:1.
2. The length of the baselines is not to exceed 100 nautical miles, except that up to 3% of the total number of baselines may exceed that length up to a maximum of 125 nautical miles.
3. The baselines must not depart to any appreciable extent from the general configuration of the archipelago.
4. The baselines must not be drawn to and from low-tide elevations (see above), unless lighthouses or similar installations permanently above sea level have been built thereon or where such an elevation is situated wholly or partly at a distance from the nearest island, not exceeding the breadth of the territorial sea.
5. The baselines must not be applied in such a way as to cut off from the high seas or the EEZ the territorial sea of another state.
6. If part of the archipelagic waters lies between two parts of an immediately adjacent neighbouring state, the traditionally exercised rights and legitimate interests of such latter state in the waters, and all rights stipulated by agreement between the two states shall continue and be respected. The breadth of the territorial sea, the contiguous zone, the EEZ and the continental shelf are to be measured from these baselines. Within these archipelagic waters, the archipelagic state may draw closing lines for the delimitation of internal waters, as under articles 9–11, above (mouths of rivers, bays and outermost harbour works).

In subsequent articles (articles 51–54), provision is made for respect to be given by the archipelagic state to existing agreements, traditional fishing rights and existing submarine cables lying entirely under water,

for a right of innocent passage, as above, by foreign vessels, through archipelagic waters, for the designation in appropriate manner by the archipelagic states of sea lanes and air routes, and for the same duties to be observed by foreign ships and aircraft, and by archipelagic states, as mutatis mutandis in the case of transit passage through straits used for international navigation under the provisions of articles 39, 40, 42 and 44.

The Exclusive Economic Zone (EEZ)

UNCLOS will perhaps always be remembered in the history of international law as having given birth to, or at least nurtured to full strength, the concept of the exclusive economic zone (EEZ). The Convention deals with the EEZ in Part V, consisting of no less than 21 articles (articles 55–75). The establishment of an acceptable régime for the EEZ occupied much of the time of UNCLOS, although the concept itself found ready approval. It has revolutionised the law of the sea.[4] The United States, although opposed to the Convention, nevertheless by the Presidential Proclamation of 10 March 1983 (see above, p 260) explicity recognised and adopted the concept.

First, there is its definition in articles 55 and 57 as an area beyond and adjacent to the territorial sea, not extending beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (that is, the 200 miles are not measured from the seaward outer limits of the territorial sea).

Second, within this zone, the adjacent coastal state does not have the equivalent of territorial sovereignty, but sovereign rights for the purpose of exploring, exploiting, conserving and managing the resources of the EEZ, and jurisdiction, with due regard to the rights of other states, with respect to the establishment and use of artificial islands and structures, marine scientific research, and the protection and preservation of the marine environment (article 56). Other rights are specified in the remainder of Part V. Broadly speaking, in the EEZ, the traditional freedoms of the high seas, for example, navigation, overflight, and the laying of cables and pipelines are unaffected, but in the case of conflicts as to rights and jurisdiction, these are to be resolved 'on the basis of equity and in the light of all the relevant circumstances' (article 59).

Most of the thorny problems and difficulties relating to the working in practice of the coastal state's control over its EEZ are dealt with in articles 60–68, namely the construction of artificial islands, installations and structures by the coastal state (article 60), the conservation and utilisation

4. See generally D. Attard *The Exclusive Economic Zone in International Law* (1986) and R. W. Smith *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (1986). The International Court of Justice in the *Continental Shelf (Tunisia-Libya) Case* ICJ 1982, 18 treated the EEZ as now a settled part of modern international law.

of the living resources of the EEZ, with special provisions as to certain species, eg highly migratory species and marine mammals. It is beyond the scope and purpose of the present book to traverse in detail the provisions contained in these articles. Rights of participation by land-locked states and geographically disadvantaged states 'on an equitable basis' in the exploitation of an appropriate part of the surplus of the living resources of the EEZ (to be worked out through agreements) are conferred by articles 69–70, which articles are, however, not to apply in the case of a coastal state 'whose economy is overwhelmingly dependent on the exploitation of the living resources' of its EEZ (article 71). It remains to be seen whether articles 69–70 will prove to be of concrete value to the states, for the benefit of whom these articles were drafted. Being no more than agreements to agree, the articles are inherently weak.

As was to be expected, there is an article, article 73, setting out the limits subject to which a coastal state may enforce the laws and regulations governing the exercise of its sovereign rights and its jurisdiction in the EEZ. Article 73 instances such measures as boarding, inspection, arrest and judicial process, and the penalty of imprisonment for any breaches is excluded. It may be said that in this area a broad and general discretion in the exercise of their powers in the EEZ has been left to coastal states.

The provisions in article 74 for delimitation of the EEZ between states with opposite or adjacent coasts verge on the platitudinous; such delimitation is to be effected by 'agreement on the basis of international law ... in order to achieve an equitable solution', but if no agreement can be reached in a reasonable time, the states concerned are to resort to the procedures for dispute settlement contained in Part XV of the Convention. States may enter into provisional arrangements pending a final agreement, and if there is already a final agreement, it is to apply.

The continental shelf

Part VI (articles 76–85; cf articles 1–15 of the Geneva Convention of 1958 on the Continental Shelf) deals not only with the continental shelf, but with the continental margin. In fact, the continental shelf is defined by reference to the continental margin as follows (see paragraph 1 of article 76):

> 'The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'

The criterion of exploitability as determining the outer limit of the shelf, to be found in article 1 of the 1958 Convention, has been discarded. In paragraph 3 of article 76 the continental margin is described as comprising 'the submerged prolongation of the land mass of the coastal state', and

as consisting of 'the seabed and subsoil of the shelf, the slope and the rise', but as not including 'the deep ocean floor with its oceanic ridges or the subsoil thereof'. Thus, geological criteria, both of a territorial and marine nature, have been adopted.

The outer limits of both shelf and margin are governed, albeit not very clearly, by paragraphs 4–7 of article 76. It is necessary first to refer to paragraph 7 which provides that, where a shelf extends beyond 200 nautical miles from the territorial sea baselines, the coastal state concerned shall delineate the shelf's outer limits by straight lines not exceeding 60 nautical miles in length, connecting fixed points defined by co-ordinates of latitude and longitude. Under paragraph 4 of the same article, wherever the continental margin extends beyond 200 nautical miles from the territorial sea baselines, the coastal state concerned is to establish the outer edge of the margin by either:

i. a line delineated in conformity with paragraph 7 by reference to the outermost 'fixed points', at each of which the thickness of sedimentary rocks is at least 1% of the shortest distance from such point to the foot of the shelf; or
ii. a line delineated in conformity with paragraph 7 by reference to 'fixed points' not more than 60 nautical miles from the 'foot' of the continental slope, such foot to be normally the point of maximum change in the gradient at its base.

However, under paragraph 5, the 'fixed points' under (i) and (ii) either shall not exceed 350 nautical miles from the territorial sea baselines or shall not exceed 100 nautical miles from the 2,500 metre isobath. The convoluted if not turgid character of these provisions is further compounded by the declaration in paragraph 6 that, notwithstanding the provisions of paragraph 5, the position is that on 'submarine ridges', not being elevations that are natural components of the continental margin such as the plateaux, rises, caps, banks and spurs of the margin, the outer limit of the continental shelf is not to exceed 350 nautical miles from the territorial sea baselines.

There is somewhat more precision in the remaining paragraphs, 8–10 of article 76. Information on shelf limits outside the 200-mile belt is to be submitted by the coastal state to the Commission on the Limits of the Continental Shelf set up under Annex II of the Convention. Shelf limits established by the coastal state on the basis of the Commission's recommendations are to be 'final and binding' (paragraph 8). The coastal state is also to deposit with the United Nations Secretary-General charts and relevant information permanently describing the shelf's outer limits, to which the Secretary-General shall give due publicity (paragraph 9). Nothing in article 76 is to prejudice the question of delimiting the shelf between states with opposite or adjacent coasts (paragraph 10).

Article 77 defines the rights of the coastal state over the shelf in a

manner which differs but little from article 2 of the 1958 Convention. That state has sovereign rights over the shelf for the purpose of exploring and exploiting its 'natural resources', these rights being exclusive in the sense that if it does not explore or exploit these, nobody can undertake activities without its express consent; nor do the rights depend on occupation, effective or notional, or on any express proclamation. The expression 'natural resources' embraces not only the mineral and other non-living resources of the seabed and subsoil, but also living organisms belonging to sedentary species, ie organisms which, at the harvestable stage, either are immobile on or under the seabed, or are unable to move except in constant physical contact with the seabed or subsoil. Thus free-swimming fish or free-moving crustaceans are not, in this context, within the meaning of the expression 'natural resources'. Articles 78–81 clarify some of the limits of these rights; they are not to affect the legal status of the superjacent waters or the air space above these, nor is their exercise to impair navigation or other rights and freedoms of other states under the Convention, such as, specifically, the laying of submarine cables and pipelines, although the delineation of the course of the pipelines is subject to the coastal state's consent. As in the case of the EEZ, under article 60 (see above), the coastal state is to have the exclusive right to construct, etc, artificial islands, installations and structures on the shelf, and the provisions otherwise of article 60 are to apply mutatis mutandis in respect to these. Moreover the coastal state is to have the exclusive right to authorise and regulate drilling on the continental shelf for all purposes.

Article 82 on payments and contributions by the coastal state with respect to the exploitation of the shelf beyond 200 nautical miles need not concern us, as it is not believed that it commands universal consensus. Nor need article 83 on the delimitation of the shelf between states with opposite or adjacent coasts; it is expressed in virtually the same terms, verging on the platitudinous, as the corresponding article for similar delimitation of the EEZ, namely article 74 (see above), and is to the same effect. Limits and lines of delimitation are to be shown on charts, or lists of geographical co-ordinates of points may be substituted; due publicity is to be given to these, and copies deposited with the United Nations Secretary-General (article 83). Article 85 preserves the coastal state's right to tunnel the shelf subsoil, irrespective of the depth of water above the subsoil.

The high seas

The régime of the high seas (in the strict sense) is covered in Part VII, divided into two sections, section 1, 'General Provisions' (articles 86–115; cf articles 1–37 of the Geneva Convention of 1958 on the High Seas), and section 2, 'Conservation and Management of the Living Resources of the High Seas' (cf articles 1–22 of the Geneva Convention of 1958 on Fishing and Conservation of the Living Resources of the High Seas).

Dealing first with the provisions in section 1, one may see from article 86 how the Convention has revolutionised the traditional concept of the high seas. The area of waters corresponding to the concept has shrunk by literally thousands of square miles, so that Part VII, bearing the title 'High Seas' applies only to all those parts of the sea not included in the EEZs, in the territorial seas or internal waters of states or in the archipelagic waters of archipelagic states. It is thus in regard to this negatively defined maritime area alone that the freedoms of the high seas specified in article 87 are solely applicable; under this article, such 'high seas' are entirely and fully open to all states, coastal or land-locked, with freedoms of navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands and other installations, fishing and scientific research (subject to Part VI on the continental shelf and Part XIII as to marine scientific research), all such freedom to be exercised with due regard to the interest of other states exercising the same freedoms.

A number of fundamental propositions are enunciated in the subsequent articles. The high seas (within the meaning of Part VII) are to be reserved for peaceful purposes (article 88), no part thereof may be the subject of a claim of sovereignty (article 89), every state has the right to sail thereon ships flying its flag (article 90), and every state is to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and the right to fly its flag, while ships have the nationality of the state whose flag they are entitled to fly, provided that there exists a 'genuine link' between the state and the ship (article 91). Article 92 (similar to article 6 of the 1958 Convention) is concerned with the status of ships as such; they may sail under the flag of one state only, and save in exceptional cases provided for in international treaties or in the Convention, are to be subject to the *exclusive jurisdiction* of that state on the high seas (emphasis added; by thus subjecting ships to the exclusive jurisdiction of the flag State, the doctrine laid down by the decision of the Permanent Court of International Justice in the *Lotus Case*[5] was negated).

The principle laid down in article 92 of the Convention does not necessarily endorse the doctrine that a ship bearing the national flag of a state is for purposes of jurisdiction treated as if it were territory of that state, on the principle that it is in effect a 'floating island'.[6] The latter expression is purely a metaphor, and is one which was criticised in *R v Gordon-Finlayson, ex p An Officer*;[7] in that case, it was pointed out that

5. (1927) Pub PCIJ Series A, No 10. See pp 40–41, 206 above.
6. See *R v Anderson* (1868) LR 1 CCR 161, 11 Cox CC 198; the *Lotus Case* (1927) Pub PCIJ Series A No 10; and the *Costa Rica Packet* (1897) 5 Moore's International Arbitrations 4948.
7. [1941] 1 KB 171. For comment on this decision see *Oteri v R* [1976] 1 WLR 1272, PC and cf the American decision of *Cunard SS Co v Mellon* 262 US 100 (1923) at 123. For criticism of the 'floating island' doctrine, see also Hall *International Law* (8th edn, 1924) pp 301–4.

a ship is not part of the territory of the flag state, but jurisdiction is exercisable over the ship by that state in the same way as over its own territory.[8] Nonetheless, this concept of the notional territoriality of vessels on the high seas had continued, prior to the United Nations Convention on the Law of the Sea of 1982, to receive recognition and application.[9]

A ship may not change its flag during a voyage, or while in a port of call, save in the case of a real transfer of ownership or change of registry. A ship that sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities with respect to any other state, and may be assimilated to a ship without nationality (article 92). These provisions do not affect the case of ships in the official service of the United Nations and its related agencies which fly the flag of the organisation in question (article 93).

Article 94 proceeds to detail the duties lying upon a flag state with respect to its ships on the high seas. The general principle is proclaimed in paragraph 1 that 'every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters' over its ships. The rest of the article sets out the measures which are to be taken, including, in particular, the maintenance of a proper register, and an elaborate enumeration of steps to be taken for the maintenance of safety at sea.

The question of jurisdictional immunity is dealt with in articles 95–96. Warships on the high seas are completely immune from the jurisdiction of any state other than the flag state, and so also are ships owned or operated by a state and used only on government non-commercial service.

Article 97 deals with the important matter of penal jurisdiction in cases of collisions or other incidents of navigation. Like article 92, which was in more general terms (see above), it negates the doctrine laid down by the Permanent Court of International Justice in the *Lotus Case*,[10] above, by providing that where, in such cases, the penal or disciplinary responsibility of the master or of any other person in the service of the ship is involved, no penal or disciplinary proceedings may be instituted against such latter persons except before the judicial or administrative authorities of the flag state or of the state of which such person is a national. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state.

Under article 98 states are under a duty to require masters of ships

8. Yet a crime committed on board a ship is, for the purposes of an extradition treaty, deemed to have been committed in the territory of the flag state, which is a party to the treaty; see *R v Governor of Brixton Prison, ex p Minervini* [1959] 1 QB 155, [1958] 3 All ER 318.
9. See article 23 of the Rome Convention of 7 October 1952, on Damage Caused by Foreign Aircraft to Third Parties on the Surface, providing that for the purposes of the Convention, a ship or aircraft on the high seas is to be regarded as part of the territory of the state in which it is registered.
10. Pub PCIJ (1927) Series A, No 10. See pp 40–41, 206 above.

flying their flags to render assistance in cases of danger, distress and collisions.

Slavery

Every state is under article 99 to take effective measures to prevent and punish the transport of slaves in ships of its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board *any ship, whatever its flag* [emphasis added] shall ipso facto be free (cf article 13 of the 1958 Convention).

Piracy jure gentium

The subject of piracy jure gentium, dealt with in articles 100–107 of the Convention, can be adequately treated only in the context of the traditional international law on the subject, considered in conjunction with these articles of the Convention.

Traditionally, in its jurisdictional aspects, the offence of piracy jure gentium was unique. A pirate was subject to arrest, trial, and punishment by all states on the ground that he represented an enemy of mankind (hostis humani generis).[11] The vessel (or aircraft) involved was similarly subject to seizure by all states. By his conduct, the person committing the offence was deemed automatically to lose the protection of the vessel's flag state and any privileges that might be due to him by virtue of his nationality.

Formerly, it sufficed to define piracy as meaning simply murder or robbery on the high seas by persons who were in effect outlaws, but this definition was gradually widened to bring it into line with conditions not prevalent when the customary rules on the subject were first evolved. This is reflected in the definition of piracy in article 101 (cf the definition in similar terms in article 15 of the 1958 Convention) as consisting of the following acts:

> '(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (c) any acts of inciting or intentionally facilitating an act described in subparagraph (a) or (b).'

11. So far was this the case that the taking of property by a pirate jure gentium did not divest the title of the true owner (pirata non mutat dominium); see Oppenheim *International Law* (8th edn, 1955) Vol I, pp 616–617.

Thus accessory conduct is included within the scope of the definition.[12] It follows from this now extended meaning of piracy that the offence may be prompted by motives other than gain, eg revenge. Moreover, the instrument of the offence may be an aircraft as well as a ship while the victim may be another aircraft, provided that it is on the high seas or in terra nullius (ie an area outside the jurisdiction of any state).

The expression 'pirate ship or aircraft' in article 101 is defined in article 103 as connoting a ship or aircraft intended by the persons in dominant control to be used for the purpose of committing the piratical acts specified in article 101.

Because of the operative words 'committed for private ends' in the definition in article 101, acts inspired by political motives and which would otherwise be treated as piratical, do not constitute piracy jure gentium. In respect to the other operative words '*against* another ship or aircraft or *against* persons or property' on board, it has been claimed that the hijacking of an aircraft can never be piracy juré gentium, because the offence is committed 'within' and not against the aircraft, nor against the persons or property on board.[13]

At the outset, it is necessary to distinguish piracy at international law and piracy at municipal law. Under the laws of certain states, acts may be treated as piratical which are not strictly speaking acts of piracy jure gentium. For example, under English criminal law the transport of slaves on the high seas is piracy, but is not so according to international law. In the same way, one must distinguish piracy jure gentium from acts (such as, eg arms running) which may be deemed to be piracy under bilateral treaties or under joint declarations of policy by states, for the strict meaning of piracy jure gentium cannot be extended by such treaties,[14] or by joint declarations, designed to govern only the relations between the states subscribing to them.

Private vessels or aircraft only can commit piracy, except that a public

12. In 1934, it had been held by the Judicial Committee of the Privy Council in *Re Piracy Jure Gentium* [1934] AC 586, that actual robbery was not an essential element of the crime of piracy, and that a frustrated attempt to commit a robbery on the high seas could be considered as piracy.
13. See also Nancy D. Joyner *Aerial Hijacking as an International Crime* (1974) p 114 for the view that air piracy under the Convention on the High Seas does not include aircraft hijacking.
14. See, however, Oppenheim *International Law* (8th edn, 1955) Vol I, p 613. Examples of such treaties are: (a) the abortive treaty concluded at the Washington Naval Conference of 1922 providing that persons violating the humane rules of maritime warfare should be tried and punished 'as if for an act of piracy'; and (b) the Nyon Arrangement of 1937 for joint action by the European Powers to prevent sinkings of merchant vessels in the Mediterranean by unidentified submarines during the course of the Spanish Civil War, which attacks were referred to as 'piratical acts'. As to the inapt use of the word 'pirate' as applied to offshore radio stations in the North Sea area, see p 278 below. More recently the term 'pirate' has been applied to the maker of unlawful copies of musical records or cassettes.

vessel or aircraft under the control of a crew which has mutinied may be treated as private, if the crew commit piratical acts (see article 102 of the Convention). A warship or other public ship under the orders of a recognised government or recognised belligerent Power is not a pirate ship. Difficulties in this connection have arisen when hostilities at sea have been conducted by insurgents in the course of a civil war. Obviously it is in the interests of the legitimate parent government to declare that those in control of insurgent vessels are pirates and to put them at the mercy of the navies of the great maritime Powers. The British practice however, has been not to treat these insurgent vessels as pirate vessels as long as they abstain from repeated or wilful acts of violence against the lives and property of British subjects. It would seem, however, that insurgent units, which commit acts of violence or depredation, in no way connected with the insurrection, such as entirely arbitrary attacks upon foreign shipping, may legitimately be treated as guilty of piracy jure gentium.

A test is sometimes suggested for distinguishing the unlicensed violence of piracy from the recognised action permitted to insurgents, namely that there is an insurgent government or administration with which foreign states may conduct relations, and which is capable of assuming responsibility for the acts of those serving in its armed forces. The test therefore is whether the insurgent vessels are acting under the orders of a responsible government[15] against which a state, affected by any injury to its citizens, may obtain redress according to the recognised principles of international law. Inasmuch as the essence of piracy is the absence of any government which can be held responsible for the piratical acts, it follows that generally speaking, apart from the circumstances in which the acts were committed (eg, if such acts consist of entirely arbitrary attacks upon foreign shipping), the offence of piracy is negatived if there be such a government.

All states are under a duty to co-operate to the fullest possible extent in the suppression of piracy on the high seas, or in any other place outside the jurisdiction of any state (article 100). Other relevant provisions in the Convention concerned with piracy are to the following effect:

a. A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived (article 104).
b. Every state may seize a pirate ship or aircraft, or one taken by piracy and under the control of pirates, and arrest the persons concerned for

15. In the case of *The Ambrose Light* 25 Fed 408 (1885), an American federal court held that an armed vessel commissioned by Colombian insurgents was properly seized as a pirate ship because there had been no express recognition of the insurgents as belligerents.

trial by the courts of the seizing state (article 105). This signifies that the jurisdiction exercisable in regard to pirates is of a 'universal' nature (see Chapter 8 above at pp 234–236).

c. Such seizure may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect (article 107).

Traffic in narcotic drugs or psychotropic substances

All states are to co-operate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions (article 108).

Unauthorised broadcasting from the high seas

Article 109 deals with problems of jurisdiction occasioned by unauthorised or unregulated broadcasting from vessels stationed in, or installations in the high seas—problems which had become acute in the 1960s, and which had then not previously engaged the attention of authorities of coastal states.[16] For the purposes of the Convention, 'unauthorised broadcasting' is defined as 'the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls'. All states are to co-operate in the suppression of such broadcasting, and any person engaged therein may be prosecuted before the courts of:

16. The question arose specifically in 1964–1965, with the commencement of transmissions by offshore radio stations in the North Sea area, moored or on fixed installations outside territorial sea limits. A great deal of what was transmitted consisted of pop songs and non-classical music, with some religious broadcasting, while the programmes were interspersed with advertising. As it was officially averred that the broadcasts were in breach of the domestic laws of North Sea countries, including telecommunication regulations, the issue was that of the rights of adjacent coastal countries to exercise jurisdiction over the stations and the persons manning them by reference to rules of international law. The term 'pirate' bestowed on the stations was inapt and misleading, nor was it contrary to international law to listen to their programmes, while semble the mere fact that the transmissions were receivable in adjacent countries was not sufficient to invest these with jurisdiction, according to international law, on the basis of the objective territorial principle (see above, pp 205–207). It was true that cogent arguments could be advanced in support of the exercise of jurisdiction under the protective principle (see above, pp 233–234) by reason of the detrimental effects on the security and good order of coastal countries because of: (a) the disturbance to the régime of allotted frequencies; (b) the interference with communications related to essential services, eg safety of navigation; and (c) the possible interference with communications connected with space exploration, and space satellites. Under the auspices of the Council of Europe, an Agreement was concluded to deal with the subject, viz. the European Agreement for the Prevention of Broadcasts Transmitted outside National Territories, signed in January 1965. In the United Kingdom, the Marine, etc Broadcasting (Offences) Act 1967 was enacted to strike down North Sea or other offshore broadcasts. Cf *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663.

a. the ship's flag state;
b. the state of registry of the installation;
c. the state of the person's nationality;
d. any state where the transmissions are receivable; or
e. any state where authorised radio communication is suffering interference.

Such states may arrest the person concerned on the high seas, and seize the broadcasting unit concerned.

An important article, article 110, confers on warships a right of boarding foreign vessels, in addition to treaty rights permitting such interference, provided that the vessel visited is not immune under articles 95–96 (see above), and that there is reasonable ground for suspecting that the vessel is engaged in piracy, the slave trade, unauthorised offshore broadcasting with the flag state having jurisdiction under article 109 (see above), or is without nationality, or though flying a foreign flag or refusing to show its flag, is of the same nationality as the warship. These provisions apply mutatis mutandis to military aircraft.

Hot pursuit; cables and pipelines

The right of hot pursuit is covered in a long and comprehensive article, article 111 (cf article 23 of the 1958 Convention). Hot pursuit of a foreign vessel may be undertaken if there is good reason to believe that the vessel has violated the laws and regulations of the coastal state, but it must be commenced when the vessel or one of its boats is within internal waters, archipelagic waters, the territorial sea or the contiguous zone, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. It is not necessary that at the time when the vessel within the territorial sea or contiguous zone receives the order to stop that the signalling ship should likewise be within these waters. If the foreign vessel is within the contiguous zone, pursuit is permissible only if there has been a violation of the rights for the protection of which the contiguous zone was established. Such right of pursuit applies mutatis mutandis to the EEZ and continental shelf. Pursuit may be commenced only after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the vessel signalled. Pursuit is permissible only by warships or military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect. The right ceases as soon as the pursued vessel enters the territorial sea of its own state or of a third state.

Articles 112–115 deal with the free right of all states to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf, and with the duties of states to adopt laws and regulations in regard to the breaking of, or injury to such cables and pipelines.

Conservation and management of living resources

The subject of conservation and management of the living resources of the high seas is dealt with in section 2 of Part VII in a manner reconcilable with the economic considerations governing articles 61–62 on the same matter in Part V on the EEZ (see above), which articles contain the key concepts. Paragraph 1 of article 61 (the article in respect to conservation of living resources) requires that the coastal state 'shall determine the allowable catch of the living resources' in the EEZ; while the use of the word 'shall' suggests a mandatory determination, article 297 (3)(a) on the settlement of fisheries disputes refers to the coastal state's 'discretionary' powers for determining the allowable catch. These provisions can be reconciled by treating paragraph 1 of 61 as involving a mandatory exercise of a discretion, the discretion being in regard to the end result. The remaining paragraphs of article 61 are drafted with due regard to the perils of over-exploitation and the necessity of proper management. Paragraph 1 of article 62 (on utilisation of the living resources) requires the coastal state to 'promote the objective of optimum utilisation of the living resources' of the EEZ. Although not specifically defined, the expression 'optimum utilisation' receives some elaboration in the succeeding paragraphs of the article. Thus, paragraph 2 provides that the coastal state is to allow other states access to[17] any surplus beyond its own national requirements as determined by it. Moreover, under paragraph 3, in granting access to the surplus, the coastal state is to take into account all relevant factors, including inter alia 'the significance of the living resources of the area to the economy of the coastal state concerned and its other national interests', so that possibly political considerations may be relevant. The term of both articles leave the coastal state with considerable latitude in the choice of the particular measures that may be adopted to achieve the declared objectives of management and utilisation of the living resources.

In section 2 of Part VII, article 116 proclaims that all states have the free right for their nationals to fish on the high seas subject to their treaty obligations, while the rights and duties, as well as the interests of coastal states are provided for, inter alia, in those articles on the protection or preservation of certain species in the EEZ. Articles 117–119 impose duties on the states parties to co-operate with other states in the conservation and management of the living resources of the high seas, to the extent that in determining the allowable catch and adopting other conservation measures, the best scientific evidence available is to be taken into account, as qualified by relevant environmental and economic factors, while also regard is to be had to the effect on species associated with the 'harvested' species. Provision is made also for exchanging scientific information,

17. With regard to the acquired or traditional fishing rights of non-littoral states, cf the *Fisheries Jurisdiction Case* (Iceland-United Kingdom) ICJ 1974, 3.

catch statistics and other relevant data. Measures taken are not to be discriminatory against the fishermen of any state. Again the very general and broad manner in which these duties are formulated verges on the platitudinous.

Islands

A short Part VIII, comprising one article only, article 121, deals with the régime of islands. Platitudinously, once more, an island is defined as a naturally formed area of land, surrounded by water, and which is above water at high tide. The territorial sea, the contiguous zone, the EEZ and the continental shelf are determined for islands in the same way as the provisions of the Convention otherwise make such determination in respect to land territory, but rocks which cannot sustain human habitation or economic life of their own are not to have an EEZ or a continental shelf.

Enclosed or semi-enclosed seas

Part IX introduces the concept of an 'enclosed or semi-enclosed sea' defined in article 122 as:

a. a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet; or
b. consisting entirely or primarily of the territorial seas and EEZs of two or more coastal states.

Under article 123, states bordering on such a sea are to co-operate with each other in respect to their rights and duties under the Convention, and are required to 'endeavour', directly or through an appropriate regional organisation, to co-ordinate their rights, duties and scientific research policies (enumerated in paragraphs (a)–(c) in that connection), and to invite, as appropriate, other interested States or international organisations to co-operate with them in furtherance of the provisions of the article.

Right of access of land-locked states to and from the sea and freedom of transit

The detailed provisions in Part X (articles 124–132) for the right of access of land-locked states to and from the sea and for the related privilege of passage through states lying between them and the coast (defined in article 124 as 'transit states') represent distinctly another major feature of the Convention. Such right of access and freedom of transit are conferred or purported to be conferred by article 125, for the purpose of land-locked states exercising their rights otherwise under the Convention. The terms and modalities of such freedom of transit are to be settled by agreement, but transit states are entitled to ensure that this freedom of passage shall in no way infringe their legitimate interests. It may reasonably be objected

that the Convention in effect bestows on land-locked states no definitive right of transit. Much depends on the transit states concerned acting in good faith in the implementation of article 125. The latter article is followed by an almost otiose, if not unintelligible, article 126 which requires that the provisions of the Convention, as well as special agreements concerning the right of access, should be excluded from 'the application' of the most-favoured-nation clause. One cannot but be mystified by the purpose that is to be served by this article.

The remaining articles of Part X contain provisions, more or less to be expected, or of a self-evident nature. Transit traffic is not to be subject to customs or other charges, except for specific services rendered, or to taxes or charges that are discriminatory vis-à-vis local transport; free zones may be provided by agreement; transit states and land-locked states may co-operate in the provision of adequate means of transport; and transit states are to take steps to avoid delays or technical difficulties for transit traffic, while ships flying the flag of land-locked states are to enjoy in maritime ports treatment equal to that accorded to foreign ships.

The 'Area' and related provisions

Part XI deals with the 'Area', ie, the seabed and ocean floor and subsoil thereof, and related provisions, and may be regarded as directed to the future establishment of a deep seabed mining régime (DSBM). As to this Part, it cannot yet be said that it commands universal consensus, and in these circumstances, it is believed that it would be inappropriate at this juncture to examine Part XI in any detail in this book, save broadly to describe its content. It is divided into five sections, namely, section 1 consisting of general provisions defining the scope of the Part, section 2 enunciating the fundamental principles concerning the legal status, responsibilities of States, etc, so far as concerns the Area, section 3 dealing with the development of the resources of the Area, and the relevant policies to be applied as to such development, section 4 providing for the establishment of an 'International Sea-Bed Authority' for the purposes, inter alia, of organising and controlling activities in the Area, and administering its resources, and defining also the function and composition of the proposed organs of the Authority, together with the related matters of financial arrangements for the Authority and the legal status, privileges and immunities of the Authority and its organs, and section 5 containing provisions for the settlement of disputes by, and for advisory opinions to be given by the Sea-Bed Disputes Chamber of the International Tribunal of the Law of the Sea, the Statute of which Tribunal is set out in Annex VI to the Convention. Reference perhaps should be made to article 136 proclaiming the doctrine which influenced the taking of the steps leading to the convening of UNCLOS, viz that 'the Area and its resources are the common heritage of mankind', and to article 137 defining generally and consistently with the doctrine of article 136 the legal status of the Area

and its resources (no state to claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, etc).

Protection and preservation of the marine environment

Part XII deals with the protection and preservation of the marine environment, and is one of the longest Parts in the Convention containing 11 sections comprised of no less than 46 articles (articles 192–237). It could not really be claimed, however, that Part XII is one of the best drafted Parts of the Convention. In a number of the articles, there appears to be unnecessary verbosity, with the consequence here and there of a degree of ambiguity. Some provisions are self-evident and throughout the Part there is a certain degree of repetitiousness. It would not be consistent with the purpose of this book to attempt an analysis of Part XIII other than one of the broadest nature.

Section 1 (articles 192–196) bears the title, 'General Provisions', and the general obligation is proclaimed in article 192 that states have the obligation to protect and preserve the marine environment, while in recognition nonetheless of the resource policies of developing and other states, it is provided that states have the sovereign right to exploit their natural resources pursuant to their environmental policies, and in accordance with their duty to protect and preserve the marine environment. The two articles thus reflect the same kind of relationship between development and environmental considerations that manifested itself in the course of the Stockholm Conference of 1972 on the Human Environment (see Chapter 14, below, on Development and the Environment, at pp. 395–397, 408–409).

These general articles are followed by articles 194–196 on measures to prevent, minimise and control pollution of the marine environment, or the creation of additional damage or hazards, and on measures to prevent, etc, pollution of that environment by new technologies or the introduction of alien or new species.

Section 2 (articles 197–201) deals in a manner to be expected with global and regional co-operation, section 3 (articles 202–203) with scientific and technical assistance in this area to developing states and provides for preferential treatment to be afforded to such states, section 4 (articles 204–206) with the monitoring of the risks or effects of pollution, the publication of results of such monitoring, and the assessment of the potential effects of activities as to which there may be reasonable grounds for believing that these could cause substantial or significant and harmful changes to the marine environment, and section 5 (articles 207–212), bearing the title, 'International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment', contains provisions as to pollution from land-based sources, pollution from seabed activities subject to national jurisdiction, pollution from activities in the 'Area', the adoption by states of laws and regulations to prevent, minimise

and control the pollution of such an environment by dumping, pollution from vessels, and pollution from or through the atmosphere.

Section 6 on Enforcement (articles 213–222) is of some significance by reason of the duties, inter alia, imposed on states, according to the source of pollution, to enforce anti-pollution or anti-dumping regulations. The enforcing state may be that state having territorial jurisdiction (land-based sources of pollution; article 213), or the exploiting state (pollution from seabed activities; article 214), or in the case of dumping, the coastal state where dumping occurs within its territorial sea, EEZ or continental shelf, the flag state of the vessel or aircraft responsible for dumping, or the state having territorial jurisdiction as to acts of loading of wastes, etc occurring within its territory (article 216). Special articles deal with enforcement by flag, port and coastal states, and with measures to be taken by a port state as to the seaworthiness of vessels within one of its ports or at one of its offshore terminals. There is a special article also with respect to enforcement of measures as to pollution from or through the atmosphere (article 222), while under article 221 nothing in Part XII is to prejudice the right of states under international law to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat thereof, following upon a maritime casualty or acts relating thereto, which may reasonably be expected to have major harmful results (cf the Brussels Conventions of 1969 as to Oil Pollution Casualties and Oil Pollution Damage, referred to above, pp 255–256).

Section 7 (articles 223–233) is entitled 'Safeguards', which does not appear to be a very appropriate heading, in the light of the content of the section, which deals with measures to facilitate proceedings (tendering of evidence, etc), by what agencies the powers of enforcement are to be exercised, the manner of investigation of foreign vessels, the limitation of penalties to those of a monetary nature, notifications of action taken by the flag state or other state concerned, the liability of states for unlawful or excessive measures and safeguards in respect to passage through straits used for international navigation (see above, pp 266–267).

Section 8 on ice-covered areas, containing the one article, article 234, confers important rights on coastal states that have jurisdiction over such areas; they are entitled to 'adopt and enforce' non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the EEZ, where particularly severe climatic conditions and the presence of ice over such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment would cause major harm to, or irreversible disturbance of the 'ecological balance'. Due regard is to be had to navigation and the preservation of the marine environment based on the best available scientific evidence.

Section 9 on responsibility, also containing the one article, article 235, renders states responsible for the fulfilment of their international obligations as to the marine environment. This again seems to be either a self-evident provision or redundant. It also provides, inter alia, that states are to ensure that their legal systems afford prompt and adequate remedies for damage caused by pollution of the marine environment by persons under their jurisdiction.

Under section 10 on sovereign immunity (containing only article 236), the above-mentioned provisions are not to apply to any warships, naval auxiliary, other vessels or aircraft owned or operated by a state and used, for the time being, only on government non-commercial service. However, states are to ensure that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with the Convention.

Finally, section 11, the concluding section of Part XII (containing only article 237) endeavours to reconcile the provisions of that Part with the obligations of states under other conventions on protecting and preserving the marine environment; if previously concluded, Part XII is not to prejudice the special obligations of states thereunder. This applies also to agreements concluded in furtherance of the general principles laid down in the Convention.

Marine scientific research, development and transfer of marine technology, settlement of disputes, general provisions and final provisions

The remaining Parts of the Convention, Parts XIII, XIV, XV, XVI and XVII, deal respectively with the subjects of marine scientific research, the development and transfer of marine technology, the settlement of disputes, the general provisions and the final provisions of the Convention. It is proposed to examine these Parts only in a broad manner, and without going into detail.

As might be expected, Part XIII enunciates general principles concerning what is declared to be the right of all states to conduct marine research; eg this must be exclusively for peaceful purposes, and without interfering with the legitimate uses of the sea compatible with the provisions of the Convention. International co-operation in this area is to be promoted through such means as the publication and dissemination of information and knowledge, and in particular the furnishing of information to affected coastal states. All such research in the EEZ and in the waters of the continental shelf is to be subject to the consent of the coastal state, but when the proposed research is solely for peaceful purposes and is in conformity with a number of other criteria laid down in Part XIII, consent is normally to be given. The development of scientific research installations and equipment in the marine environment must be effected in such a way as to conduce to safety, and so as not to interfere with shipping routes; also, identification markings must be borne, and warning

signals are required to be given. States and international organisations are to be held responsible for damage caused by their own research activities, or for action taken against research conducted by others, when such action is in breach of the Convention. Inter alia, in the event of certain disputes, the researching state may require the coastal state to submit to international conciliation upon the ground that the coastal state had not acted in a manner compatible with the Convention.

Part XIV contains somewhat ambitious provisions concerned with promoting the development, transfer and dissemination of marine technology, international co-operation to implement these objectives (including in that regard co-operation with the projected International Sea-Bed Authority), the establishment of national and regional marine scientific and technological centres and co-operation among and with international organisations. Some of the provisions of Part XIV, although expressed in the language of obligations, appear nevertheless to be of a hortatory character. Part XIV imposes upon States the duty to promote marine technology on fair and reasonable terms and conditions, with due regard for all legitimate interests, including the rights and duties of holders, suppliers and recipients of technology. Broadly speaking, international co-operation will be promoted through the establishment of guidelines, criteria and standards for technology transfer, and the co-ordination of international programmes.

Part XV on the settlement of disputes likewise contains a number of ambitious provisions. States are obliged to settle by peaceful means any disputes over the interpretation or application of the Convention. When they cannot reach agreement on a negotiatory basis, they will have to submit most types of disputes to a compulsory procedure involving a binding decision; provision in that regard is made in section 2 bearing the title 'Compulsory Procedures Entailing Binding Decisions'. States have four options in such compulsory procedure. Under paragraph 1 of article 287 (the second article in section 2) a state, when signing, ratifying or acceding to the Convention or at any time thereafter, shall be free to choose by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention:

a. The International Tribunal for the Law of the Sea, to be established in accordance with Annex VI to the Convention (see ante).
b The International Court of Justice.
c. An arbitral tribunal constituted in accordance with Annex VII.
d. A special arbitral tribunal constituted in accordance with Annex VIII for particular categories of disputes (fisheries; the marine environment, marine scientific research or navigation, etc).

Paragraph 2 of article 287 provides that such a declaration under paragraph 1 is not to affect or be affected by the obligation of a state

party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal as provided for in section 5 of Part XI (settlement of disputes relating to the 'Area'). Then, under paragraph 3, a state party which is party to a dispute not covered by a declaration in force, is to be deemed to have accepted arbitration in accordance with Annex VII. Section 3 sets out the limitations on the applicability of section 2. Certain categories of disputes will have to be submitted to conciliation (Annex V), which procedure is in its results not binding on the parties. States have the option of declining to accept compulsory settlement processes in the case of certain categories of disputes as to specially sensitive matters, eg, boundaries and military activities.

Part XVI, entitled 'General Provisions', proclaims a number of general principles which are to govern the conduct of states parties. Two at least of these seem redundant, inasmuch as they are expressive of already established principles; eg, article 300 declaring that states parties are to fulfil in good faith their obligations under the Convention, and are to exercise their jurisdictions, etc, without abuse of any right, and article 301 which reiterates the prohibition in paragraph 4 of article 2 of the United Nations Charter (no threat or use of force against the territorial integrity or political independence of any state, or conduct in any manner inconsistent with the principles of international law contained in the United Nations Charter). States are not bound to disclose information contrary to their essential security interests. Coastal states have jurisdiction over archaeological objects and objects of historical origin found at sea up to the outer edge of their contiguous zone. States parties are under a duty to protect such objects found at sea, and to co-operate in the performance of this duty (article 303).

Part XVII contains the final provisions, which are of some interest, especially article 305 which renders the Convention open to signature by a large variety of entities, not merely states, but Namibia, represented by the United Nations Council for Namibia, self-governing 'associated' states with competence in respect to the subject-matters of the Convention, territories enjoying full internal self-government, recognised as such by the United Nations without having attained full independence, and with similar competence, and international organisations (intergovernmental organisations, to which states have transferred legal competence over matters governed by the Convention, can sign and accede to it under specified conditions, in accordance with Annex IX). The non-seabed provisions of the Convention can be amended by two-thirds of the states parties, but the amendments will apply only to those states which ratify or accede thereto. The seabed provisions can be amended with the approval of the Assembly and the Council of the Authority, but only if they do not prejudice the system of exploration and exploitation pending a review conference to be held fifteen years after commercial exploitation begins. The Convention remained open for signature until 9 December

1984, at the Jamaica Ministry of Foreign Affairs, and, also from 1 July 1983 until 9 December 1984, at the United Nations Headquarters in New York. As a consequence, there are, at the date of writing, 159 signatures, ie 41 more than the original signatories on 10 December, the major non-signatories being the United States, the United Kingdom and Federal Republic of Germany (FRG). It was to enter into force 12 months after deposit of the sixtieth instrument of ratification or accession (article 308), but at the date of writing there were less than 40 ratifications or accessions, and it would seem that it will be some time before the Convention comes into effect.

General

It remains to be seen whether: (a) the Convention will become a generally or universally ratified or accepted instrument; or (b) a largely unratified or largely unaccepted Convention, the provisions of which will however be acknowledged by general consensus of the international community as generally operative so as to be virtually of equivalent status to customary rules of international law (see above, pp 35–39). The latter situation, namely (b), is bound to create both foreseeable difficulties (eg, as between non-party deep seabed mining states and the Enterprise, if it should be established) and also, as yet, unforeseeable problems of major dimensions.[18] That, for all practical purposes, the four Geneva Conventions of 1958 (see above) will cease to be operative, except as between a minority of states inter se seems clear; article 311 paragraph 1 of the Convention provides that the Convention shall prevail, as between states parties, over the Geneva Conventions of 1958, and this would imply that the latter conventions can, at the free discretion of non-parties, remain operative between them inter se, although as a practical matter they are more likely to accept the main provisions of the Convention (ie other than those concerning the 'Area' and the Sea-Bed Authority) as governing their activities at sea. Article 311 paragraph 2 lays it down that the Convention is not to alter the rights and obligations of states parties under agreements compatible with the Convention, and which do not affect the enjoyment by other states parties of their rights or the performance of their obligations under the Convention. This reflects the fact that certain maritime matters remain outside the scope of the Convention. An illustration is that of the general regulations to be observed for preventing collisions at sea. These regulations were originally set out in an Annex to the Final Act of the London Conference of 1960 on the Safety of Life at Sea, but they were superseded by the revision thereof

18. The possible 'scenarios' likely to arise if the Convention does not enter into force, or, on the other hand, is not ratified or acceded to by major deep seabed mining states, are closely and perceptively examined by Jesper Grolin in an article, 'The Future of the Law of the Sea: Consequences of a Non-Treaty or Non-Universal Treaty Situation' (1983) 13 Ocean Development and International Law pp 1–31.

effected by the Convention of 1972 on the International Regulations for Preventing Collisions at Sea, which came into force on 15 July 1977, and to which, at the date of writing, 82 states are parties. Amendments to this Convention were adopted on 19 November 1981 by the resolution of the Assembly of the Intergovernmental Maritime Consultative Organisation (IMCO)—the name of which Organisation was changed as from 22 May 1982, to that of the 'International Maritime Organisation' (IMO). 1 June 1983 was set as the date for the entry into force of the amendments.

The United Nations Convention on the Law of the Sea is an instrument without precedent in the history of international legislation, and its impact on the domain of international law generally can or will be measured only with any certainty in the course of time.

Developments since adoption of the Convention

Developments since the Convention was adopted on 10 December 1982 may be briefly noted, fuller details lying outside the scope of this book. Shortly afterwards, pursuant to Resolution I annexed to the Final Act, there was set up a Preparatory Commission ('the PrepCom'), provided with the United Nations Secretariat services and funded from the United Nations Budget, with tasks of preparing the entry into effective operation of the Sea-Bed Authority to regulate deep seabed mining (DSBM) under Part XI of the Convention, and of setting up the Tribunal for the Law of the Sea. Also, under Resolution II, the PrepCom was to deal with preparatory investment in 'pioneer' seabed activities before the Convention came into force. Another of its responsibilities was to draft rules, regulations and procedures, including those to constitute a Deep Seabed Mining Code. The PrepCom has held annual sessions since a first session in 1983 in Kingston, Jamaica, where the Sea-bed Authority is to have its Headquarters. The main body of the PrepCom is the Plenary, while it works through four specialised commissions, dealing respectively with: (1) the problems of land-based producers of minerals; (2) preparations to set up the Enterprise; (3) rules, regulations and procedures (see above); and (4) the Tribunal for the Law of the Sea. France, India, Japan and the Soviet Union have applied for registration as 'pioneer' investors. The United States is not participating in the PrepCom, and is seeking to develop an alternative DSBM system involving mutual recognition of national DSBM licences. Progress has not been at the rate expected, partly due to the Convention not yet being in force, partly because the world minerals market is not encouraging, at the date of writing, for a commercial DSBM, as contemplated previously. In other words, although much work has been done, the preparatory phase is still proceeding.

3. MARITIME CANALS

Canals which are inland waterways are part of the territory of the territorial states through which they pass, and by analogy are subject to the rules as to rivers.

As to maritime canals, special treaty rules are or have been applicable to the Suez, Panama and Kiel Canals. The Suez Canal was to some extent neutralised and demilitarised by the Convention of Constantinople of 1888, under which it was to be freely open in time of peace[19] as well as of war to merchant vessels and warships of all nations. It was not to be blockaded, and in time of war no act of hostility was to be allowed either in the canal itself or within three sea miles from its ports. These provisions could not, and did not in practice preclude a strong naval power, such as Great Britain, in time of war, from blockading access for enemy vessels to the Canal beyond the limit of three sea miles. Men-of-war were to pass through the Canal without delay, not staying longer than 24 hours in Port Said and Suez. Troops, munitions, and other war material were not to be shipped or unshipped inside the Canal or in its harbours, and no permanent fortifications were allowed in it, or the stationing of men-of-war. Subject to the provisions of the 1888 Convention, the Canal was territorially part of Egypt.

In 1956, Egypt purported to nationalise the Suez Canal Company which enjoyed a concession to operate the Canal. It thereupon became a vital question, as to what extent the free rights of states to use the Canal might be subject to impairment in the future. In ultimate analysis, the issue lay at the root of the Anglo-French intervention against Egypt in the Canal zone, in October–November 1956.

There is an opinion of some weight to the effect that the rights to use the Canal are not dependent on the former concession, nor exercisable only on sufferance by Egypt, but are vested rights of an international character, guaranteed by international law. Reference may be made, apart from the 1888 Convention, to the Anglo-Egyptian Agreement of 19 October 1954, under which the parties recognised that the Canal was 'a waterway economically, commercially and strategically of international importance', and to the principles approved by the United Nations Security Council on 13 October 1956—among them, that freedom of passage should be maintained 'without discrimination, overt or covert', that the Canal should be 'insulated' from the politics of any country, and that

19. In September 1951, the United Nations Security Council affirmed the principle of freedom of transit through the Suez Canal under this Convention by adopting a Resolution calling upon Egypt to terminate certain restrictive practices in respect to shipping passing through the Canal, which were designed by Egypt to operate as a 'blockade' of the ports of Israel. From the comments of certain delegates, it appeared that the Constantinople Convention was regarded as dedicating an international maritime highway.

tolls and charges should be fixed by agreement. Egypt's Declaration of 24 April 1957,[20] in which it affirmed that it would respect the terms and spirit of the 1888 Convention, has, however, prevented the issue from becoming clarified.

The Panama Canal stands in an entirely different position from the Suez Canal. The status of, and the respective rights of the United States and Panama in respect to that Canal are now governed by a set of treaties and arrangements concluded by the two governments at Washington on 7 September 1977 and consisting, inter alia, of the Panama Canal Treaty and Annex thereto, a Treaty concerning the Permanent Neutrality and Operation of the Panama Canal (hereinafter referred to as 'the Neutrality and Operation Treaty'), and a Protocol to the latter treaty.

By these arrangements a new régime has been created for the Panama Canal, superseding the four treaties which had previously regulated the status of the Canal as an international waterway and the respective rights in respect thereto of the United States, Panama and third countries, namely the Hay-Pauncefote Treaty of 1901 between the United States and Great Britain, the Hay-Varilla Treaty of 1903 between the United States and Panama, the Treaty of Friendship and Co-operation between the United States and Panama signed in March 1936, and the Treaty of Mutual Understanding and Co-operation between the United States and Panama concluded in January 1955. The 1901 Treaty had provided that the Canal should be free and open to the vessels of commerce and war of all nations on terms of entire equality,[1] and that the Canal was not to be blockaded, nor any act of hostility committed within it. Under the 1903 Treaty the United States was to enjoy rights of operation and control over the Canal Zone in perpetuity, and for all practical purposes continued de facto to exercise sovereign rights in regard to the area.

Under the Panama Canal Treaty of 1977, however, Panama's territorial sovereignty over the Canal and the Canal Zone is explicitly recognised, while the United States Government is to relinquish control at the end of 1999; Panama, as 'territorial sovereign', grants to the United States 'for the duration of the Treaty' rights of operation of, maintenance of and protection of the Canal, and rights to regulate the orderly transit of vessels. Implicit in these provisions is the continuance of the Canal as an international maritime and access route—a status spelled out in more detail in the Neutrality and Operation Treaty, and in the Protocol thereto. In article I of the Neutrality and Operation Treaty, Panama declared that

20. For the text of the Declaration, see 51 AJIL (1957) 673–675. The Canal was opened to Israel-bound cargoes in pursuance of article 5 of the Egypt-Israel Peace Treaty, thus ending restrictions imposed since 1948 on the basis of self-defence on Egypt's part.

1. Although it did not contain an express provision that the Panama Canal was to be open to all vessels in time of peace as well as of war. Ideally, the principle of non-discrimination should apply to all canals which are international highways; and cf Baxter *The Law of International Waterways* (1964) p 183.

the Canal '*as an international transit waterway*, shall be permanently neutral in accordance with the régime established in the Treaty', and in article II it has made a declaration of the neutrality of the Canal 'in order that both in time of peace and in time of war it shall remain secure and open to *peaceful transit* by the vessels of all nations on terms of entire equality', without discrimination as to conditions or charges of transit.[2] Under article V, at the end of 1999, when the United States Goverment is to relinquish control, only Panama is to operate the Canal and to maintain military forces, defence sites and military installations in the Canal Zone. The Protocol is significant as enabling participation in the new régime of countries other than Panama and the United States; under Article III, the Protocol is open to accession 'by all States of the world'. Thus the Protocol serves to multilateralise the provisions for non-discriminatory access and neutrality, in effect as part of general international law, by its impact on the position bilaterally created between the United States and Panama under the Neutrality and Operation Treaty.

Some commentators have entered reservations in respect to the question whether this will necessarily represent the purported effect of the 1977 arrangements betwen the United States and Panama. They have raised the point that the word 'transit', introduced into the provisions of the treaties, is ambiguous, and might not be wide enough to cover all such movements and operations by commercial vessels and warships as might conceivably become necessary; for example, for the defence of the Canal. On the other hand, the provisions are open to the interpretation that they constitute a 'dedication'[3] of the Canal as an international non-discriminatory maritime highway.

The Kiel Canal was made freely open to the merchant vessels and men-of-war of all nations under the Treaty of Versailles of 1919, but in 1936 Germany denounced the relevant provisions contained in article 380 of the Treaty. No doubt freedom of passage will be formally restored under the peace treaty, when it is made, with Germany. In the *Wimbledon Case*,[4] the Permanent Court of International Justice held in respect of the Kiel Canal, and applying the precedents of the Suez and Panama Canals, that the passage of a belligerent warship through an interoceanic canal would not compromise the neutrality of the riparian state.

2. Cf as to the principle of non-discrimination and international maritime highways, Baxter, op cit, p 183.
3. Cf Baxter, op cit, pp 182–183.
4. (1923) Pub PCIJ Series A, No 1, at 25, 28.

CHAPTER 10

State responsibility

1. NATURE AND KINDS OF STATE RESPONSIBILITY

Frequently action taken by one state results in injury to, or outrage on, the dignity or prestige of another state. The rules of international law as to state responsibility concern the circumstances in which, and the principles whereby, the injured state becomes entitled to redress for the damage suffered.[1] State responsibility has been authoritatively stated to be confined to 'the responsibility of states for internationally wrongful acts'.[2] This is state responsibility in the strict sense, the source of such responsibility being an act or acts in breach of international law. But can liability be cast upon states in respect of acts not constituting a violation of any rule of international law, eg, private conduct, regardless of whether such conduct is or is not in contravention of domestic law? This subject has for some time now been under consideration by the International Law Commission under the heading 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law'. It is almost entirely of the nature de lege ferenda, ie an area in which the law has yet to be formulated, and is regarded as being mainly concerned with the duties of governments to oversee activities which may lead to trans-border environmental damage.

Obviously the redress to be obtained for internationally wrongful acts will depend on the circumstances of the case. Most usually the injured state will attempt to get *satisfaction* (as it is called) through diplomatic negotiations, and if only its dignity has been affected, a formal apology from the responsible state or an assurance against the repetition of the matters complained of, will generally be regarded as sufficient. Pecuniary reparation, as distinct from satisfaction, is, however, sometimes necessary, particularly where there has been material loss or damage, and in many instances the question of liability and the amount of compensation have to be brought for adjudication before an international arbitral tribunal.

1. In regard to the work of the International Law Commission 1973–1980 on state responsibility, a subject that it had commenced considering in 1955, see *The Work of the International Law Commission* (3rd edn, 1980) pp 85–88.
2. *Report* of the International Law Commission on the Work of its *27th Session* (1975) para 33, p 6.

The wrongs or injuries which give rise to state responsibility may be of various kinds. Thus a state may become responsible for breach of a treaty, in respect of the non-performance of contractual obligations, for injuries to citizens of another state, and so on. The breach of duty may be: (a) an act, or (b) an omission.

In ultimate analysis, state responsibility is governed by international standards (although in particular branches an international standard may incorporate a national standard), and it depends on international law whether and to what extent the act or omission of a particular state is deemed legitimate or wrongful. Where the acts or omissions of a state measured by such standards are held to be legitimate, state responsibility does not arise. For example, as all states are generally conceded to have complete power to refuse to admit aliens into their territory, the states of which the aliens are nationals have no claim against any state which has refused ingress. Similarly, where international law concedes jurisdiction to a state which proceeds to exercise it, there is no breach of duty for which that state is responsible.

The law of state responsibility is still in evolution, and may possibly advance to the stage where states and individuals are fixed also with responsibility for breaches of international law which are 'international crimes',[3] as distinct from normal responsibility for breaches giving rise ordinarily to an obligation only to make reparation or pay compensation. Indeed the United Nations General Assembly since 1978 and the International Law Commission since 1982 have continuously been concerned with the subject of international criminal responsibility, to be formulated in a Code of Offences against the Peace and Security of Mankind (to include, inter alia, the crime of apartheid, and that of racial discrimi-

3. At the 1962 session of the International Law Commission, some members were of the opinion that 'under modern international law, State responsibility arose less in connection with the treatment of aliens than as a result of acts which endangered or might endanger international peace, such as aggression, denial of national independence, or of exchange of friendly relations with States, and violation of provisions of the United Nations Charter' (see *Report* of Commission on the Work of its *14th Session* (1962) p 31). One of the principles proclaimed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the United Nations Charter, adopted by the General Assembly in 1970, is: 'A war of aggression constitutes a crime against the peace, for which there is responsibility under international law'. Draft article 19 on state responsibility, as adopted by the International Law Commission, deals with 'international crimes', defined (in para 2) as resulting from the breach by a state of an international obligation so essential for the protection of the fundamental interests of the international community that such breach is recognised by that community as a whole as an international crime—a somewhat circular definition. Para 3 of the same article goes on to illustrate this definition by examples, such as a breach of the prohibition against aggression, maintaining colonial domination by force (contrary to self-determination), and breaches of a serious nature of the prohibitions against slavery, genocide, apartheid and massive pollution of the atmosphere or seas.

nation). Some Western countries are unenthusiastic about the project of such a Code, because, among other considerations, it might lead to the review of treaties which are working reasonably well, or because of problems concerning what sort of tribunal or tribunals would be needed to exercise jurisdiction over offending states or individuals.

Another important matter which will have incidence on the developing law of state responsibility is the extent to which states are or may become involved in the control of ultra-hazardous activities, eg, nuclear experiments, the development of nuclear energy, space exploration,[4] and the 'sonic boom' or 'sonic bang' of new types of aircraft. This is not a domain in which traditional diplomatic procedures of protest, demands for satisfaction, and claims can be of avail. Dangers must be anticipated, and if possible completely excluded; eg, if there be such a risk as an alteration of the environment of the earth. It may be necessary to impose strict duties of consultation, notification, registration and providing information, while even a process of injunction, mandatory or restraining, may need to be developed. There may be room for other international safeguards.

Federal states, protected states, and component territorial government entities

The question frequently arises as to the *incidence of liability* when injury is done by or through a state member of a federation, or by or through a protected state. The accepted rule appears to be that the federal state and the protecting state are responsible for the conduct respectively of the member state and the protected state, inasmuch as in the realm of foreign affairs they alone are recognised as having capacity to enter into relations with other states. This is true even although the facts and events which give rise to liability are actually matters constitutionally within the exclusive competence of the member state or the protected state. According to the International Law Commission[5] 'a consistent series of legal decisions', cited by it in the report, 'has affirmed the principle of the international responsibility of the Federal State for the conduct of organs of component States amounting to a breach of an international obligation of the Federal State, even in situations in which internal law does not provide the Federal State with means of compelling the organs of component States to abide by the Federal State's obligations'. In the same report,[6] reference was made to two other suggested justifications for this principle of the international responsibility of the federal state, namely:

4. See pp 177–188 above.
5. *Report* of the Commission on the Work of its *26th Session* (1974) para 123, in its commentary on draft art 7 on State Responsibility.
6. Ibid.

a. The conduct of the component state is imputed or attributed to the federal state, in the same way as the conduct of its federal organs.
b. The rationale that the federal state is in a sense vicariously responsible for the conduct of a component state.

It follows that it will be no defence to an international claim as to conduct by a component state to plead the provisions of the federal constitution or—in the case of a claim relating to the conduct of the protected state—the terms of the treaty of protection. British practice has long adhered to these principles, and as long ago as in the course of the preparatory work for the Hague Codification Conference of 1930, it was officially stated on behalf of Great Britain that 'the distribution of powers between [a federal state] and the other or subordinate units on whose behalf it is entitled to speak is a domestic matter with which foreign states are not concerned', thus corresponding to the first rationale stated above.

A like doctrine applies in respect to other component units of states in general, whether federal or unitary. In its above-mentioned report of 1974, the International Law Commission stated:[7]

> 'The principle that the State is responsible for acts and omissions of organs of territorial governmental entities, such as municipalities, provinces and regions, has long been unequivocally recognised in international judicial decisions and the practice of State.'

In respect to the normal overall responsibility of the federal state for a component state's breach of international obligations, there is one qualification which was specifically referred to by the International Law Commission in its above-mentioned report of 1974.[8] In certain federations, the position is that the component state may for some purposes or in some degree be treated as a subject of international law, and, as such, may have international obligations which are incumbent on it, but not on the federal state of which it is a member. The conduct of the component state, if in breach of its international obligations, is then imputable or attributable solely to it, and not to the federal state.

Limits between international law and municipal law

It is important when considering practical cases of state responsibility to keep clearly in mind the limits between international law and municipal law. This distinction has a particular bearing on two matters:

a. the breach of duty or non-performance by a state of some international rule of conduct which is alleged to give rise to responsibility;[9]

7. Ibid; cf *Heirs of Duc de Guise Award* (1951), United Nations Report of International Arbitral Awards, Vol XIII, 161 (responsibility of Italy for region of Sicily).
8. Ibid.
9. The International Law Commission currently prefers that the breach be referred to as a 'breach of an international obligation', rather than as a breach of a rule or norm of international law; see Professor Ago's Fifth Report (1976) on State Responsibility to the Commission, paras 5–6, pp 3–4.

b. the authority or competence of the state agency through which the wrong has been committed.

As to a., the breach or omission must in ultimate analysis be a breach of, or omission to conform to, some rule of international law. It is immaterial that the facts bring into question rights and duties under municipal law as between the state alleged to be responsible and the citizens of the claimant state. Further, it is no answer to an international claim to plead that there has been no infraction of municipal law if at the same time a rule of international law has been broken, or, as it has been put by the International Law Commission, the fact that an act may be characterised as internationally wrongful 'cannot be affected by the characterisation of the same act as lawful by internal law'.[10]

As to b., it is in general not open to any state to defend a claim by asserting that the particular state agency which actually committed the wrongful act exceeded the scope of its authority under municipal law. A preliminary inquiry as to the agency's authority under municipal law is necessary as a matter of course, but if, notwithstanding that the agency acted beyond the scope of its authority, international law declares that the state is responsible, international law prevails over municipal law.

It follows from these two principles, a. and b., that, as already mentioned in Chapter 4 above,[11] a state may not invoke its municipal law as a reason for evading performance of an international obligation.

Defences and justifications

The subject of defences and justifications in respect to a claim of state responsibility—a subject not generally elaborated upon in some international law treatises—did, however, occupy the attention of the International Law Commission at its sessions, in particular, in 1979 and 1980. In 1979, it adopted draft articles as regards the following defences:

a. The alleged wrongful act has been committed by a state in circumstances where it is subject to the power of direction or control of another state, as the result of coercion exerted by that other state.
b. Consent by the state affected by the alleged wrongful act to its commission.
c. Countermeasures (eg, by way of legitimate reprisals) permissible in international law and not involving armed force.
d. Situations of irresistible force majeure or of extreme distress, contributing to the commission of the unlawful act, where there was an absence of wilfulness on the part of the officials concerned.

In 1980, the International Law Commission adopted two important articles on the justifications, respectively, of necessity and self-defence.

10. See draft art 4 on State Responsibility, in *Report* of the Commission on the Work of its *27th Session* (1975) para 52, p 11.
11. See above, pp 88–89.

The provision as to a state of necessity (draft article 33) imposed somewhat severe restrictions on this defence; it was as follows:

> '1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
>
> a. the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
>
> b. the act did not seriously impair an essential interest of the State towards which the obligation existed.
>
> 2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
>
> a. if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law;[12] or
>
> b. if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
>
> c. if the State in question has contributed to the occurrence of the state of necessity.'

The draft article (article 34) adopted as to self-defence was phrased in general terms so far as concerns lawful acts of self-defence in response to an armed attack within the meaning of article 51 of the United Nations Charter, or in other words, it did not enumerate or specify what particular acts should be deemed to possess the character of self-defensive measures; it was in these terms:

> 'The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.'

2. RESPONSIBILITY FOR BREACH OF TREATY, OR IN RESPECT OF CONTRACTUAL OBLIGATIONS; EXPROPRIATION OF PROPERTY[13]

State responsibility for breach of a treaty obligation depends upon the precise terms of the treaty provision alleged to have been infringed. More often than not this raises purely a question of construction of the words used. If the treaty provision is broken, responsibility follows. According to the Permanent Court of International Justice in the *Chorzów Factory*

12. Ie a rule of jus cogens; see pp 55–57 above.
13. See generally on the rules of international law as to expropriation, Wortley *Expropriation in Public International Law* (1959); and I. Foighel *Nationalization: A Study in the Protection of Alien Property in International Law* (1982). In regard to recent developments and changed approaches, see M. Sornarajah *The Pursuit of Nationalised Property* (1986).

(*Indemnity*) *Case*,[14] it is a principle of international law that 'any breach of an engagement involves an obligation to make reparation'.

Somewhat different considerations apply to the case of contracts entered into between a state and alien citizens or corporations. A breach by a state of such a contract will not necessarily engage its responsibility at international law, nor will such responsibility, when it exists, be identical in kind with the liability under the contract. Here, the responsibility at international law arises only if the state breaks some duty extraneous to the contract, for example, if it be guilty of a denial of justice to the other contracting party. A state may, however, impliedly contract with another state that it will observe the terms of arrangement with a citizen of the latter state, although it would seem from the decision of the International Court of Justice in the *Anglo-Iranian Oil Co Case* (*Jurisdiction*)[15] that weighty proof is required of such an implied treaty.

The responsibility of a state for expropriating[16] foreign private property is an entirely different matter, and here modern conditions appear to have wrought changes. In the nineteenth century, any expropriation of the property of a foreign citizen would have been regarded as a clear basis for an international claim. At the present time, however, the widening control by states over the national economy and over almost every aspect of private enterprise, and the measures of nationalisation of different industries adopted by so many states, make it difficult to treat, as contrary to international law, an expropriation of foreign property for a public purpose in accordance with a declared domestic policy, applied without discrimination to the citizens of the expropriating state and to aliens alike.[17]

14. (1928) Pub, PCIJ Ser A, No 17, p 29.
15. ICJ 1952, at 109 et seq; there the British Government claimed that when, in 1933, it sponsored the conclusion of a new oil concession contract between Persia and the Anglo-Iranian Oil Company, Persia engaged itself towards Great Britain not to annul or alter the concession. The Court rejected the contention, holding that there was no privity of contract between Persia and Great Britain (ibid, at 112).
16. The terms 'nationalisation' and 'confiscation' have also been used. The term 'expropriation' appears, however, to be the generic term, and to include 'nationalisation', ie the taking of property by a state with a view to its continued exploitation by that state in lieu of the exploitation by private enterprise; see *Anglo-Iranian Oil Co v Idemitzu Kosan Kabushiki Kaisha* [1953] ILR 305, for the view that nationalisation is merely a species of expropriation. The term 'confiscation' is used to denote a temporary acquisition of property, as in time of war or an arbitrary or penal taking of property, without compensation (cf Garcia Amador's Fifth Report on International Responsibility, presented in 1960 to the International Law Commission).
17. The Arbitrator in the *LIAMCO Case* (1977) 20 International Legal Materials 1 declared that a purely discriminatory nationalisation is illegal and wrongful. Note also the provision in art 2 para 3 of the Covenant on Economic, Social and Cultural Rights of 16 December 1966, that developing countries, 'with due regard to human rights and their national economy', may determine to what extent they will guarantee to non-nationals the economic rights recognised in the Covenant. In its Resolution on permanent sovereignty over natural resources, adopted on 17 December 1973, the United

Practice, doctrine, and case law unite in showing that to be valid under international law, an expropriation of foreign property must:

1. be for a public purpose or in the public interest;
2. not discriminate against aliens as such;
3. not involve the commission of an unjustified irregularity.

It is believed also that an expropriation of foreign property is contrary to international law if it does not provide for the prompt payment by the expropriating state of just, adequate, and effective compensation.[18] On the other hand, some writers maintain and some courts have held[19] that the absence of any such proper provision for compensation does not render the expropriation illegal under international law, but that at most there is a duty to pay such compensation, the expropriation remaining lawful for all purposes, including transfer of title. There is even a difference of opinion concerning the measure of the compensation payable; some writers are of the opinion that it need only be reasonable in the circumstances, having regard to the state of the economy of the expropriating state. It is said, however, that compensation which is of a nominal value only, or which is indefinitely postponed, or which is the subject of a vague and non-committal promise, or which is below the rate of compensation awarded to nationals of the expropriating state, is contrary to international law.

In the case of an unlawful expropriation, the expropriating state must,

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Nations General Assembly affirmed that each nationalising state, by virtue of its sovereignty to safeguard its natural resources, is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes should be settled in accordance with the domestic legislation of that nationalising state. An affirmation in somewhat similar terms appears in sub-para (c) of para 2 of art 2 of the Charter of Economic Rights and Duties of States adopted by the General Assembly in 1974; this contains a reference to the payment of 'appropriate compensation', and provides for the settlement of any controversy by the domestic tribunals of the nationalising state, 'unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means'. Note that the Charter makes no reference to the necessity of absence of discrimination.

18. See decision of Supreme Court of Aden in *Anglo-Iranian Oil Co Ltd v Jaffrate* [1953] 1 WLR 246, treating as invalid the Iranian legislation of 1951 nationalising British oil interests in Iran, Bin Cheng *Transactions of Grotius Society* (1960) Vol 44, p 267 at pp 289 et seq, and Wortley op cit, pp 33 et seq. For a decision of a municipal court treating a foreign expropriation as contrary to international law, see also *Banco National de Cuba v First National City Bank of New York* 478 F (2d) 191 (1973). Under the Restatement of the Foreign Relations Law of the United States (Revised, 1985), 'just compensation' is required. Cf the decision of the Iran-United States Claims Tribunal in *Starret Housing Corporation v Islamic Republic of Iran* (1984) 23 *international Legal Materials* 1090.

19. See, eg, decision of Bremen District Court in 1959, concerning the Indonesian legislation of 1958, nationalising Dutch enterprises, referred to by Domke, 54 AJIL (1960) 305 at pp 306–7, 312–5. Cf also *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323 at 349.

in addition to paying the compensation due in respect of a lawful expropriation, pay also damages for any loss sustained by the injured party.[20]

In recent times, problems as yet unsolved by international law have been created by the emergence of various forms of so-called 'creeping expropriation' (eg, restriction of profits by discriminatory price control, taxes on the repatriation of capital, high discriminatory taxation, etc).[1] One method of mitigation of the difficulties involved is by the negotiation of bilateral treaties of friendship and commerce, with provisions, among others, for consultation between the parties.

An English court will not recognise or enforce a foreign expropriation law which is unlawful, in the sense mentioned above,[2] of being a purely confiscatory measure. The more recent trend in the decisions of English courts is, in the absence of exceptional circumstances, to recognise foreign expropriations and, if so required, to give effect thereto within the limits of local law and procedure; see, eg, *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, [1986] 1 All ER 129.

The 'Calvo Clause'

It is convenient at this point to discuss the clauses of the type known as the 'Calvo Clause'. These clauses (named after the Argentinian jurist, Calvo) were at one time very frequently inserted in contracts between Central and South American governments and foreign companies or persons to whom concessions or other rights are granted under the contracts. Under such a clause the foreign concessionaire renounced the protection or assistance of his government in any matters arising out of the contract. The following clause, which was adjudicated upon in the *North American Dredging Co Case*[3] before the United States–Mexico General Claims Commission, is an example:

> 'The contractor and all persons, who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any

20. See *Chorzów Factory (Indemnity) Case* (1928) Pub PCIJ Series A, No 17 pp 46–48.
1. Cf D. H. Ott *Public International Law in The Modern World* (1987) pp 188–189. One suggested solution is the payment of partial compensation of an appropriate nature, having due regard fairly to the internal needs of the compensating state; see C. P. Bauman in (1987) 19 *Case Western Reserve Journal of International Law* pp 103–119.
2. Cf however, *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112 at 123–124, and *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323 at 346–349.
3. Annual Digest of Public International Law Cases, 1925–1926, No 218.

rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract.'

The object of such a clause is to ensure that legal disputes arising out of the contract shall be referred to the municipal courts of the state granting the concession or other rights, and to oust the jurisdiction of international arbitral tribunals or to prevent any appeal for diplomatic action to the national state of the company or individual enjoying the concession, etc. Its insertion in so many contracts with Latin American states was due to the number of occasions when on rather weak pretexts concessionaire companies or persons in these states sought the intervention of their own governments to protect their interests without any recourse to the remedies available in local municipal courts.

There have been several conflicting decisions by international arbitral tribunals on the legality of the Calvo Clause. In a number of cases it has been held null and void on the ground that an individual cannot contract away the right of his government to protect him. In other cases the arbitrators have treated it as valid and as barring the claim before them. Thus, in the *North American Dredging Co Case*,[4] the United States–Mexico General Claims Commission dismissed the claim on the ground that under the clause it was the duty of the claimant company to use the remedies existing under the laws of Mexico, and on the facts the company had not done this. This decision has been accepted by the British Government as good law. On the other hand, in the case of the *El Oro Mining and Rly Co Ltd*[5] where the Calvo Clause was pleaded as a defence, the British–Mexican General Claims Commission declined to dismiss the claim inasmuch as the claimant company had actually filed suit in a Mexican court, and nine years had elapsed without a hearing. Therefore, it could not be said that the claimant company had sought to oust the local jurisdiction.

Perhaps the better opinion as to the Calvo Clause may be summed up as follows:

1. Insofar as such clause attempts to waive *in general* the sovereign right of a state to protect its citizens, it is to that extent void.
2. But, to quote a statement of the British Government, 'There is no rule to prevent the inclusion of a stipulation in a contract that in all matters pertaining to the contract, the jurisdiction of the local tribunals shall be complete and exclusive'. In other words, it would be obviously improper for the individual to treat the state against which he seeks redress as an inferior and untrustworthy country, and to apply for his government's intervention without making any claim in the local courts.
3. Where such a stipulation purports to bind the claimant's government

4. See n 3 above.
5. Annual Digest of Public International Law Cases, 1931–1932, No 100.

not to intervene in respect of a clear violation of international law, it is void.

To sum up, it may be said that the Calvo Clause is ineffective to bar the right of states to protect their nationals abroad, or to release states from their duty to protect foreigners on their territory.

Debts

Claims asserting the responsibility of a state for debts more frequently arise in cases of state succession where an annexing or successor state seeks to evade the financial obligations of its predecessor. Such claims also occur, however, in many other cases where governments fail in the service of loans or default in contributions to international institutions of which they are members.

Three theories have been advanced as to the right of a state to protect subjects, creditors of another state:

1. Lord Palmerston's theory, enunciated in 1848, that the former state is entitled to intervene diplomatically, and even to resort to military intervention as against a defaulting debtor state.
2. The 'Drago Doctrine' (so called after the Argentinian Minister of Foreign Affairs who first affirmed it in 1902) that states are duty bound not to use against a defaulting debtor state compulsory measures such as armed military action. This doctrine was intended to apply in favour of Central and South American states as a virtual corollary to the Monroe Doctrine;[6] accordingly, in its later form, it laid down that the public debts of such American states could not 'occasion armed intervention nor even the actual occupation of the territory of American nations by a European Power'. Drago's objections were principally confined to the use of armed force in the collection of public debts; he was not directly opposed to diplomatic intervention or to claims before international tribunals. Subsequently, the Hague Convention of 1907 for limiting the Employment of Force for the Recovery of Contract Debts provided that the states parties to the Convention would not resort to armed force in order to recover contract debts due to their nationals by another state, except where the state refused to accept arbitration or to submit to an arbitral award.[7]

6. See above, pp 107–108.
7. Having regard to the obligations of states members of the United Nations to settle their disputes peacefully, and to refrain from the threat or use of force against other states (see art 2 of Charter), the 'Drago Doctrine' has lost much of its importance and application.

3. According to the most generally accepted theory, the obligation of a debtor state is similar in all respects to obligations under international agreements in general. Therefore no special rules nor special methods of redress are applicable where a debtor state defaults.

3. RESPONSIBILITY FOR INTERNATIONAL DELINQUENCIES (WRONGS UNCONNECTED WITH CONTRACTUAL OBLIGATIONS)

In practice, most cases of state responsibility, at least before international tribunals, arise out of wrongs alleged to have been committed by the state concerned. By wrong in this connection is meant the breach of some duty which rests on a state at international law and which is not the breach of a purely contractual obligation. To such wrongs, more frequently the term 'international delinquency' is applied. It is too early yet to measure the effects of the impact on the present topic of the increasing tendency under international law to cast responsibility on individuals for delinquencies (see Chapter 3, above).

Most of the cases which come under this head concern injuries suffered by citizens abroad. Indeed, the topic of protection of citizens abroad really makes up most of the law on this subject. These injuries may be of different kinds, for example, injuries to property in the course of riots, personal injuries, improper arrests by the local authorities, the refusal of local judicial tribunals to accord justice or due redress, and so on. Generally speaking, a person who goes to live in the territory of a foreign state must submit to its laws; but that is not to say that certain duties under international law in respect to the treatment of that person do not bind the state. Examples are the duty on the state to provide proper judicial remedies for damage suffered, and the duty to protect alien citizens from gratuitous personal injury by its officials or subjects.

It may be said that according to international law, aliens resident in a country have a certain minimum of rights necessary to the enjoyment of life, liberty and property, but these are most difficult to define.

In the subject of international delinquencies, it is important to apply the notion of *imputability*. This notion assists in clarifying the subject and in providing a proper framework for its theory. To take a practical example, if an agency of state X has caused injury to a citizen of state Y in breach of international law, technically we say that state X will be responsible to state Y for the injury done. What this means is that the organ or official of state X has committed a wrongful act, and the conduct in breach of international law is *imputed* from the organ or official to the state. The *imputation* is thus the result of the intellectual operation

necessary to bridge the gap between the delinquency of the organ or official, and the attribution of breach and liability to the state.[8]

The practical necessity of the notion is founded on the importance of keeping clear the limits between international law and municipal or state law. Breaches of duty by state agencies may be imputed to the respondent state according to rules of international law, even though under municipal law such acts would not have been imputed to that state, because, for example, the agency concerned had acted outside the scope of its authority.

Imputability therefore depends on the satisfaction of two conditions:

a. conduct of a state organ or official in breach of an obligation defined in a rule of international law;
b. that according to international law, the breach will be attributed to the state.

It is only if the breach is imputable that the state becomes internationally responsible for the delinquency. Responsibility begins where imputability ends. As has been emphasised by the International Law Commission:[9]

> '... The attribution of an act or omission to the State as an international legal person is an operation which of necessity falls within the scope of international law. As such it is distinct from the parallel operation which may, but need not necessarily, take place under internal law.'

In establishing the incidence of state responsibility, the inquiry proceeds as follows:

1. It is first of all necessary to determine whether the state organ or official guilty of the relevant act or omission had or had not authority under municipal law in that connection, apart from the case where a specific instruction from a superior instrumentality was acted on.

2. If it be found that the state organ or official has such authority, the next matter to be investigated is whether the breach of duty is or is not imputable, so as to make the state responsible at international law. Here international law acts entirely autonomously.[10] For instance, it may be that although the state organ or official exceeded the authority conferred

8. The *Harvard* Draft Convention on the International Responsibility of States for Injuries to Aliens uses the expression 'attributable' rather than 'imputable' (see arts 1 and 15). In connection with state responsibility, the International Law Commission also preferred 'attribution' to 'imputation', upon the ground that this would obviate the ambiguities inherent in the notions of 'imputation' and 'imputability', which are used in an entirely different sense in certain systems of internal criminal law; see *Report* of the Commission on the Work of its *22nd Session* (1970) para 77. In the draft articles adopted by it at its 25th–27th Sessions, 1973–1975 (see arts 7–10), the International Law Commission adhered to the term 'attribution'.
9. *Report* of the Commission on the Work of its *22nd Session* (1970) para 77.
10. See *Report* of the International Law Commission on the Work of its *27th Session* (1975) commentary on draft art 10, pp 12 et seq.

by municipal law, international law will none the less impute liability to the state. Thus, in the *Youmans Case*,[11] a lieutenant of state forces in a town in Mexico was ordered by the mayor of the town to proceed with troops to quell riots against and stop attacks being made on certain American citizens. The troops, on arriving at the scene of the riot, instead of dispersing the mob, opened fire on the house in which the Americans were taking refuge and killed one of them. The other two American citizens were then forced to leave the house, and as they did so were killed by the troops and the mob. The troops had disobeyed superior orders by their action in opening fire. It was held that the Mexican Government was responsible for the wrongful acts of the soldiers even though they had acted beyond the scope of their authority.

3. But if it be ascertained that the state organ or official had no such authority under municipal law, so that the acts were completely ultra vires, no imputation of liability arises. Where an incompetent state agency commits an ultra vires act, it cannot be said to have acted on behalf of the state. To quote the Report of a League of Nations Sub-Committee:[12]

> 'If the act of the official is accomplished outside the scope of his competence, that is to say, if he has exceeded his powers, we are then confronted with *an act which, judicially speaking, is not an act of the State*. It may be illegal, but from the point of view of international law, the offence cannot be imputed to the State.'

However, even in these circumstances a state may become responsible if through the omissions or default of other officials or organs it has facilitated the commission of the ultra vires act, or has broken an independent duty of international law, such as a duty to take steps to restrain the commission of the wrongful act, or to take measures to prevent the recurrence of the offence.[13] Thus the state may incur an indirect responsibility arising out the ultra vires acts. It may possibly also be liable in such circumstances if it has 'held out' the incompetent agency as having authority (unless there be some constitutional or legal prohibition of the acts of 'holding out' relied upon by the claimant state), but even then the 'holding out' would still necessitate an imputation to the respondent state of conduct by some instrumentality other than the incompetent agency which tortiously acted or omitted to act.

4. Where the illegal acts are committed by private citizens and not by an organ or official of the state the grounds for not imputing liability to the

11. Annual Digest of Public International Law Cases, 1925–1926, p 223. See also *Royal Holland Lloyd v United States* (1932) 26 AJIL (1932) 410, and cf the *La Masica Case* (1916) *United Nations Reports of International Arbitral Awards* Vol XI, 560.
12. Report of Sub-Committee of Committee of Experts for the Progressive Codification of International Law (1927) in League of Nations Doc C.196, M.70, 1927, V, p 97.
13. See report of Sub-Committee of Committee of Experts for the Progressive Codification of International Law, op cit, p 97.

state are much stronger, for the doctrine of imputability rests on the assumption that the delinquency has been committed by an agency *at least* of the state concerned, or by persons actually acting on behalf of the state.[14] But here again, by their omissions, or default, the agencies of the state may have broken some independent duty of international law, and liability may then be imputed to the state; for example, if it fails in its duty of repression and punishment of the guilty persons,[15] or if it has actually inspired the illegal act or acts committed, or if it has become an accessory after the fact by wilfully benefiting from the wrongful act or acts of the private citizen or citizens concerned, or if, by conduct or declaration (oral or written) it has authorised or ratified the unlawful act or acts.[16] It is sometimes said that before a state is liable in this connection, there must be some implied complicity in the wrongful act either by negligent failure to prevent the injury, or to investigate the case, or to punish the guilty offender. In this connection, the inordinate upsurge during recent years of terrorist acts committed by individuals or groups has raised problems concerning the extent to which the states, in the territory of which these acts have been perpetrated, may be liable in respect of the injuries or losses caused by these acts. Inter alia, it has been suggested that the local state may incur liability by reason of the negligent creation of opportunities for the commission of terrorist acts, or by the failure to punish terrorists adequately for their crimes or at all, or because of the failure to permit their extradition to the state of nationality of the victim or victims.

One particular example of damage done by private individuals has several times come before arbitral tribunals,[17] namely, that inflicted on the property or persons of aliens in the course of mob riots. It has been ruled on these occasions that the state is responsible for the acts of the rioters only if it is guilty of a breach of good faith or has been negligent in preventing the riots. If the state reasonably affords adequate protection for the life and property of aliens, it has fulfilled its duty at international

14. Cf *British Property in Spanish Morocco Case* (1925) *United Nations Reports of International Arbitral Awards* Vol X, 689.
15. Art 13 of the above-mentioned *Harvard* Draft Convention (p 305, n 8 above), limits the scope of this duty by relation to criminal acts, and stipulates that the injured alien or some other alien (eg a relative) must have thereby been deprived of the opportunity to recover damages from the delinquent; otherwise such inadequacy of efforts of apprehension or prosecution are not of themselves grounds of an imputable liability.
16. *Case of United States Diplomatic and Consular Staff in Tehran* ICJ 1980, 3; and cf *Nicaragua v United States* ICJ 1986, 14 (alleged laying of mines by agents of the United States in Nicaraguan waters). It follows from the latter case that the individuals need not be nationals of the state to which imputability is attached (see paras 75 et seq of the judgment).
17. See, eg, the *Home Missionary Society Case*, Annual Digest of Public International Law Cases, 1919–1922, pp 173–4. This case is referred to by the International Law Commission in the *Report* on the Work of its *27th Session* (1975) pp 26–27.

law towards these persons. To quote the Report of the League of Nations Sub-Committee mentioned above:

> 'Damage suffered by foreigners in case of riot, revolution or civil war does not involve international responsibility for the State. In case of riot, however, the State would be responsible if the riot was directed against foreigners, as such, and the State failed to perform its duties of surveillance and repression.'

Thus a state is liable if it promotes or finances groups to engage in injurious mob rioting, or encourages or instigates this activity on their part.[18]

In two of the draft articles adopted by it in 1973–1975 on state responsibility and remaining unaltered by it at its 32nd Session in 1980, the International Law Commission considered it appropriate that the doctrine of imputability or attributability should extend, but only in exceptional circumstances, to certain entities and persons other than state organs or state officials, stricto sensu, provided that there was some genuine connection of the entities and persons with state activities.[19]

First, in paragraph 2 of draft article 7, it was provided:

> 'The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial government entity, but which is *empowered by the internal law of that State to exercise elements of the governmental authority*, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.'

The purpose was to cover entities such as public or public utility corporations, empowered to exercise governmental authority, the International Law Commission's view being that it was 'important that the State should not be able to evade its international responsibility in certain circumstances solely because it has entrusted the exercise of some elements of the governmental authority to entities separate from the state machinery proper'. The Commission used the descriptive words 'empowered by the internal law of that State to exercise elements of the governmental authority' because the real common feature of these entities was that they were 'empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State'.

Second, draft article 8 made provision for attribution to the state of the conduct of persons acting in fact on behalf of the State in these terms:

> 'The conduct of a person or group of persons shall also be considered as an act of the State under international law if

18. *Report* of the International Law Commission on the Work of its *27th Session* (1975) p 31.

19. See *Report* of the International Law Commission on the Work of its *26th Session* (1974) para 123.

a. it is established that such person or group of persons was in fact acting on behalf of that State; or
b. such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.'

Paragraph a. was intended by the International Law Commission to cover cases in which the action of state organs is supplemented by the action of private persons or groups who act as 'auxiliaries' on the state's behalf, while ostensibly remaining outside the official structure of the state. Paragraph b., on the other hand, was intended to embrace the cases of persons who had assumed public functions in order to carry on services which could not be interrupted or which had to be provided because of exceptional circumstances; for example, the discharge of such public functions during a military invasion in the absence of officials or official bodies, or during natural disasters, such as earthquakes or floods, again in the absence of state officials. The qualification is that the circumstances must justify the exercise by private persons of the necessary elements of authority.

Paragraph a. is illustrated to a striking extent by the prosecution in New Zealand of the agents of the French Government involved in the sinking of the Greenpeace vessel the *Rainbow Warrior* in New Zealand internal waters in July 1985. France admitted liability for the acts of the agents, and those prosecuted and convicted could not rely on the so-called doctrine of 'immunity of attribution' in order to avoid trial and punishment for contravening New Zealand criminal law. It was also immaterial so far as the responsibility of France was concerned that the agents concerned were of subordinate status.

General principles as to protection of citizens abroad[20]

The rules of state responsibility under this head depend on keeping a proper balance between two fundamental rights of states:

i. the right of a state to exercise jurisdiction within its own territory, free from control by other states;
ii. the right of a state to protect its citizens abroad.

Most frequently claims are laid on the basis of what is termed 'denial of justice'.[1] Although used in quite a range of different meanings, in a broad sense, the expression covers all injuries inflicted on citizens abroad in violation of international justice, whether by judicial, legislative or

20. A state may also, under this heading of 'protection of citizens abroad', become liable towards an international institution for injuries done to officials of the institution, while acting within the scope of their duties; see Advisory Opinion of the International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations* ICJ 1949, 174 et seq.

1. See, on the whole subject, Freeman *The International Responsibility of States for Denial of Justice* (1938).

administrative organs, for example, maltreatment in gaol, or arbitrary confiscation of property; but in its narrow and more technical sense it connotes misconduct or inaction on the part of the judicial agencies of the respondent state, denying to the citizens of the claimant state the benefits of due process of law. To constitute a 'denial of justice' in this narrow sense there must be some abuse of the judicial process or an improper administration of justice, for example, wrongful arrest and detention, obstructing access to the courts, unwarranted delays in procedure, a manifestly unjust judgment of the court, a refusal to hear the defendant, or a grossly unfair trial.[2] However, a mere error in a domestic court's decision is, semble, not sufficient; the decision must be so obviously wrong that it cannot have been made in good faith, and/or with reasonable care.

In the *Chattin Claim* (1927)[3] the United States–Mexico General Claims Commission found that a denial of justice had occurred on Mexico's part, and it cited certain facts in support:

> 'Irregularity of Court proceedings is proven with reference to absence of proper investigations, an insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open Court a mere formality, and a continued absence of seriousness on the part of the Court.'

The Commission also pointed out that the relevant procedure followed (in 1910–1911) was insufficient by international standards. Similarly, in the *Cutting Case*,[4] the United States intervened with Mexico in regard to the trial of an American citizen who had been arrested on a charge of criminal libel.[5]

Important in this connection is the matter of *exhaustion of local remedies*, particularly where claims for denial of justice are brought before international tribunals. It appears to be the rule that no state should intervene or claim in respect of an alleged denial of justice to a national or other wrong until all local remedies open to that national have been exhausted without result. The obvious principle underlying the rule is that until there has been recourse to the proper final courts or

2. The provisions of arts 9–11 and 14 of the International Covenant of 1966 on Civil and Political Rights, that, inter alia, prohibit arbitrary arrest or detention, or delay in trial proceedings, and that lay down (in art 14) minimum guarantees for the due determination of a criminal charge necessarily have an impact upon the scope of liability for denial of justice. This point is recognised in §711 of the American Restatement of the Foreign Relations Law of the United States (Revised, 1985). Bilateral treaties may also contain standards for the treatment of aliens, to be respected by the contracting states.
3. See 22 AJIL (1928) 667.
4. See above, p 209.
5. A mere error in judgment of an international tribunal does not amount to a denial of justice; see *The Salem Case* (1932) *United Nations Reports of International Arbitral Awards* Vol II, p 1202.

authorities of the respondent state it cannot be said that there has been a denial of justice. Another consideration is that every opportunity for redress in the municipal sphere should be sought before the matter assumes the more serious aspect of a dispute between states.

It is not easy to reconcile draft article 22, as adopted by the International Law Commission, with this conception of exhaustion of local remedies. This article provides that when a state's conduct has created a situation not complying with an obligation as to the treatment of aliens, but such obligation may allow this or an equivalent result to be achieved by subsequent conduct of that state, 'there is a breach of the obligation *only* if the aliens concerned have exhausted the *effective* local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment'. Semble, however, a breach always remains a breach, irrespective of whether or not local remedies have been exhausted.

A detailed consideration of the local remedies rule lies outside the scope of this book, but certain principles may be briefly formulated:

a. a local remedy is not to be regarded as adequate and need not be resorted to if the municipal courts are not in a position to award compensation or damages;
b. a claimant is not required to exhaust justice if there is no justice to exhaust; for example, where the supreme judicial tribunal is under the control of the executive organ responsible for the illegal act, or where an act of the legislative organ has caused the injury suffered;
c. where the injury is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts,[6] semble the injured foreign citizens are not required to exhaust local remedies;
d. states may waive the condition that local remedies should be exhausted, although it is not clear whether an agreement between the disputant states to arbitrate the relevant issues will of itself operate as an implied waiver.

On the other hand, as the *Ambatielos Arbitration* (1956), between Greece and Great Britain, shows,[7] local remedies are not exhausted if an appeal to a higher Court is not definitely pressed or proceeded with, or if essential evidence has not been adduced, or if there has been a significant failure to take some step necessary to succeed in the action.

According to the decision of the International Court of Justice in the *Interhandel (Preliminary Objections) Case*,[8] the local remedies rule applies

6. However, if this is not clearly shown, only the municipal courts themselves can determine the issue of jurisdiction, so that the local remedies rule applies; see *Panevezys-Saldutiskis Rly Case* (1939) Pub PCIJ Series A/B No 76.
7. See 50 AJIL (1956) 674–679.
8. ICJ 1959, 6.

a fortiori where the national of the claimant state concerned is actually in the course of litigating the matter before the municipal courts of the respondent state, and the municipal suit is designed to obtain the same result as in the international proceedings. Moreover, the rule applies even though the municipal courts may be called upon to apply international law in reaching a decision on the matter. The decision of the International Court of Justice to some extent demonstrates that international tribunals will not be easily persuaded that local remedies are unavailable or have been exhausted, but will closely consider all the circumstances in that connection.

State responsibility and the fault theory[9]

It is often said that a state is not responsible to another state for unlawful acts committed by its agents unless such acts are committed wilfully and maliciously or with culpable negligence.[10]

It is difficult to accept so wide a conclusion and so invariable a requirement. A general floating condition of malice or culpable negligence rather contradicts the scientific and practical considerations underlying the law as to state responsibility. Few rules in treaties imposing duties on states contain anything expressly in terms relating to malice or culpable negligence, and breaches of those treaties may without more involve the responsibility of a state party. It is only in specific cases when particular circumstances demand it that wilfulness or malice, or negligence may be necessary to render a state responsible; for example, if the state knowingly connives in the wrongful acts of insurgents or rioters, it would become liable, although not generally otherwise, or if it were negligent in failing to provide adequate police protection for diplomatic premises against the injurious acts of demonstrators or rioters, and damage occurred.[11] Moreover, fault can seldom enter into account in the case of alleged breaches of international law by legislative or judicial organs, or where the relevant state agency is acting in the exercise of a statutory discretion, and there is no evidence of arbitrariness or capriciousness.

Further, the actual decisions of international arbitral tribunals fail to justify a general or absolute condition of malice or culpable negligence. An instructive precedent is supplied by the case of the *Jessie* which came before the British–American Claims Arbitral Tribunal in 1921. There the

9. The subject is discussed in García Amador's Fifth Report to the International Law Commission on International Responsibility; see *Yearbook* of the Commission 1960, Vol II, 41, pp 61–64. Cf the *Report* of the International Law Commission on the Work of its *25th Session* (1973) para 58, in its notes on draft art 3 on State Responsibility, as to what constitutes objectively 'an internationally wrongful act'.
10. Cf Judge Krylov's dissenting opinion in the *Corfu Channel (Merits) Case* ICJ 1949, 4, and his insistence that state responsibility presupposes culpa.
11. Cf *Report* of the International Law Commission on the Work of its *25th Session* (1973) para 58, in notes on draft art 3 on State Responsibility, referring to this case of negligence.

United States was held responsible to Great Britain for the action of its officers, although such action was bona fide and in the belief that it was justified by a joint regulation adopted by the two countries. The tribunal laid down the wide principle that:

> 'Any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands.'

Thus the tribunal did not hold that the presence of malice or culpable negligence was a condition precedent of state responsibility.

In the field of state responsibility for nuclear activities, there has to be, subject to the nature of the situations arising and subject to reasonable general qualifications, some form of strict or absolute liability. The difficulties here are not to be minimised.[12] The safety of the international community cannot be ensured under a system whereby a state would be responsible only if it were proved to be negligent in the management of nuclear fuels and nuclear installations. This involves the additional difficulty which in some instances, may require the problem of insurance to be dealt with, of the availability of sufficient financial resources to meet large-scale liabilities for major damage.

The unavoidable dangers involved in nuclear activities, particularly those related to the use of, and experiments with, nuclear weapons, together with the increase in the number of non-nuclear-weapon states engaged in the development of nuclear energy, partly explain the signature on 1 July 1968, of the Treaty on the Non-Proliferation of Nuclear Weapons (currently referred to as 'the NPT'), which is the principal international instrument aimed at preventing the spread of nuclear weaponry. The dangers inherent in the nuclear arms race also materially influenced the conclusion of the treaty. The two key provisions are contained in articles I and II. Article I provides that each nuclear-weapon state party to the treaty is not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly, and also is not to assist, encourage, or induce any non-nuclear-weapon state to manufacture or acquire or control such weapons or devices. Article II obliges each non-nuclear-weapon state party to the treaty not to receive the transfer from any transferor whatsoever of nuclear weapons or devices, directly or indirectly; and not to manufacture or acquire these, or to seek or

12. Cf R. Fornasier 'Le Droit International Face au Risque Nucléaire' *Annuaire Français de Droit International* Vol X (1964) pp 303–311. Note also the following instruments: (1) Convention on Third Party Liability in the Field of Nuclear Energy, Paris, 29 July 1960, with Supplementary Convention. (2) Convention on the Liability of Operators of Nuclear Ships, Brussels, 25 May 1962. (3) Convention on Civil Liability for Nuclear Damage, Vienna, 21 May 1963. (4) The Convention on the Physical Protection of Nuclear Material, Vienna, 26 October 1979. On the validity at international law of the use of nuclear weapons, see p 551, n 2 below.

receive assistance in their manufacture. Under article IV, the right of all parties, subject to articles I and II, to use nuclear energy for peaceful purposes is preserved, while non-nuclear-weapon states parties are through agreements negotiated with the International Atomic Energy Agency (IAEA), pursuant to article III, to accept the safeguards system evolved by that organisation.[13]

The treaty is a compromise, and possibly does not represent an ideal solution, but without it nuclear proliferation would have been removed from the major controls established under its provisions.

In relation to this subject of nuclear activities, reference should be made lastly to the two conventions adopted in the wake of the Chernobyl nuclear reactor accident in April 1986, namely the Convention of 1986 on Early Notification of a Nuclear Accident, and the Convention of 1986 on Assistance in the Case of a Nuclear Accident or Radiological Emergency. Under the terms of the former Convention, a state is, inter alia, under a duty to notify and to provide information both to states which might be adversely affected, on the one hand, and to the International Atomic Energy Agency (IAEA) at Vienna, on the other hand, of the occurrence of a nuclear accident involving its civil and military facilities and activities, except nuclear weapons. This is semble a duty of a strict nature, for the breach of which the non-notifying state incurs absolute liability.

4. CLAIMS

Inasmuch as a state has a right to protect its citizens abroad, it is entitled to intervene diplomatically or to lodge a claim for satisfaction before an international arbitral tribunal if one of its subjects has sustained unlawful injury for which another state is responsible. The claimant state is deemed to be injured through its subjects, or to be asserting its right to ensure respect for the rules of international law vis-à-vis its own nationals,[14] and once the intervention is made or the claim is laid, the matter becomes one that concerns the two states alone. The injured subject's only right is to claim through his state as against the state responsible. Some writers indeed hold the view that if the injured subject waives his rights of compensation, his state can none the less prosecute a claim for the injury done to him.

13. This is a truly international system, involving both reporting and inspection. Prior to the treaty, a large number of countries were subject to the system; see the address, 21 September 1966, by the Director-General of IAEA to the 10th General Conference, and M. Willrich 60 AJIL (1966) 34–54. Also, since the NPT (see above), and more particularly since 1977, a large number of bilateral safeguards agreements have been concluded between uranium-exporting countries, on the one hand, and uranium-importing countries, on the other hand. On the treaty generally, see M. I. Shaker *The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959–1979* (3 vols, 1980).
14. See *Panevezys-Saldutiskis Rly Case* (1939) Pub PCIJ Series A/B No 76.

Sometimes it is expressed that this right corresponds to an administrative duty of the state towards such of its nationals as have suffered injury.[15] But state practice (for example, of the Department of State of the United States) shows that most states regard the sponsoring of claims by nationals as entirely within their discretion. Whether or not protection be a right or a duty of the state, it is now well established that in the international forum, as a rule, the only recognised claimants are states. To quote the Permanent Court of International Justice:[16]

> 'Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant.'

It follows from the general principle that once compensation has been assessed and paid by the defendant state to the claimant state, the defendant state, apart from express contract, is not interested in nor entitled to concern itself with the manner in which the complainant state disposes of the sum of money awarded. The complainant state need not in fact remit to its injured citizen the whole of the compensation received by it.

The persons on behalf of whom a state is entitled to propound an international claim are primarily its nationals, but may include also 'protected' subjects such as those placed under that state's diplomatic protection, and even aliens who have complied with almost all the conditions of naturalisation. In the majority of cases, international arbitral tribunals have applied the rule that the injured person must have the nationality of the claimant state or other recognised status at the time the injury was suffered and must retain it until the claim is decided (or at least until the claim is presented), but other requirements and refinements in connection with the nationality of the injured party have also been adopted by different arbitrators. The necessity for the rule was expressed by the United States–Germany Mixed Claims Commission as follows:[17]

> 'The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other national is injured. As between nations the one inflicting the injury will ordinarily listen to the complaint only of the nation injured. ... *Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency on* behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalisation laws for the purpose of procuring its espousal of their claims.'

Where the party injured is a company or corporation, the matter is

15. See *Gschwind v Swiss Confederation* Annual Digest of Public International Law Cases, 1931–1932 at 242–3.
16. *Mavrommatis Palestine Concessions Case (Jurisdiction)* (1924) Pub PCIJ Series A, No 2, p 12.
17. See Report of Decisions of the Commission, pp 175 et seq. Cf also the difficult case of *The Bathori* [1934] AC 91.

likewise governed by the 'nationality of claims' canon. Only the national state is entitled to espouse the claim of the company or corporation, the nationality of which is determined by tests referred to in Chapter 12 below.[18] Difficulties may arise, however, in the case of the so-called 'triangular' situation, namely:

a. Injury in breach of international law is done to a company incorporated and with its registered office in state A.
b. The act occasioning the injury has been committed by state B, where the company has carried on its operations.
c. The principal shareholders of the company are nationals of, and resident in state C.

Is state C entitled to espouse the claims of the shareholders who have incurred loss through the act of state B?

The principles governing such a situation were clarified in 1970 by the International Court of Justice in the *Barcelona Traction Case* (Belgium–Spain),[19] where the Court ruled in favour of the respondent state, Spain, upon the antecedent ground that Belgium had no locus standi to espouse before the Court claims of alleged Belgian nationals who were shareholders in the subject company, Barcelona Traction, Light and Power Company, Limited, inasmuch as the latter was incorporated in Canada and was, in an international legal sense, of Canadian nationality. The reasoning relied upon by the Court may be expressed as follows:

a. International law was bound to have regard to the general tenor of rules of national legal systems, which was to the effect that an infringement of a company's rights by outsiders did not involve liability towards the shareholders, even if their interests were detrimentally affected by the infringement. Consistently, therefore, the *general* rule of international law was that the national state of the company concerned was entitled to exercise diplomatic protection for the purpose of seeking redress for an international wrong done to the company.
b. A different principle might apply if the wrong were aimed at the direct rights of the shareholders as such (eg, the right to attend and vote at general meetings), but in the instant case, Belgium had conceded that its claim was not based upon upon any infringement of the direct rights of shareholders, but only upon the alleged illegal measures taken in Spain against the company.
c. The general rule of the exclusive entitlement of the national state of the company might conceivably, in certain cases, give way to the right of the national state of the shareholders, for example where the

18. See p 344.
19. *Case Concerning the Barcelona Traction, Light and Power Co Ltd (Second Phase)* ICJ 1970, 3.

company itself had ceased to exist, or the protecting national state of the company lacked capacity to exercise diplomatic protection; however, in the instant case the Barcelona Traction, Light and Power Company, Limited had not ceased to exist as a corporate entity in Canada, nor was the Canadian Government incapable of exercising diplomatic protection, although for reasons of its own, its interposition on behalf of the company had ceased as from 1955.

The Court did not accept certain propositions, namely:

i. If investments formed part of a country's national economic resources, and these were prejudicially affected contrary to that country's right to have its nationals enjoy a certain standard of treatment, it could claim for breach of international law done to it. A claim of this nature would have to be based on treaty or special agreement, which did not exist between Belgium and Spain.
ii. For reasons of equity, a country should be entitled in certain cases to take up the protection of its nationals who were shareholders in a company, the victim of a breach of international law. Any such alleged equitable justification would open the door to competing claims on the part of different states, thereby creating insecurity in international economic relations.[20]

The net effect of the Court's decision is then that an international court ought to be reluctant to 'pierce the corporate veil' in order to allow a country other than the national state of the company to seek redress for an international wrong done to the company.

According to the decision of the International Court of Justice in the *Nottebohm Case (Second Phase)*,[1] where the person, whose claim is being propounded by the claimant state, is a national of it by naturalisation, the claimant state will not be entitled to proceed, if such person has no close and genuine connection with that state, sufficient for the grant of its nationality. A somewhat similar principle applies if he is of dual nationality; his 'real and effective nationality' must be that of the claimant state.[2]

In the *I'm Alone Case*[3] between Canada and the United States, the Canadian Government was held entitled to claim although only the

20. In its judgment (see para 99) the Court referred to the case of a company established in a foreign country in order to obtain tax or other advantages, and said that it did not seem 'to be in any way inequitable' that these advantages should be balanced by the risk that a state other than the national state of shareholders would be solely entitled to exercise diplomatic protection.
1. See ICJ 1955, 4.
2. Cf *Florence Strunsky Mergé Case* (1955) 50 AJIL (1956) 154.
3. See *United Nations Reports of International Arbitral Awards* Vol III, p 1609. This case arose out of the sinking in 1929 of the *I'm Alone*, a British schooner of Canadian registry, by a United States coastguard vessel at a point on the high seas more than 200 miles from the United States coast. The *I'm Alone* was engaged in the smuggling of

nominal or de jure owner of the vessel—the *I'm Alone*—was of Canadian nationality, the real or de facto owners being actually Americans. Counsel for the United States urged that the damages awarded would ultimately go into the pockets of American citizens, but this was treated as an irrelevant consideration.

This doctrine of 'nationality of claims' has with some justification been condemned as artificial, and the theory that a claimant state is injured through its subjects has been described as a pure fiction, but they are both supported by the weight of state practice and arbitral decision.

It remains to point out that states may by treaty lay down special principles or provide for a special procedure inter partes for claims in respect of disputes, or for tortious injuries received by their citizens.[4] In that connection, reference may be made to article 25 of the Convention of 18 March 1965, on the Settlement of Investment Disputes between States and Nationals of Other States, enabling private investors who are nationals of a state party to settle investment disputes with the government of another state party. In the case of a private investor, who is a natural person, he is to have the nationality of the state concerned on the date of the consent of the parties to submit the dispute to settlement and on the date of the *registration* of the relevant request for settlement by arbitration or conciliation; but a person who on either date possessed the nationality of the investment-receiving state is ineligible to use the machinery of the Convention, even if the investment-receiving state consented to access being given. However, in the case of a private investor who is a body corporate or other entity, the position is not so rigid; not only is access allowed to corporations, etc, which had the nationality of a state party other than the investment-receiving state on the date of the consent to submit, but also to those who on that date held the nationality of the investment-receiving state, provided that the latter state agrees to treat the claimant as the national of another state, because of foreign control. This is a radical advance, enabling regard to be had to the realities of control of corporations and companies.

Damages

Under international law, in matters of state responsibility, a claimant state is always entitled to some damages where its claim has been sustained, irrespective of whether the wrongful act subject of the claim has caused material damage, or injury, or pecuniary loss. Further, if the wrongful act be an infringement, contrary to international law, of the rights of a

alcoholic liquor into the United States, but the Canadian Government claimed that the sinking was illegal and not justified by any convention with the United States.

4. See, eg, art VIII of the Agreement of the North Atlantic Powers of 19 June 1951, regarding the Status of their Forces (claims in respect to acts or omissions of members of the forces or civilian components), and cf the claims provisions in the stationing of forces agreements concluded by the Soviet Union.

private citizen whose claim has been espoused by that state, the damage deemed to have been suffered by the claimant state is an independent damage not identical with that suffered by the individual. To quote the Permanent Court of International Justice in the *Chorzów Factory (Indemnity) Case*:[5]

> 'The damage suffered by an individual is never ... identical in kind with that which will be suffered by a State; *it can only afford a convenient scale for the calculation of the reparation due to the State*.'

This principle is consistent with the award in the *Lusitania Death Claims*, arising out of the sinking of the British vessel, the *Lusitania*, by a German submarine in 1915. The United States–Germany Mixed Claims Commission, in claims by the United States on behalf of American citizens drowned when the vessel sank, refused to grant vindictive or exemplary damages[6] against the German Government.[7] On the other hand, such damages appear to have been awarded by the United States–Mexico General Claims Commission in the *Janes Case* (1926), where the claim was lodged by the United States in regard to the failure of the Mexican authorities to take prompt and effective action to apprehend the murderer of an American citizen. The Commission awarded damages for the 'indignity' done to the relatives of the victim by the murderer's non-punishment.[8]

The normal rule, having regard to the fact that usually exact restitution may be impossible, is that an award by way of reparation should be for the payment of monetary compensation.[9] In some instances, however, restitution may necessarily be the more appropriate remedy.[10]

In several instances, international arbitral tribunals have awarded two separate heads of damage, one in respect of the damage suffered by individuals, and the other in respect of injury to the claimant state. Such an award was made in the *I'm Alone Case*, above, and is consistent with the views expressed by the International Court of Justice that the United Nations can claim compensation both in respect of itself and of the damage to individuals arising out of injuries suffered by its officials in the course of their duties.[11]

5. (1928) Pub PCIJ Series A, No 17, p 28.
6. Vindictive or exemplary damages are damages given on an increased scale in respect of acts committed maliciously or with gross negligence or in other circumstances of aggravation.
7. Annual Digest of Public International Law Cases, 1923–1924, No 113.
8. Annual Digest of Public International Law Cases, 1925–1926. No 158. Apart from arbitral awards, states have in practice repeatedly paid indemnities in the form of vindictive damages to other states for breaches of duty of more than ordinary concern.
9. But cf *Chorzów Factory (Indemnity) Case* (1928) Pub PCIJ Series A, No 17, pp 47–48.
10. See the award in *Texaco v Libya* (1978) 17 International Legal Materials 1.
11. See Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* ICJ 1949, 174 et seq.

In practice, however, most states limit their claims to the loss actually suffered by the individual,[12] and such loss is also usually the measure of the arbitral tribunal's award, irrespective of the degree of blame attachable to the delinquent or respondent state.[13]

Finally, reference may be made to the significant course taken by the International Court of Justice in 1986 in its judgment in the case of *Nicaragua v United States*.[14] The Court had found in favour of Nicaragua that the United States had been in breach of certain obligations under customary international law (including the wrongful use of force) and also in breach of a Treaty of 1956 of Friendship, Commerce and Navigation entered into by the two parties. Nicaragua, as the successful complainant, requested the Court to adjudge and declare that compensation was due to Nicaragua, the quantum thereof to be fixed subsequently, and to make an interim award. In response to this request, the Court made the following rulings: (a) it had jurisdiction to order reparation; (b) the request by Nicaragua for the nature and amount of the reparation to be determined in a subsequent stage was appropriate; and (c) there was no provision in the Court's Statute either specifically empowering it or debarring it from making an interim award, as requested. Notwithstanding these rulings, this was a case in which one party, the United States, had not appeared, and the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It therefore did not consider that it could accede *at that stage* to Nicaragua's request. The order made by the Court was accordingly 'that the form and amount of [the] reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in [the] case'.

12. In the *Chorzów Factory (Indemnity) Case* (1928) PCIJ Series A, No 17, pp 46–48, the Permanent Court of International Justice laid it down that the measure of damages for an international wrong is determined by what is necessary to make restitution, together with special damages for loss not covered by such restitution. The International Court of Justice awarded to Great Britain the replacement of one destroyer that had been lost through explosions for which Albania was held liable; see the *Corfu Channel (Assessment) Case* ICJ 1949, 244.
13. This is not, however, an absolute or invariable rule. In the *I'm Alone Case* (1935), referred to at p 317 above, no damages were awarded corresponding to the loss of the vessel sunk, the award being primarily for the lack of respect for the flag of the vessel subject of the alleged unlawful act of sinking.
14. ICJ 1986, 14, paras 283–285.