Second Edition

HANDBOOK OF INTERNATIONAL LAW

Anthony Aust

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Handbook of International Law, second edition

To the new student of international law, the subject can appear extremely complex: a system of laws created by States, courts and tribunals operating at the global and national level. A clear guide to the subject is essential to ensure understanding. This handbook provides exactly that: written by an expert who both teaches and practises in the field, it focuses on what the law is, how it is created, and how it is applied to solve day-to-day problems. It offers a uniquely practical approach to the subject, giving it relevance and immediacy. The new edition retains a concise, user-friendly format allowing central principles such as jurisdiction and the law of treaties to be understood. In addition, it explores more specialised topics such as human rights, terrorism and the environment. This handbook is the ideal introduction for students new to international law.

Anthony Aust is a solicitor and former Deputy Legal Adviser of the Foreign and Commonwealth Office, London. He now practises as a consultant on international law and constitutional law to governments, law firms and international organisations. He is a visiting professor at various universities. His publications include *Modern Treaty Law and Practice* (Cambridge, 2nd edn 2007).

Handbook of International Law

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For Kirsten

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Foreword to the First Edition

Tony Aust has already produced *Modern Treaty Law and Practice* (Cambridge University Press, 2000; Chinese edn, 2005; 2nd English edn, 2007). This was an exercise in the handbook mode which some scholars profess to dislike, and which most of them certainly neglect. In my own case, I confess that that book is often to hand, because it is a place to start looking at problems in the law of treaties on an everyday basis. It does not claim to be definitive, but it succeeds in its task of introducing and of providing initial guidance in a clear and well-informed way. Take for example the short discussion on provisional application (ibid., pp. 172–6), an issue of great practical significance as to which there is little or nothing in the older treatises. What he says is clear, well illustrated – one is pointed to difficulties and prominent instances (e.g. the Energy Charter Treaty) – and one is told that the case of provisional application which everyone knows – GATT 1947 – is 'hugely atypical'.

The clear guidance and practical sense of *Modern Treaty Law and Practice* is here repeated on the broader canvas of general international law, an area of equal significance but much less accessible than the law of treaties. These days everyone including taxi drivers talks about customary international law, although they probably (and wisely) do not use the term. But there is an awareness that an imminent threat is a condition for action in self-defence; that the Security Council can authorise individual States to use force but may be expected to do so in clear language; that crimes against humanity are punishable and might be punished; and that human rights confront State responsibility with consequences for both. Providing guidance in this much broader frame is a challenge. But non-specialists have to start somewhere and this is a good place to start.

Tony Aust brings to the work a sense of humour, of balance and of British practice – but the work is not parochial. Her Majesty's Government has a long tradition (back to the 1880s) of a legal adviser in the Foreign Office, and there has been a consistent pattern of consultation on issues perceived as legal. It can be traced in the United Kingdom Materials on International Law (UKMIL), published in the *British Yearbook of International Law* since 1978 and running now to thousands of pages – but it goes back much further than that. Senior

decision makers tend to say that they like their lawyers 'on tap and not on top' (as one British ambassador to the UN put it). But if one is ever involved in a long-running international dispute it is a fair bet that the government which has had a consistent, legally informed approach is the more likely to prevail, whatever the initial merits may have been. Aust has been a participant in this process from the British side for as long as thirty-five years – a process sometimes affected by forays from Lord Chancellors (as in Suez in 1956) or Attorneys-General (as with Iraq in 2003) but constant and generally consistent. In turn, good international law has reinforced sustainable international policy – witness those two occasions where the costs of the alternatives were considerable.

The treatment of the subject is light and sometimes schematic – more detailed issues will require more research. But he covers the ground and gives a good idea of its shape and contours, and this is a valuable service at a time of overspecialisation.

James Crawford
Whewell Professor of International Law
University of Cambridge
28 April 2005

Preface to Second Edition

[Q]uotation is a national vice.[1]

The *Oxford English Dictionary* defines a handbook as a short manual or guide; and this book is intended to be a helpful means of finding out about international law. As James Crawford said in his foreword, a handbook is meant to be kept often to hand. So, when one comes across a problem (perhaps a new area of the international law or a new concept or term of that law) one can turn first to the handbook and get a quick answer to questions such as: What is a State? What is the exclusive economic zone? Who is a refugee? What is the legal regime of Antarctica? How are diplomatic and State immunity confused? What is Palestine? Should one prefer an arbitral tribunal to an international court? What is a Chapter VII resolution? My purpose is to explain international law principles and rules in a clear and concise way. I avoid as far as possible theory and speculation.

Although the book can be read as an introduction to the subject, it is also designed to meet the need for a practical guide for those concerned with international law, whether on a regular or an occasional basis. In the twentieth century, a tremendous amount was written about international law. General works may be intended rather more for the student. Dealing as they do with the history of international law, its doctrines and intellectual problems, such works do not always have enough space to set out the law in detail. That is right. Most students of international law, whether undergraduate or postgraduate, will not practise it.

However, today, many people need to know about international law, not only legal advisers to foreign ministries. Therefore, an object of this book is to make more people aware of the international law that lies behind so many ordinary activities. Today international law affects almost every sort of human activity. To take one simple example: foreign flights by air are only possible because of an elaborate network of bilateral treaties; and they have been concluded pursuant to a multilateral treaty (the Chicago Convention of 1944) which provides the basic legal structure for the regulation of international civil aviation. And

[1] Evelyn Waugh, *The Loved One*, 1948, Ch. 9.

when your aircraft crashes, treaties going back to 1929 may limit the compensation received by your family (see pp. 324–5 below).

In recent years, treaties providing for the protection of human rights and the environment have become widely known. But there are many other important areas regulated by treaties – some of which date back to the nineteenth century – yet they are largely unknown, except to the specialist. That the Table of Treaties is much longer than the Table of Cases merely reflects the fact that treaties now play a much more important role in the day-to-day work of the international lawyer. Today, decisions of international courts and tribunals have a less central role. Similarly, common law practitioners will be familiar with the way legislation, primary and secondary, has increased so much in volume and complexity in the last sixty years that it is now the principal element of their work.

The vital role played by international law is often not obvious even to lawyers, unless they specialise in the subject. Fortunately, in recent years George W. Bush, Saddam Hussein and Slobodan Milošević have done much to heighten awareness of the law on the use of force, UN sanctions, war crimes and crimes against humanity. Yet specialists – whether lawyers or not – in areas such as human rights, the environment or the European Union, often do not have a good grounding in international law, even though their fields have been created wholly or largely by treaties. A physicist needs to have advanced mathematics, and no doctor could qualify without a good knowledge of chemistry and biology. Similarly, international civil servants, government officials, NGO staff and other specialists all need to be more familiar with the international law underlying their subject, and not just the particular texts that may seem relevant.

It is a mistake to think that only international courts and tribunals decide disputes about international law. National courts and tribunals still decide most of them. And international law can reach far down into the internal legal order of States, sometimes with unexpected effects. In 1994, a merchant ship belonging to a former communist State was arrested in Scotland on the initiative of the crew who had not been paid for months. Normally the arrest would have been perfectly proper, but, unknown at first to the local court, there was a bilateral treaty, between that State (when it was communist) and the United Kingdom, which prohibited the arrest of merchant vessels for such a purpose. The treaty had been made part of UK law and had not been revoked or amended.

Although law is always developing, it is a mistake to think that all of it is uncertain. International law develops continually. It has its share of grey areas, but that does not mean that it is always a matter of opinion. Most of the basic principles and rules are well established. As with the law of each State, the problems faced daily are concerned more with how to apply a well-established rule to the facts. This goes also for most cases before national courts and tribunals. Cases such as *Pinochet* (see pp. 5 and 162 below) are the exception, not the rule.

All practising lawyers know how different the practice of law is from what they learned as a student. It is the same for international law. I have therefore included as much as possible of its practical aspects. This book explains how the law is actually developed and applied by States and international organisations. I was very fortunate to have been a foreign ministry legal adviser for thirty-five years. It gave me an insight into how things are done, and I have put much of my experience into this book. When I have not been able to draw on that experience, or that of former colleagues, I have been able to use my understanding of what international law can really do, and what it is important. This understanding has been developed during a lifetime of practice, which inevitably gives one a feel for what is really important. I have aimed to convey this throughout the book.

I hope that teachers and students of international law will find the book of value. There is an increasing awareness of the need to teach international law (and not just EU law), and especially how it is developed, within its proper context, and this book has certainly benefited from teaching students over the years. The proper context is largely that of diplomacy. One cannot properly appreciate why a treaty or a UN Security Council resolution was drafted in a particular way unless one understands something of the political or diplomatic process that produced it and how problems are eventually solved. That knowledge helps to explain what diplomats and other international negotiators actually do. Yet, in any country, diplomats are a small minority. I have therefore tried to set international law in the context in which it is made.

This book is not just of interest to diplomats, as is largely the case with *Satow* and similar books. My aim is to cover most areas of international law, not just those that are of particular interest to a diplomat (Denza's excellent and authoritative *Diplomatic Law* is limited to the Vienna Convention on Diplomatic Relations). Nevertheless, I hope this book will be useful to diplomats who may well be concerned with many more aspects of international law than they think. Even those who work in foreign ministries or embassies with easier access to expert legal advice have a need to understand that advice so that they can act upon it properly and effectively. There are all too many diplomats with no or little legal knowledge of the international law which underlies their work or who work largely without legal advice, having to deal with international legal problems as best they can.

The chapters vary much in length. The longer ones, such as those on the law of treaties, of diplomatic relations and of the sea, give a fairly detailed treatment of those topics, since they are central to any study of international law. Other, more specialised topics, like human rights and environmental law, are dealt with more summarily since they cannot be described in detail in a book of this length: the leading British work on international environmental law has over 800 pages which is much longer than this book. So, many chapters are more in the nature of introductions to the subject; the background and concepts being concisely described, and longer and learned sources of information mentioned.

Whenever possible, I have tried to use *primary* sources: treaties, judgments and authoritative commentaries. It is always desirable to consult the original text, be it a Security Council resolution, a treaty or whatever. Reading what you want to know often clears the mind of 'spin', which may have been put on the text. Like many others, inevitably I have had to rely also on leading general works like *Oppenheim*'s *International Law* (vol. 1, 9th edn, London, 1992) and Shaw's *International Law* (6th edn, Cambridge, 2008), as well as many other books and articles.

All the chapters have references to books and articles, cases and other materials, which the reader is encouraged to consult. Websites are indispensable today. Shaw's *International Law* has a useful list of websites. This book does not have such a list, but wherever possible the text will mention the relevant sites, including some of the more obscure. But one must always remember that website addresses do sometimes change. When this happens – or at other times – resort to a Google search may be necessary.

As far as possible, the facts and law are stated as at 31 July 2009, although inevitably some later developments have been added at the proof stage.

All material, comments and corrections should be sent to me at: aiaust@aol.com.

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Practitioners and scholars expert in a particular field have been good enough to take time to comment on whole or parts of draft chapters, to point out mistakes and omissions or to provide and suggest or correct material. I must therefore particularly thank Mahdad Fallah Assadi, Jane Crellin, Nevil Hagon, Arancha Hinojal, Johannes Huber, Saskia Hufnagel, Robert Kennedy, John Louth, Denzil Millar, Annebeth Rosenboom and Mark Villager. But, I am bound to have left some people out.

However, all opinions and errors are mine.

I must also thank Sinéad Moloney and the team at Cambridge University Press for helping to put together this second edition for publication.

Lastly, I must again thank my wife, Kirsten Kaarre Jensen, for putting up with the demands on me – and therefore her – of writing, as well as making perceptive suggestions from the viewpoint of a former diplomat and, what is equally important, a non-lawyer.

Table of treaties

Where appropriate, a treaty is listed under the name or acronym by which it is commonly known or the subject matter is mentioned first. Today, some multilateral treaties are regularly amended, and therefore the most reliable source for the up-to-date text may well be an official website.

Multilateral treaties

Bilateral treaties

Table of MOUs

For an explanation of the term 'MOU', see pp. 51–5 below.

Multilateral MOUs

Alma Ata Declaration 1991, ILM (1992) 138 24

Declaration on the Granting of Independence to Colonial Countries and Peoples 1960, UNGA Res. 1514 (XV) 47

Friendly Relations Declaration 1970, UNGA Res. 2625 (XXV); ILM (1970) 1292 7, 36, 265

Hague Declarations 2 and 3 1899, R&G 59 and 63 238

Helsinki Final Act 1975, ILM (1975) 1293 47, 53, 59, 178

OSCE Charter of Paris 1990, ILM (1991) 193 52

Rio Declaration on Environment and Development 1992, ILM (1992) 876; B & B Docs. 9 306–8

St Petersburg Declaration 1868, R&G 53 238

Stockholm Declaration of Principles 1972, B & B Docs. 1 305–6

Universal Declaration of Human Rights 1949, UNGA Res. 217 (III); BGG 18 11, 170, 217

Bilateral MOUs

(Although there are many more bilateral than multilateral MOUs, this list is extremely short since few are published, even when they are not confidential. So, see also Aust MTLP, pp. 489–92 and 495–6.)

Argentina–UK Joint Declarations 1989 and 1996 (ILM (1990) 129 and (1996) 304 329

Russia–US Charter of Partnership and Friendship 1992, ILM (1992) 782 52

Table of cases

Glossary of legal terms

accession	Same effect as ratification (q.v.), but not preceded by signature.
acquis communautaire	See p. 444.
adherence	Shorthand term for consent to be bound (q.v.).
agrément	Formal approval by the receiving State of the appointment of a named person as an ambassador (see p. 111).
comitology	See p. 444.
comity	Principles or rules of politeness, convenience or goodwill observed by governments and courts (see p. 11).
compromis	Special agreement to take a dispute to an international court or tribunal (see p. 403).
consensus	See p. 58.
consent to be bound	To ratify or accede to a treaty (see p. 59).
customary international law	Rules derived from general practice among States together with *opinio juris* (q.v.) (see pp. 6–7).
de facto	Existing as a matter of fact.
de jure	Existing as a matter of law.
domestic law	The internal law of a State (sometimes referred to as 'municipal' or 'national' law).
erga omnes	Valid for all (see p. 10).
estoppel	The principle that a State cannot act inconsistently if it has acquiesced in a particular situation or taken a particular position with respect to it (see p. 8).
ex gratia	Without admission of liability.

exchange of notes	Two or more instruments which constitute either a treaty or an MOU (see p. 52).
exequatur	Formal approval by the receiving State of the appointment of a named person as head of a consular post (see p. 143).
final act	Formal document recording the results of a diplomatic conference, especially one to adopt a multilateral treaty (see p. 59).
full powers	Formal document authorising a person to sign a treaty or do other acts with respect to a treaty (see p. 57).
international law	The body of rules legally binding on States and other subjects of international law (q.v.) in their relations with each other (see pp. 2–3).
international legal personality	Being a person or legal entity to which international law attributes legal rights and obligations, mainly States and international organisations (see p. 180).
intertemporal	The principle that facts must be assessed in the light of the international law at the relevant time, not the law at the time a dispute arises or an issue falls to be decided (see p. 35).
jurisdiction	The right in international law for a State to exercise authority over its nationals and persons and things in its territory, and sometimes abroad (extraterritorial jurisdiction) (see pp. 42 et seq.).
jus ad bellum	The law on the use of force (see p. 235).
jus cogens	Peremptory rule of law (see p. 10).
jus in bello	The law of armed conflict (see p. 235).
lex ferenda	Law which is being sought to become established.
lex lata	Established law.

lex specialis	A specific legal rule which is an exception to a general rule.
memorandum of understanding	Name given to both treaties and MOUs (see p. 52).
MOU	A non-legally binding international instrument (see pp. 51 and 53).
non-liquet	See p. 407.
norm	Imprecise term (see p. 8).
opinio juris	General belief by States that a non-treaty rule is legally binding on them (see p. 7).
party	A State that has consented to be bound by a treaty and for which the treaty is in force (see p. 49).
primary legislation	Law made by a legislature (cf. secondary legislation (q.v.)).
private international law	The domestic law dealing with cases with a foreign element (also known as 'conflict of laws') (see p. 1).
ratification	Following signature, the expression of a State's consent to be bound by a treaty (see p. 60).
rebus sic stantibus	A fundamental change of circumstances (see p. 97).
res communis	Land or sea that can be used by any State or is subject to a common regime (see p. 40).
reservation	A unilateral Statement, however phrased or named, made by a State when consenting to be bound by a treaty by which it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (see p. 64).
retorsion	Retaliatory act which is not unlawful (see p. 391).
secondary legislation	Legislation by the executive under power given by primary legislation (q.v.).
signatory	An imprecise term best avoided (see p. 62).
soft law	See p. 11.

sovereignty	The right of a State to act independently of other States, subject only to such restrictions as international law imposes.
State	A defined territory with a permanent population and a government (see p. 15).
State responsibility	Responsibility of a State in international law for its wrongful acts (see pp. 376 et seq.).
subject of international law	Possessor of rights and obligations in international law, mainly States and international organisations (see p. 12).
subordinate or subsidiary legislation	Secondary legislation (q.v.).
subsidiarity	See p. 445.
terra nullius	Territory belonging to no State (see p. 37).
toilette	The final tidying up of a legal text, especially a treaty.
travaux préparatoires (or *travaux*)	Preparatory work of a treaty (see p. 87).
treaty	See pp. 50 et seq.
ultra vires	Exceeding legal authority.
uti possidetis	See p. 24.

Abbreviations

Works cited in the footnotes

Aust MTLP	A. Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007
B & B Docs.	Birnie and Boyle, *Basic Documents on International Law and the Environment*, Oxford, 1995
BGG	Brownlie and Goodwin-Gill, *Basic Documents on Human Rights*, 4th edn, Oxford, 2002
B, B & R	Birnie, Boyle and Redgwell, *International Law and the Environment*, 3rd edn, Oxford, 2009
Brownlie	I. Brownlie, *Principles of Public International Law*, 7th edn, Oxford, 2008
Collier and Lowe	Collier and Lowe, *The Settlement of Disputes in International Law*, Oxford, 1999
Denza	E. Denza, *Diplomatic Law*, 3rd edn, Oxford, 2008
Hertslet	Hertslet, *Commercial Treaties* (reprinted in 10 vols., 1970)
Higgins	R. Higgins, *Problems and Process*, Oxford, 1994
O'Connell	D. O'Connell, *International Law*, 2nd edn, London, 1970
Oppenheim	*Oppenheim's International Law*, 9th edn, London, 1992
R & G	Roberts and Guelff, *Documents on the Laws of War*, 3rd edn, Oxford, 2000
Shaw	M. Shaw, *International Law*, 6th edn, Cambridge, 2008
UN Depositary Practice	*Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*
UN Multilateral Treaties	*Multilateral Treaties Deposited with the Secretary-General*
Whiteman	M. Whiteman, *Digest of International Law*

Other abbreviations

AC	*Appeal Cases* (Law Reports, England and Wales)
AD	*Annual Digest and Reports of International Law Cases* (16 vols.) (now ILR)
AFDI	*Annuaire Français de Droit International*
AJIL	*American Journal of International Law*
AER	*All England Law Reports*
ASA	air services agreement
ASIL	American Society of International Law
A&T	administrative and technical
ATS	*Australian Treaty Series*
AU	African Union (formerly the OAU)
Aust YBIL	*Australian Yearbook of International Law*
BIICL	British Institute of International and Comparative Law
BIT	bilateral investment treaty
BSP	*British and Foreign State Papers*
BYIL	*British Yearbook of International Law*
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources 1980
CETS	Council of Europe Treaty Series (from 2004)
CFI	Court of First Instance (EU)
CFSP	Common Foreign and Security Policy (EU)
Ch	*Chancery Division* (Law Reports, England and Wales)
CLCS	Commission on the Limits of the Continental Shelf
CLJ	*Cambridge Law Journal*
CLP	*Current Legal Problems*
CLR	*Commonwealth Law Reports*
Cm, Cmd, Cmnd	UK Command Papers (official publication)
CMLR	*Common Market Law Reports*
COCOM	Coordinating Committee for Multilateral Export Controls
CoE	Council of Europe
COREPER	Committee of Permanent Representatives
CSCE	Conference on Security and Co-operation in Europe (now OSCE)
CTBT	Comprehensive Nuclear Test-Ban Treaty 1996
CTS	*Consolidated Treaty Series*
CWC	Chemical Weapons Convention
DSB	Dispute Settlement Body (WTO)
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice (EU)

ECOSOC	Economic and Social Council (UN)
ECR	*European Court Reports*
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EEZ	exclusive economic zone
EFTA	European Free Trade Area (not EC or EU)
EJIL	*European Journal of International Law*
ES	Emergency Session of the UN General Assembly
ETS	CoE *European Treaty Series* (until 2004, see CETS above)
EU	European Union
EURATOM	European Atomic Energy Community
EWCA (Civ)	Law Report (England and Wales), Court of Appeal, Civil Division
EWHC (Admin)	Law Report (England and Wales), High Court, Administrative Division
EWHC (Ch)	Law Report (England and Wales), High Court, Chancery Division
EWHC (QB)	Law Report (England and Wales), High Court, Queen's Bench Division
FAO	Food and Agriculture Organization
FCO	Foreign and Commonwealth Office (UK)
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia (see SFRY)
F.2d	*Federal Reporter* (2nd series) (US)
GAOR	*General Assembly Official Records*
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
GYIL	*German Yearbook of International Law*
Hague Recueil	*Recueil des Cours, Académie de Droit International de la Haye*
Hansard	Official record of UK parliamentary debates (Lords or Commons)
HKSAR	Hong Kong Special Administrative Region
HMSO	Her Majesty's Stationery Office (UK)
IAEA	International Atomic Energy Authority
IASTA	International Air Services Transit Agreement 1944
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICC	International Criminal Court or International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights 1966

ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILM	*International Legal Materials*
ILO	International Labour Organization
ILR	*International Law Reports* (see also AD)
Iran–US CTR	*Iran–US Claims Tribunal Reports*
ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunications Union
IWC	International Whaling Convention/Commission
KB	*King's Bench Division* (Law Reports, England and Wales)
LL. R	*Lloyds Law Reports*
LNTS	*League of Nations Treaty Series*
LQR	*Law Quarterly Review*
MEP	Member of the European Parliament
MERCOSUR	Mercado Común del Sur
MFA	Ministry of Foreign Affairs
MLR	*Modern Law Review*
MOU	Memorandum of Understanding (see p. 51)
NAFTA	North American Free Trade Agreement 1992
NATO	North Atlantic Treaty Organization
NGO	non-governmental organisation
NILR	*Netherlands International Law Review*
NLM	national liberation movement
NY	New York
NYIL	*Netherlands Yearbook of International Law*
OAS	Organization of American States
OAU	Organization of African Unity (now African Union)
OECD	Organization for Economic Cooperation and Development
OJ	*Official Journal of the European Communities*
OSCE	Organization for Security and Cooperation in Europe (previously CSCE)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice (replaced by the ICJ)

PJCCM	Police and Judicial Co-operation in Criminal Matters (EU)
PLO	Palestine Liberation Organization
PRC	People's Republic of China
QB	*Queen's Bench Division* (Law Reports, England and Wales)
QMV	qualified majority voting
RIAA	*Reports of International Arbitral Awards*
RoC	Republic of China (Taiwan)
SAR	Special Administrative Region
SCOR	*Official Records of the UN Security Council*
SFRY	Socialist Federal Republic of Yugoslavia (see FRY)
SI	statutory instrument (UK secondary legislation)
SPLOS	document of a meeting of the States parties to UNCLOS
TEU	Treaty on European Union (Maastricht Treaty)
TIAS	*Treaties and other International Agreements* (US)
TLR	*Times Law Reports*
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRNC	Turkish Republic of Northern Cyprus
UAR	United Arab Republic
UK	United Kingdom of Great Britain and Northern Ireland
UKHL	On-line law report (UK), House of Lords
UKSC	UK Supreme Court Law Report
UKTS	*United Kingdom Treaty Series*
UN	United Nations
UNCC	UN Compensation Commission
UNCIO	UN Conference on International Organization
UNCITRAL	UN Commission on International Trade Law
UNCLOS	UN Convention on the Law of the Sea 1982
UN Doc.	UN official document
UNESCO	UN Educational, Scientific and Cultural Organization
UNGA	UN General Assembly
UNHCHR	UN High Commissioner for Human Rights
UNHCR	UN High Commissioner for Refugees
UNIDROIT	International Institute for the Unification of Private Law
UNJurYB	*UN Juridical Yearbook*
UNMIK	UN Mission in Kosovo
UNSC	UN Security Council
UNTS	*United Nations Treaty Series*
US	United States of America
UST	*United States Treaties and other International Agreements*

VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WLR	*Weekly Law Reports*
WMD	Weapons of mass destruction
WMO	World Meteorological Organization
WTO	World Trade Organization or World Tourism Organization
YB	Yearbook
YBIL	Yearbook of International Law
YBILC	*Yearbook of the International Law Commission*
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

1

International law

International Law, after all, is simply a system of manners written large.[1]

Higgins, *Problems and Process*, Oxford, 1994, pp. 1–55 ('Higgins')
Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 43–137 ('Shaw')
Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 3–115 ('Oppenheim')
Brownlie, *Principles of Public International Law*, 7th edn, Oxford, 2008, pp. 3–68 ('Brownlie')

Introduction

First, let us clear away any misunderstandings about, so-called, *private* international law and *transnational* law.

Private international law

Private international law is an unfortunate term for what is more properly and accurately called *conflict of laws*. That is the body of rules of the domestic law [2] of a State that is applicable when a legal issue contains a foreign element, and it has to be decided whether a domestic rule should apply foreign law or relinquish jurisdiction to a foreign court.[3] The cases which give rise to the problem concern mostly divorce, care of children, probate and contract. Many of the rules are now found in legislation. Naturally, over time the respective domestic rules grow closer as States and their courts come to adopt similar solutions to the same problems, but they remain domestic rules. Established in 1893, the Hague Conference on Private International Law seeks primarily to harmonise domestic rules on conflict of laws, and since 1954 has concluded nearly forty multilateral treaties.[4] These must be distinguished from treaties that seek to

[1] Alexander McCall Smith, *The Sunday Philosophy Club* (paperback edn, 2005), p. 158. As they say: discuss.
[2] See p. 11 below, including its relationship to international law.
[3] Collier, *Conflict of Laws*, 3rd edn, Cambridge, 2001, pp. 386–94.
[4] See, for example, the Choice of Court Agreements Convention, 2005, ILM (2005) 1291. For all about the Hague Conference, go to its excellent website (www.hcch.net), and see Oppenheim, p. 7.

unify or harmonise States' substantive domestic law, such as on carriage by air or sea, or intellectual property.[5]

UNCITRAL is that part of the United Nations charged with promoting the harmonisation of international trade law.[6] But, the name, UNIDROIT, is most misleading. It neither part of the United Nations, nor even a UN specialised agency. It is an international organisation with sixty-three Member States that seeks to harmonise domestic laws, especially commercial.[7] Since 1964, it has concluded eleven conventions.

A legal matter may raise issues of both international law and conflict of laws, particularly on questions of jurisdiction.[8] Today, the distinction between international law and conflict of laws can be blurred as more international law, treaties in particular, reaches down into the internal legal order, as exemplified by the law of the European Union.[9] Nevertheless, it is still vital to appreciate the distinctions between different categories of law, their purpose and how they develop.

Transnational law

This term seems to have been invented to describe the study of any aspect of law that concerns more than one State, in particular conflict of laws, comparative law (the study of how the domestic laws of different States deal with a particular area or issue of domestic concern), supranational law (European Union law) and public international law, particularly in the commercial field. It may bring useful insights into the development of law, in particular how different types of law may influence others. But, one should not be led into believing that we are now living in a world where all laws of whatever type are rapidly converging. Within many States, especially federations, and even in the United Kingdom, there are separate systems of domestic law, and this is likely to continue for a long time.

The nature of international law

International law is sometimes called *public* international law to distinguish it from private international law, though, as already explained, even the latter term can lead to misunderstandings. Whatever the connections which international law has with other systems of law, it is clearly distinguished by the fact that it is not the product of any one national legal system, but of States. The United Nations now has 192 States which are Members. They now account for the vast majority of States which make up our world. In the past, international law was referred to as the Law of Nations.[10]

[5] Oppenheim, p. 6, n. 11. [6] See p. 359 below. [7] See www.unidroit.org
[8] See p. 42 below. [9] See p. 430 below.
[10] See J. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963, esp. pp. 1–40 on the origins of international law.

Although it has developed over many centuries,[11] international law as we know it today is commonly said to have begun with the Dutch jurist and diplomat, Grotius (Hugo de Groot), 1583–1645, and with the Peace of Westphalia 1648.[12] That event marked not only the end of the Thirty Years War, but also the end of feudalism (and, with the Reformation, general obedience to the Pope), and the establishment of the modern State with central governmental institutions that could enforce control over its inhabitants and defend them against other States. But since those States had to live with each other, there had to be common rules governing their external conduct. Although rudimentary rules had been developing ever since civilised communities had emerged, from the mid-seventeenth century they began to evolve into what we now recognise as international law.

But is international law really law?

Unfortunately, this question is still being asked, and not only by law students. The answer depends on what is meant by 'law'. Whereas the binding nature of domestic law is not questioned, new law students are usually confronted with the issue: is international law merely a collection of principles that a State is free to ignore when it suits it? Whereas newspapers report ordinary crimes on a daily basis, it is usually only when a serious breach of international law is alleged to have occurred that the media take notice. This can give a distorted impression of the nature of international law. Because it has no easy sanction for its breach, and there is no international police force or army that can immediately step in, international law is often perceived as not really law. Yet, the record of even the most developed domestic legal systems in dealing with crime does not bear close scrutiny.

Although it is as invidious as comparing apples and oranges, in comparison with domestic crime States generally do comply rather well with international law. If, as Hart argued,[13] law derives its strength from acceptance by society that its rules are binding, not from its enforceability, then international law is law. As we will see when we look at the *sources* of international law, its binding force does not come from the existence of police, courts and prisons. It is based on the consent (express or implied) of States, and national self-interest: if a State is seen to ignore international law, other States may do the same. The resulting chaos would not be in the interest of any State. While the language of diplomacy has changed over the centuries from Latin to French to English, international law has provided a vitally important and constantly developing bond between States. As this book will show, today in many areas of international law the rules

[11] See Shaw, pp. 13–42; A. Nussbaum, *A Concise History of the Law of Nations*, rev. edn, New York, 1954.

[12] 1 CTS p. 3. [13] *The Concept of Law*, Oxford, 1961.

are well settled. As with most domestic law, it is how the rules are to be applied to the particular facts that cause most problems.

The *raison d'être* of international law is that relations between States should be governed by common principles and rules. Yet, what they are is determined by national interest, which in turn is often driven by domestic concerns. Those matters on which international law developed early on included the immunity of diplomats and freedom of the high seas. The latter was crucial to the increase in international trade, the famous 1654 Treaty of Peace and Commerce between Queen Christina and Oliver Cromwell epitomising this.[14]

To look at the question from a more mundane point of view, international law is all too real for those who have to deal with it each day. Some foreign ministry legal departments are large: the US State Department has some 200 legal advisers; the UK Foreign and Commonwealth Office about forty, including some eight posted abroad in Brussels, Geneva, New York, The Hague, and elsewhere. To qualify to be an FCO legal adviser one must first be qualified to practise law in the United Kingdom. Like other legal advisers to ministries of foreign affairs, the task of the FCO legal advisers is to advise on a host of legal matters (both international and domestic) that arise in the conduct of foreign affairs. They also have the conduct of cases involving international law in international, foreign and domestic courts and tribunals. The legal departments of other foreign ministries are often staffed by diplomats who have legal training but may not be qualified to practise law; and they may well alternate between legal and political posts. Most foreign ministries have few, if any, legal advisers who during their careers do little other than law. But, if international law is not law, then legal advisers to foreign ministries are all drawing their salaries under false pretences.

Although, fortunately, more students are studying international law, it is not easy for a young private legal practitioner to practise it. Even in large law firms that have international law departments, the bulk of the work is international commercial arbitration. The involvement of legal practitioners in international law is usually incidental to their normal domestic work. Most of those who appear before international courts or tribunals are professors of international law who may not even be practitioners in their own domestic legal system. But there are also jobs for international lawyers in the United Nations and other international organisations, and NGOs.

International lawyers

Sometimes the media will describe a person as an 'international lawyer', yet at most he may have a practice with many foreign clients, and be concerned more with foreign law and conflict of laws. Yet, when the media is full of stories questioning the lawfulness of a State's actions, some domestic lawyers rush to

[14] 1 BSP 691.

express their, often critical, opinions. They are not always wrong, but can display a lack of familiarity with international law, apparently believing that the reading of a textbook or an (apparently simple) instrument such as the UN Charter is enough. The fact that some textbooks are lucid and make international law accessible, does not mean that a domestic lawyer, however eminent, can become an expert on it overnight. The difficulties that the judges of the House of Lords (now the Supreme Court) had in grappling with international law in the *Pinochet* case, despite having been addressed by several experts in international law, are amply demonstrated by their differing separate opinions.[15] Some domestic lawyers have specialised in particular areas of international law such as aviation, human rights or the environment, without necessarily having first a good grounding in international law generally. Yet, an expert in tax law will necessarily have a sound knowledge of contract, tort and other basic areas of domestic law. Without such knowledge, it would be difficult to advise effectively.

The sources of international law

International law differs from domestic law in that it is sometimes even more difficult to find out what the law is on a particular matter. Domestic law is usually more certain and found mostly in legislation and judgments of a hierarchy of courts. In contrast, international law is not so accessible, coherent or certain. There is no global legislature (the UN General Assembly does *not* equate to a national legislature), and no (at least formal) hierarchy of international courts and tribunals. As with the (mainly unwritten) British Constitution, an initial pointer to the international law on a given topic is often best found in up-to-date textbooks. They will explain that international law is derived from various sources, which are authoritatively listed in Article 38(1) of the Statute of the International Court of Justice (annexed to the UN Charter, see its Article 92) as:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognised by civilized nations;
d. subject to the provisions of Article 59,[16] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Treaties

The reference in (a) above to 'international conventions' is to bilateral and multilateral treaties. For the moment, it is enough to say that, as with domestic

[15] *Pinochet (No. 3)* [2000] 1 AC 147; [1999] 2 WLR 825; [1999] 2 All ER 97; 119 ILR 135.
[16] The article provides that decisions of the Court are in law binding only on the parties to the case (*res judicata*), though they naturally have considerable influence on other States and courts.

legislation, treaties now play a crucial role in international law. Important areas of customary international law have now been codified in multilateral treaties which are widely accepted even by States which are not parties to such treaties. In consequence, custom and the other sources of international law are no longer as important as they used to be. But that does not mean that custom is on a lower level than treaties. There is no formal hierarchy of the sources of international law. As between parties to a treaty, the treaty binds them. As between a party to a treaty and a non-party, custom will apply, including custom derived from treaties.[17] General principles of law, judgments and the opinions of writers are of less importance as sources. (The law of treaties is dealt with in some detail in Chapter 5.)

Customary international law

Customary international law – or simply 'custom' – must be distinguished from 'customary law'. The latter term usually refers to domestic law which is an important part of the law of some States and deals largely with family matters, land and suchlike. In international law, a rule of custom evolves from the *practice* of States, and this can take a considerable or a short time. There must first be evidence of substantial uniformity of practice by a substantial number of States. In 1974, the ICJ found that a rule of custom (now superseded) that States had the exclusive right to fish within their own 12 nautical mile zone had emerged.[18] State practice can be expressed in various ways, such as governmental actions in relation to other States, legislation, diplomatic notes, ministerial and other official statements, government manuals (as on the law of armed conflict), certain unanimous or consensus resolutions of the UN General Assembly and, increasingly, in soft-law instruments (see p. 11 below). The first such resolution was probably Resolution 95(I) of 11 December 1946 which affirmed unanimously the principles of international law recognised by the Charter of the Nuremberg International Military Tribunal and its judgment.

When a State that has an interest in the matter is silent, it will generally be regarded as acquiescing in the practice. But if the new practice is not consistent with an established rule of custom, and a State is a *persistent objector* to the new practice, the practice either may not be regarded as evidence of new custom or the persistent objector may be regarded as having established an exception to the new rule of custom. This is a controversial matter.[19]

But to amount to a new rule of custom, in addition to practice there must also be a general recognition by States that the practice is settled enough to amount to an obligation binding on States in international law. This is known as *opinio*

[17] See p. 7 below, and Aust MTLP, pp. 11–14.
[18] *Fisheries Jurisdiction (UK* v. *Iceland*; *Germany* v. *Iceland)*, *ICJ Reports* (1974), p. 3, at pp. 23–6; 55 ILR 238. For the present law, see p. 297 below.
[19] See Shaw, esp. pp. 77–81.

juris (*not* the opinions of jurists). Sometimes recognition will be reflected in a court judgment reached after legal argument based on the extensive research and writings of international legal scholars. In themselves, neither judicial pronouncements,[20] nor a favourable mention in a UN resolution, even when it is adopted by a large majority, are conclusive as to the emergence of a new rule of custom. But, in *Nicaragua* v. *US (Merits)* (1986)[21] the International Court of Justice found that the acceptance by States of the Friendly Relations Declaration of the UN General Assembly[22] constituted *opinio juris* that the Charter prohibition on the use of force now also represented a new rule of custom. There is however a growing tendency for international courts and tribunals, without making a rigorous examination of the evidence, to find that a new rule of custom has emerged. In *Tadić* the International Criminal Tribunal for the Former Yugoslavia ruled that it had jurisdiction over war crimes committed during an internal armed conflict, even though its Statute does not provide for this.[23]

Establishing *opinio juris* can be difficult, and everything will depend on the circumstances.[24] It is easiest when the purpose of a new multilateral treaty is expressed to be codification of customary international law. Even if the treaty includes elements of progressive development,[25] if it is widely regarded by States as an authoritative statement of the law, and constantly and widely referred to, it will soon come to be accepted as reflecting the rules of custom, sometimes even before it has entered into force. This was certainly the case with the Vienna Convention on the Law of Treaties 1969, which even now has only just over one hundred parties.[26] Although some provisions of the UN Convention on the Law of the Sea 1982 (UNCLOS) went in many respects beyond mere codification of rules of custom, the negotiations proceeded on the basis of consensus.[27] It was therefore that much easier, during the twelve years before UNCLOS entered into force, for most of its provisions to be accepted as representing customary international law.

[20] See what the ICJ said in the *Namibia*, Advisory Opinion, *ICJ Reports* (1971), p. 6; paras. 87–116; 49 ILR 2; and in the *Legality of Nuclear Weapons*, Advisory Opinion (UN), *ICJ Reports* (1996), p. 226, paras. 64–73; 110 ILR 163. The point is even more so for those advisory opinions which deal with highly political issues: see, for example, not only the advisory opinion on the *Legality of Nuclear Weapons*, but also the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ICJ Reports* (2004), p. 136; 129 ILR 37; ILM (2004) 1009, and the request in 2008 for an advisory opinion on whether the unilateral declaration of independence by Kosovo is in accordance with international law. For more on advisory opinions, see p. 427 below.

[21] *ICJ Reports* (1986), p. 14, paras. 183–94; 76 ILR 1.

[22] UNGA Res. 2625(XXV); ILM (1970) 1292.

[23] See the decision of the Appeals Chamber: www.icty.org, Case IT-94-1, paras. 65 et seq.; 105 ILR 453.

[24] Shaw, pp. 84–9.

[25] See n. 27 below.

[26] See p. 50 below. See also Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243, at 248–51.

[27] See H. Caminos and M. Molitor, 'Progressive Development of International Law and the Package Deal' (1985) AJIL 871–90.

An accumulation of bilateral treaties on the same subject, such as investment treaties, may in certain circumstances also be evidence of a rule of custom.[28]

General principles of law recognised by 'civilized' nations[29]

Compared with domestic law, international law is relatively underdeveloped and patchy, although in the last sixty years it has developed several important new specialised areas. International courts and tribunals have always borrowed concepts from domestic law if they can be applied to relations between States, and by this means have developed international law by filling gaps and strengthening weak points. Such concepts are chiefly legal reasoning and analogies drawn from private law, such as good faith and estoppel.[30]

Good faith

The obligation to act in good faith is a fundamental principle of international law, and includes equity.[31] Article 2(2) of the UN Charter requires all Members to fulfil their Charter obligations in good faith. Similarly, the Vienna Convention on the Law of Treaties 1969 requires parties to a treaty to perform the treaty (Article 26), and to interpret it (Article 31(1)), in good faith.[32] The principle is not restricted to treaties but applies to all international law obligations.

Estoppel

Known as preclusion in civil law systems, estoppel has two aspects. A State that has taken a particular position may be under an obligation to act consistently with it on another occasion. And when a State has acted to its detriment in relying on a formal declaration by another State, the latter may be estopped from denying its responsibility for any adverse consequences.[33]

Norms

Sir Robert Jennings, a former president of the International Court of Justice, once famously said that he would not recognise a norm if he met one in the street. But, some international lawyers do speak of norms of international law. In English, norm means a standard. Use of the word seems to have been popularised by Professor Hans Kelsen,[34] who saw international law as at the top of a hierarchy of law. The term is used more by lawyers brought up in the

[28] See p. 345 below.

[29] 'Civilized' should not be seen as demeaning; the Statute is merely referring to States which have reached an advanced state of legal development.

[30] See H. Lauterpacht, 'Private Law Sources and Analogies of International Law', in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Sir Hersch Lauterpacht*, Cambridge, 1970–8, vol. 2, pp. 173–212; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, 1953, reprinted 1987.

[31] Oppenheim, pp. 38 and 44. [32] See further pp. 75 and 84 below, respectively.

[33] Oppenheim, pp. 1188–93. See p. 54 below about the possible legal consequences of an MOU.

[34] *General Theory of Law and State*, Harvard, 1945.

civil law tradition, than lawyers in the common law tradition. It may be useful in a theoretical analysis of certain international law issues.[35] Unfortunately, it is also used loosely to cover not only established principles and rules but also *lex ferenda* (see below), and sometimes without a clear distinction being made between ones which have been established and mere aspirations.[36] It is unusual for the term 'norm' to be found in treaties.

Judicial decisions

Although, formally, judgments of courts and tribunals, international and domestic, are a subsidiary source of international law, in practice they may have considerable influence on the development of international law. This is because judgments result from careful consideration of particular facts and legal arguments and therefore usually carry authority. There are relatively few international courts and tribunals, but tens of thousands of domestic ones. Moreover, most cases involving international law come before *domestic* courts, often final courts of appeal.[37] The cumulative effect of such decisions on a particular legal point can be evidence of custom, although domestic courts sometimes get international law very wrong. One must be chary of many advisory opinions, especially those delivered by international courts.[38]

Teachings of the most highly qualified publicists

The role played by writers on international law is also subsidiary. In the formative days of international law, their views may have been more influential than they are today. Now their main value depends on the extent to which the books and articles cited are works of scholarship, that is to say, based on thorough research into what the law is said to be (*lex lata*) rather than comparing the views of other writers as to what they think the law ought to be (*lex ferenda*). A work of rigorous scholarship will inevitably have more influence on a court, whether domestic or international.

General international law

One sees this phrase from time to time. It is a rather vague reference to the corpus of international law, and therefore includes those treaty principles or rules that have become accepted as also customary international law.[39]

[35] See for example D. Shelton, 'International Law and "Relative Normativity"', in M. Evans (ed.), *International Law*, 2nd edn, Oxford, 2006, pp. 159–85.
[36] See also so-called soft law, p. 9 below.
[37] See the cumulative indexes to *International Law Reports*, published by Cambridge University Press.
[38] See pp. 427–9 below.
[39] See p. 6 above. See also, R. Jennings, 'What is International Law and How Do We Tell It When We See It? (1981) 37 *Swiss Yearbook of International Law*, p. 59. On statements of international law, see (2003) BYIL 585–6.

Obligations *erga omnes*

In *Barcelona Traction* (Second Phase), the International Court of Justice pointed out that certain obligations of a State are owed to all States, or *erga omnes* (to all the world). These include *jus cogens* and important human rights.[40] Certain treaties have been held to create a status or regime valid *erga omnes*.[41] Examples include those providing for neutralisation or demilitarisation of a certain territory or area, such as Svalbard or outer space; for freedom of navigation in international waterways, such as the Suez Canal; or for a regime respecting a special area, such as Antarctica.[42]

Jus cogens

Jus cogens (or a peremptory or absolute rule of general international law) is, in the words of Article 53 of the Vienna Convention on the Law of Treaties 1969:

> a norm accepted and recognized 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.

The concept was once controversial.[43] Now it is more its scope and applicability that is unclear.[44] There is no agreement on the criteria for identifying which principles of general international law have a peremptory character: everything depends on the particular nature of the subject matter. Perhaps the only generally accepted examples of *jus cogens* are the prohibitions on the use of force (as laid down in the UN Charter)[45] and on aggression, genocide, slavery, racial discrimination, torture and crimes against humanity.[46] This is so even where such acts are prohibited by treaties from which parties can withdraw.[47] Despite what may be said or written, it is wrong to assume that many important provisions of human rights treaties, such as due process, are *jus cogens*, or, for that matter, even rules of customary international law.[48] Whether self-determination is a *jus cogens* is open to question given that the principle may be very difficult to apply in practice: see the tricky debate about Kosovo.[49]

[40] See *Legal Consequences* (n. 20 above), paras. 154–9.
[41] See M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford, 1997, pp. 24–7; and p. 327 below.
[42] See pp. 327 et seq. below for details about the regime.
[43] See I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, Manchester, 1984, pp. 203–41.
[44] For an in-depth discussion of *jus cogens*, see Sinclair (see above note), pp. 203–26. See also p. 376, nn. 2–4, below for references to them, and Crawford's useful book (n. 46 below).
[45] See p. 204 below.
[46] See the ILC Commentary on Art. 26 of its draft Articles on State Responsibility (go to www.un.org/law/ilc/) or see Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge 2002, pp. 187–8.
[47] See p. 93 below. [48] See p. 228 below. [49] See pp. 17, 21 and 362 n. 4 below.

'Soft law'

There is no agreement about what is 'soft law', or indeed if it really exists.[50] Generally, it is used to describe international instruments that their makers recognise are *not* treaties, but have as their purpose the promotion of 'norms' (see above) which are believed to be good and therefore should have general or universal application. This is particularly so if such instruments employ imperative terms such as 'shall.' Such non-treaty instruments are typically called Guidelines, Principles, Declarations, Codes of Practice, Recommendations or Programmes. They are frequently to be found in the economic, social and environmental fields. The Rio Declaration on Environment and Development 1992 is one.[51] Because the subject matter is usually not yet well developed, or there is a lack of consensus on the content, it cannot be embodied in a treaty. But that soft law instrument, the Universal Declaration of Human Rights 1948, has been the source for many universal and regional human rights treaties. Many 'soft law' instruments can be regarded as MOUs in the sense that there is no intention that they should be legally binding,[52] although some of their provisions may later be incorporated into treaties or come to be regarded as representing customary international law.[53]

Comity

In their international relations, States also observe certain rules of comity.[54] These are not legally binding, but rules of politeness, convenience and goodwill, such as the reciprocal provision of free, but often very limited, on-street parking for diplomats.[55] Later, some *may* become binding rules. Domestic courts may also rely upon comity as a reason for not accepting jurisdiction in a case, but this may be either because they are applying a rule of conflict of laws or acting with restraint in exercising their jurisdiction.[56]

Domestic law

The law that applies within a State is described variously as 'national', 'internal' or 'municipal' law, although most international lawyers now seem to favour the term 'domestic law'. So, it will be used in this book, even though it is sometimes confused with family law.

[50] See Boyle, in Evans (ed.) *International* Law, 2nd edn, Oxford, 2006, pp. 145–58; B, B & R, *International Law and the Environment*, 3rd edn, Oxford, 2009, pp. 34–7.
[51] ILM (1992) 876; B & B Docs. 9; and see p. 306 below.
[52] See pp. 51 and 53 below as to the meaning of MOUs.
[53] See Boyle and Chinkin, *International Law-making Processes*, Oxford, 2007; Aust MTLP, pp. 53–7.
[54] See Oppenheim, pp. 50–1; Brownlie, p. 28.
[55] See *Parking Privileges for Diplomats* (1971) 70 ILR 396; and Denza, *Diplomatic Law*, 3rd edn, Oxford, 2008, pp. 200–4.
[56] See p. 146 below.

For international lawyers, the most important aspect of domestic law is its relationship (interface) with international law.[57] Most judgments on issues of international law are made by domestic courts, and, by this means, much of international law has been developed and will continue to do so.[58] Although international law exists on the international plane, much of it is now intended to reach deep into the internal legal order of States and so operate in domestic law. This is most obvious with treaties, many of which have to be implemented in domestic law to be effective. International law does not allow a State to invoke its domestic law to justify its failure to perform a treaty,[59] but this applies equally to the rest of international law.[60] The way in which domestic courts deal with an issue of international law is therefore important. (The place of treaties in domestic law is explained at pp. 74–80 below.)

How customary international law is applied by domestic courts is entirely dependent on the constitution and law of each State. Most treat customary international law as part of domestic law and unlike foreign law (which in common law systems has usually to be proved by expert evidence) is therefore a matter for legal argument. The chief difference of approach is between those constitutions that provide that customary international law is supreme law (e.g. Germany), and those where it is not. In the latter case, if there is a conflict between customary international law and (1) the constitution: the constitution prevails (e.g. the United States), *or* (2) legislation: the legislation prevails (e.g. in the United Kingdom and most Commonwealth States). The latter rule reflects the pure form of dualism.[61]

Subjects and objects of, and actors in, international law

By 'subjects', is not meant topics, but those persons or entities to which international law applies. It obviously applies to States and international organisations.[62] But can international law apply also to natural persons (individuals) and legal persons, such as corporations established under domestic law? Such persons are not creations of international law, and are not regarded by most authorities as subjects of international law, that is, to whom international rights (and obligations) attach *directly*.[63] Instead, such persons are generally seen as 'objects' of international law.

Although international law increasingly gives rights to, and imposes obligations on (natural or legal) persons, the notion that they therefore enjoy rights and obligations under international law can lead to misunderstandings. Such

[57] See generally Oppenheim, pp. 52–86; E. Denza, in M. Evans (ed.), *International Law*, Oxford, 2006, pp. 423–44.
[58] See the consolidated index to the over 135 (and counting) volumes of *International Law Reports*, published by Cambridge University Press.
[59] Article 27 of the VCLT (see p. 75 below). [60] Oppenheim, pp. 82–6.
[61] See further in respect of treaties, at pp. 76–8 below. [62] Oppenheim, p. 16.
[63] For a thought-provoking view, see Higgins, pp. 16 and 39–55.

rights and obligations can be enforced by, or against, persons only through action by States. Persons only can enjoy rights under international law if States have agreed to this. For example, a person with a claim against a foreign State cannot take that claim to an international court or tribunal without intervention by the person's State. Either the State has to act on behalf of the person,[64] or there must be some mechanism established by the States concerned (usually by treaty) under which the person can bring the claim directly before an international tribunal.[65] Likewise, if under international criminal law or the law of armed conflict natural persons are liable to be prosecuted in domestic or international courts for serious breaches, that can be done only when States have agreed on the necessary international means to do just that,[66] and this will need some action by the States in their own law. The position is the same for human rights in international law. In short, international rights and obligations still exist on the international plane, being granted by States.[67]

National liberation movements

With the development of the law relating to non-self-governing territories and the principle of self-determination, certain movements – now usually referred to as national liberation movements (NLMs) – may be in the process of acquiring the status of a subject of international law,[68] although, with the notable exception of Palestine, most of the peoples represented by NLMs have now obtained statehood for their territories. This process was helped by permanent observer status in the UN being accorded to NLMs that were recognised by the Organization of African Unity (now the African Union) or the League of Arab States, so, in practice, excluding secessionist movements.

NGOs

Even if (like Amnesty or Greenpeace) they operate internationally, non-governmental organisations (NGOs) are bodies established under domestic law. Although they have proliferated enormously since the end of the Second World War, and been very active, and sometimes influential, on the international scene, they are not subjects of international law.[69] Unless they provide humanitarian relief, they are essentially providers of information, lobbyists or pressure groups, and so all NGOs may be regarded as non-State actors. For students who think life in an NGO may suit them, they should know that a lot of their time will be taken up in competing with other NGOs which are in the same

[64] See p. 167 below.
[65] For example, under bilateral investment treaties, see p. 345 below, although enforcement of an award may need to be done in domestic law.
[66] See pp. 245 et seq. below.
[67] See also pp. 235 et seq. below on the relationship between international and domestic law.
[68] See Oppenheim, pp. 162–4; Shaw, pp. 245–8; Brownlie, p. 62.
[69] Oppenheim, p. 21.

field, in particular trying to get money for their own NGO. And, as in any job, they may have to carry out policies laid down by the head of the NGO with which they may not agree. This is not to denigrate NGOs, some of which do excellent work, but as a warning to students that if they work for an NGO they should not be surprised if they become disillusioned.

The International Committee of the Red Cross (ICRC) is perhaps the oldest NGO, founded in 1863. It has an important humanitarian role, a rather special status, and is very much respected.[70]

[70] See pp. 178 and 244 below. The ICRC should not be confused with *national* Red Cross societies.

2

States and recognition

States are, at this moment of history, still at the heart of the international legal system.[1]

Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 119–203 ('Oppenheim')
Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006 ('Crawford')
Higgins, *Problems and Process*, Oxford, 1994 ('Higgins'), pp. 39–48
Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 195–242 ('Shaw')

Introduction

International organisations, legal persons (i.e. corporations), natural persons (i.e. individuals) and non-governmental organisations (NGOs), may sometimes be referred to collectively as 'non-State actors'. Although they are not States, they now participate much more in the international legal order. But, this is mainly because States have given them parts to play. Their role may be important, but it is a mistake to think that it is central. Only States and international organisations have international legal personality.[2] In this chapter, we will therefore basically look at States.

Criteria for statehood

The generally accepted criteria for statehood is that the entity has to demonstrate that it has '(a) a permanent population; (b) defined territory; (c) a government; and (d) capacity to enter into relations with other States'.[3] Let us take these in turn.

A permanent population. The population does not have to be homogeneous racially, ethnically, tribally, religiously, linguistically, or otherwise. But, it must

[1] Higgins, p. 39. [2] Ibid., pp. 48–55, and see pp. 12–14 above.
[3] Montevideo Convention 1933, 165 LNTS 19; and see Oppenheim, pp. 120–3.

be a settled population, although the presence of certain nomadic inhabitants does not matter.

Territory. Size does not matter either. At one time it was thought by some that countries with a small territory or population (the so-called 'mini- or micro-States') were not really States and therefore not eligible for UN membership. But since 1990, countries with small populations such as Andorra, Liechtenstein, Monaco, Nauru, San Marino and Tuvalu have joined the United Nations. Although these include mostly wealthy States, at least one is poor. Nor do the land or maritime boundaries have to be defined definitively. Many States with neighbours next door (which are most of them) have some problem over boundaries, sometimes both land and maritime. Those with no next-door neighbours, may still have maritime boundary problems.

Government. There must be a central government operating as a political body within the law of the land and in effective control of the territory. But once a State has been established, military occupation by another State (for example Germany from 1945 and Iraq from 2003), or civil war, will not affect that statehood. Nor, it would seem that a so-called failed State (one which has not had a government in control of most of the territory for several years) ceases to be a State. Somalia continues to be treated as a State and retains its UN membership.[4]

Independence in external relations. The government must be sovereign and independent, so that it is not subject to the authority of another State. The fact that under its Treaty of Friendship with India of 8 August 1949 Bhutan agreed to be guided in its external relations by Indian advice does not affect its statehood. It became a Member of the United Nations in 1971.

Thus, to be a State the entity has full capacity to enter into relations with other States. The constituent states of a federation, or the overseas territories of a State (see page 29 below), are not sovereign and do not have international legal personality. So, the fifty states of the United States of America are constituent parts of the federal State of that name. The full title of Switzerland is the Swiss Confederation, but its constitution is that of a federation.[5]

Recognition of States

There are two competing *theories* of recognition: either recognition is no more than a formal acceptance of the existing facts (*declaratory theory*), or it is the act of recognition that creates the new State as an international legal person (*constitutive theory*).[6] But, in practice, unless an entity which claims to be a State is accorded recognition by a sufficiently large number of States, it cannot

[4] See also p. 23 below about Somalia; and Crawford, esp. pp. 718–23.
[5] See Oppenheim, pp. 246–8, on confederations.
[6] See Shaw, pp. 444–54 and Warbrick in Evans (ed.), *International Law*, 2nd edn, Oxford, 2006, pp. 217–75.

realistically be a State with all the corresponding rights and obligations. For many years, and for purely political reasons to do with the Cold War, many States refused to recognise either North or South Korea,[7] North or South Vietnam[8] or East or West Germany,[9] although it can be said they all satisfied the criteria for statehood. Their admission to the United Nations was therefore also blocked.[10] So far, Kosovo, which announced its independence from Serbia on 17 February 2008, has been recognised by only some sixty States. They include most EU Member States and the United States, but do not include the EU Member States of Cyprus and Spain, which have fears that recognition of Kosovo may encourage parts of their States to declare independence. In October 2008, the UN General Assembly asked the International Court of Justice for an Advisory Opinion on whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law. The Opinion is unlikely to be given until the latter part of 2010. Many States which have not recognised Kosovo may well now await the Advisory Opinion.[11] (As to the quite different question of the *representation*, see pages 179–80 below.)

The suggestion that there is an obligation to recognise an entity as a State on the basis that, on an *objective* view, it satisfies all the criteria for recognition, has never been widely accepted.[12] Nor were the, scarcely practical and politically naive, 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' issued by the European Community on 16 December 1991.[13] Issued without proper consideration of the legal and political consequences, the Guidelines required that in order to be recognised as a State each aspirant had to give assurances that it would respect the rule of law, democracy and human rights, and guarantee the rights of minorities and the inviolability of all frontiers. Not surprisingly, the assurances were quickly given. The record since suggests that some of the new States, and, moreover, some EU members saw the exercise as just a political fig leaf to cover overhasty recognition.

Today Taiwan (see below) operates as far as possible like a State, but is recognised by only a few States, mostly small and poor. The reason for its international limbo is political, its government purporting to be the government of all China, albeit in temporary (*sic*) exile. On the other hand, Palestine, although recognised mainly by Arab States, is treated by other States, and in the

[7] See Oppenheim, pp. 133–5. Both were admitted to the United Nations only in 1991.
[8] See Oppenheim, pp. 141–3. In 1977, the single State of Vietnam was admitted to the United Nations.
[9] For the special legal status of Germany, the Federal Republic of Germany, the German Democratic Republic, and Berlin, see Oppenheim, pp. 135–41; and Hendry and Wood, *The Legal Status of Berlin*, Cambridge, 1987.
[10] See pp. 186–7 below. [11] See p. 429 below. [12] Shaw, pp. 449–51.
[13] (1991) BYIL 559–60. See also the EC Declaration on Yugoslavia of the same date: (1991) BYIL 560–1.

United Nations, virtually as if it were a State.[14] This is no doubt for good political reasons.

Membership of the United Nations is open only to 'States', although this term is not defined in the Charter. In the past, countries that were not States had been Members. Even when they were republics of the Soviet Union (and remained so until 1991), the Byelorussian SSR (now Belarus) and the Ukrainian SSR (now Ukraine) became original UN Members in 1945. This was done as part of a political deal under which India also became an original Member, although it did not become independent until 1947. Today admission to the United Nations is usually the shortest and quickest route to recognition of statehood. But it amounts to recognition only by those Members supporting admission.[15] Nevertheless, most countries that could be regarded as States are now UN Members.[16] The principal – though perhaps rather problematic – exceptions are the Vatican City, Taiwan and Palestine.[17]

Vatican City

As a result of the Lateran Pacts 1929 between the Holy See and Italy,[18] and recognition and acquiescence by States, the Vatican City (albeit tiny in area and with a resident population of papal functionaries) would seem to be regarded as a State even though its sole purpose is to support the Holy See. It has permanent observer status in the United Nations, is a full member of some other international organisations, and is a party to certain multilateral and bilateral treaties.[19] It may be best to see it as *sui generis*.

Taiwan

The island of Taiwan (Formosa) was surrendered by Japan to the Republic of China (RoC) in 1945. Following the civil war in China, which left the mainland under the control of communist forces, the nationalist government of the RoC fled to Taiwan. The victorious communists proclaimed the People's Republic of China (PRC) in 1949, and it soon became widely recognised, though, for political reasons, not by the United States until 1979. The nationalist government still claims to be the government of all China, and has therefore not claimed statehood for Taiwan. As the purported government of the RoC, Taiwan has diplomatic relations with some small developing States. Rapprochement between Taiwan and the PRC may one day be possible. In 2001, Taiwan (under the name 'Chinese Taipei' – Taipei being the capital) became a member of the World Trade Organization on the basis that it is a

[14] See p. 26 below. [15] See UN Doc. S/1466 (1950), and Oppenheim, pp. 177–83.
[16] Several Arab Members have declared formally that they do not recognise Israel.
[17] See p. 26 below. [18] 130 BSP 791; (1929) AJIL Supp. 187.
[19] Oppenheim, pp. 325–9; Shaw, pp. 243–4.

separate customs territory, which was also the case with the European Union, Hong Kong, China and Macao, China. Since 2008 relations between China and Taiwan have improved with, for example, much better transport links, and respective government statements have been more conciliatory. A new generation in Taiwan may eventually lead to it agreeing to become a Special Administrative Region (SAR) of the PRC, albeit with more autonomy than Hong Kong or Macao.[20]

Turkish Republic of Northern Cyprus

The so-called Turkish Republic of Northern Cyprus (TRNC) is recognised only by one State, Turkey.[21] Following the decision of representatives of the Turkish Cypriot community in 1963 to cease participating in organs of the Republic of Cyprus (ROC), and refusing to recognise its laws, there were serious civil disturbances and UN peacekeeping forces were deployed to Cyprus, and are still there. Extensive population movements resulted in the majority of the Turkish Cypriots moving to the north of the island. Following the overthrow of the ROC Government in 1974 by a *coup d'état* inspired by the then military regime in Greece, the Turkish army invaded the north, and continues to occupy it.[22] A buffer zone (the so-called Green Line) separates the occupied north from the south. In separate referendums in April 2004, a UN settlement plan for Cyprus was approved by the Turkish Cypriots, but rejected by the Greek Cypriots. The Republic of Cyprus became a Member of the European Union on 1 May 2004, but for the time being the area over which the ROC Government does not exercise effective control (i.e. the occupied part) is not part of the European Union. There are now some signs that there may eventually be agreement on unification of the whole island, although this may well take some time.

Soviet Republics and former Soviet Republics

Most States are republics, and this can lead to misunderstandings. The full title of the Soviet Union was the Union of Soviet Socialist Republics, yet the many republics of the USSR were no more than provinces.[23] The Russian Federation[24] now consists of 21 (non-independent) republics (including Chechnya, Ingushetia and *North* Ossetia), 49 oblasts, 10 autonomous okrugs, 6 krays, 2 federal cities and 1 autonomous oblast.

[20] See p. 179 below on the Hong Kong and Macao SARs.
[21] See UNGA Res. 541 (1983) and Res. 550 (1984). [22] See Oppenheim, pp. 189–90.
[23] See text to n. 15 above on the even more misleading cases of Byelorussia and Ukraine. The name, Commonwealth of Independent States, correctly represents the position of Members which were previously Soviet republics (see n. 46 below).
[24] See p. 364 below on the continuation of statehood.

Abkhazia and *South Ossetia* (population possibly 200,000 and 100,000 respectfully) are renegade provinces of the State of Georgia, itself a former Soviet republic. Since 1991, they acted as if they were not part of Georgia, and they were (and still are) *de facto* part of Russia. In 2008, both republics formally declared their independence from Georgia and that they were sovereign States. Although this was recognised by Russia, except for Nicaragua the declarations of independence have not been recognised by other States, especially by former Soviet republics. Neither province is a Member of the United Nations. The present situation may have been the fault of the Russian Government recognising in 1991, and in haste, the independence of various republics within their then existing boundaries, but without giving due consideration to the wishes of the people in part of a republic who wanted that part to remain in Russia. In fact, and for many years, Russian forces have been stationed in South Ossetia and Abkhazia (ostensibly to protect the people); and those inhabitants who wanted to stay Russian had Russian passports and travelled to the outside world via Moscow. It is now reported that, as well as expanding its airbase in Abkhazia, Russia may build a naval base on Abkhazia's Black Sea coast in case it loses its naval base in the Crimea when the lease from Ukraine expires in 2017.

A similar situation exists in *Transdniestria* (population about 500,000). Transdniestria is a small sliver of territory along the border between Moldova and Ukraine, both former Soviet republics. It is largely populated by Russians and is protected by Russian forces. It makes its money mainly from smuggling, corruption and organised crime. Although it proclaimed its independence from Moldova in 1990, it has not been recognised as a State. *De facto*, it is part of Russia.

But, these examples are not necessarily good for Russia for there are fractious Russian provinces in the Caucuses, such as Chechnya, Dagestan, Ingushetia, Karachaevo Cherkessia and Kabardino Balkaria, all of which border Georgia and any of which may one day try to secede, Chechnya having tried twice already, albeit unsuccessfully.

Within Azerbaijan is the enclave of *Nagorno-Karabakh*, whose population consists predominately of ethnic Armenians. Between 1988 and 1994, there was a war between Armenia and Azerbaijan over the enclave which led to some 600,000 Azeris fleeing to Azerbaijan, and some 25,000 deaths. Armenia still controls the enclave. Neither the UN Security Council, nor the Organization for Security and Co-operation in Europe (OSCE), has been able to resolve the problem. In November 2008, the two States announced that they would try to settle their differences over the enclave.

Republika Srpska is one of the two entities, the other being the Federation of Bosnia and Herzegovina, which together constitute the State of Bosnia and Herzegovina.[25]

[25] See Article 1(3) of the so-called Dayton Agreement, ILM (1996) 75.

Kosovo is, or perhaps was, a province of Serbia, although between 1999 and 2008 it was under UN administration (UNMIK). Following Kosovo's declaration of independence on 17 February 2008, UNMIK now concentrates on protecting the non-Albanian minority in Kosovo (chiefly Serbs).[26] The EU Rule of Law Mission in Kosovo (EULEX, Kosovo) helps the Government of Kosovo.

Yugoslavia

Even though the Federal Republic of Yugoslavia (FRY) asserted that it was the continuation of the *Socialist* Federal Republic of Yugoslavia (SFRY), the other former republics of the SFRY (the new States of Croatia, Bosnia and Herzegovina, Macedonia and Slovenia) as well as most third States, did not accept this or the FRY's claim to the seat of Yugoslavia in the United Nations and other international organisations.[27] In September 1992, the UN General Assembly decided that the FRY could not continue automatically the membership of the SFRY; that it should apply for membership; and that meanwhile it could not take part in the work of the General Assembly.[28] The effect of this decision was that the membership of 'Yugoslavia' was not terminated or suspended, but the practical consequence was that FRY representatives could no longer take part in the work of the General Assembly, its subsidiary organs, or conferences or meetings convened by the General Assembly.[29]

Domestic courts and unrecognised States

Nevertheless, domestic courts sometimes adopt the sensible view that, even if their government does not recognise an entity such as the TRNC as a State, life must go on and so the courts will sometimes give effect to laws and acts of public authorities of unrecognised States when they concern the ordinary but essential day-to-day aspects of life, such as births, marriages, divorces, deaths,[30] and certain commercial matters.[31]

[26] See www.unmikonline.org. See also the index of this book; and for the detailed history of Kosovo, M. Weller, *Contested Statehood*, Oxford, 2009.

[27] (1992) BYIL 655–8. See also the report of the Badinter Commission, 92 ILR 162, at 166. The ICJ elided the question in *Genocide (Bosnia* v. *Yugoslavia)* (Provisional Measures), *ICJ Reports* (1993), p. 3, at pp. 20–3; ILM (1993) 888; 95 ILR 1.

[28] See UNSC Res. 757 (1992), 777 (1992), 821 (1993) and 1074 (1996), and UNGA Res. 47/1, 47/229 and 48/88; ILM (1992) 1421. See also the detailed consideration of the status of the FRY between 1992 and 2000 in *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)* (Preliminary Objections), *ICJ Reports* (2004), paras. 25 and 54–91.

[29] See UN Doc. A/47/485. For the problems of succession to FRY treaties and to property, see pp. 369 and 372 below.

[30] See *Hesperides Hotels* v. *Aegean Turkish Holidays* [1978] QB 205; 73 ILR 9, *per* Lord Denning *obiter* (the case concerned Turkish-occupied Northern Cyprus); *Caglar* v. *Bellingham* 108 ILR 510, at 535–40; *Reel* v. *Holder* [1981] 1 WLR 1226; 74 ILR 105.

[31] *Al-Fin Corporation's Patent* [1970] Ch 160; 52 ILR 68.

Self-determination[32]

One of the purposes of the United Nations is to develop friendly relations among States based on respect for the principles of equal rights and self-determination of peoples (Article 1(2) of the UN Charter). Article 73 declares that the interests of the inhabitants of non-self-governing territories (e.g. colonies and other overseas territories) are 'paramount', and envisages, among other things, the development of their eventual self-government. At that time, independence for most overseas territories was not envisaged, but events moved rapidly. Paragraph 2 of the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960[33] declared that all peoples have the right to self-determination, and thus to determine freely their political status. Article 1(2) of the International Covenant on Civil and Political Rights 1966[34] also provides that all peoples have the right of self-determination, which is now recognised as a right *erga omnes*.[35] But this does not mean that an overseas territory must always become independent, even if the parent State would like most of its remaining overseas territories to opt for independence. Self-determination means that the people can decide that it will not so opt. So, those that still remain ultimately dependent on the parent State have, at least for the moment, freely chosen to stay as they are.

This can be illustrated by the example of *Gibraltar* (less than 7 sq km).[36] A 1967 referendum of the inhabitants resulted in 12,138 voting for the status quo and 44 for returning to Spain. Nevertheless, ignoring the referendum, and Article 73 of the UN Charter, UNGA Resolution 2429(XXIII) (1968) called for the end of the 'colonial situation' in Gibraltar. The resolution was adopted with 67 votes, with 18 against and 34 abstentions. Although Gibraltar can still be an irritant in Anglo-Spanish relations, much has changed since then: Spain is now a democracy, and it and the United Kingdom both belong to the European Union. In 2002, a proposal for joint sovereignty was overwhelmingly rejected in another referendum by 17,900 votes to 187. On 18 September 2006 Spain, the United Kingdom and Gibraltar announced that they had reached an agreement (actually an MOU, see pages 51 to 54 below) on several matters, including the airport and pensions.[37] Spain retains two enclaves on the coast of Morocco: Ceuta and Melilla (48 sq km in all).

In November 2008, there was a referendum of the 57,000 inhabitants of *Greenland* (of which 50,000 are Inuit). Of the population, 72 per cent took part, 75% of them voting for independence from Denmark, the colonial power. Greenland gained self-rule in 1979, but it gets a large annual subsidy from

[32] See Crawford, pp. 107–47. [33] UNGA Res. 1514 (XV).
[34] 999 UNTS 171 (No. 14668); ILM (1967) 368: UKTS (1977) 6.
[35] On *erga omnes*, see p. 10 above. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* (2004), p. 136, para. 87; 129 ILR 37; ILM (2004) 1009.
[36] See p. 37 below on sovereignty over to Gibraltar. [37] See www.gibnet.com/texts/trip_1.htm.

Denmark amounting to 30 per cent of Greenland's GDP. The population is small, but Greenland is very large: about 2,160,000 sq km, most of it being within the Arctic Circle. With global warming and the possibility of extracting oil (estimated at between 10 and 20 billion barrels) from what was previously seen as an inhospitable land, may now become a practical reality. But, it could be 15 to 20 years before oil is found, and then some years before the necessary huge investment in extracting the oil pays any dividends. So, for now, independence looks a long way off. Even if it were to come, it is likely that the cost of, and profit from, the extraction of its rich mineral reserves would be shared with Denmark. Greenland is not within the European Union.

Judgments in delimitation disputes can lead to a significant number of people suddenly finding themselves living under the government of a different State and as their nationals.[38] A negotiated settlement or plebiscite, or the involvement of an organisation like the United Nations, rather than resort to an international court, may be a better way of handling such politically and emotionally charged matters.[39]

Secession

The principle of self-determination was originally conceived primarily for colonial situations, and so any proposed secession by the people of part of a *metropolitan* State is likely to be highly contentious. Not only is the notion of a 'people' not that easy to apply,[40] but the principle of self-determination is inevitably in tension with those of territorial integrity[41] and *uti possidetis*.[42] Between 1945 and the end of the Cold War, there was perhaps only one successful case of secession by force (Bangladesh).[43] But during that period, there were several failed attempts at secession involving the use of force, such as those by Biafrans, Katangans and Basques.

Most claims to statehood are likely to come either from a former overseas territory (and should pose no problem),[44] or from that part of a State which asserts it has become a new State. Somaliland was a British protectorate until 1960 when, only days after its independence, it joined with the former Italian Trust Territory of Somaliland to form the new State of Somalia, now widely seen as a 'failed State'.[45] But, since 1991, Somaliland has been *de facto* independent of Somalia, although it has not been recognised as a State.

[38] See *Land and Maritime Boundary between Cameroon and Nigeria, ICJ Reports* (2002), p. 303, esp. paras. 107, 123 and 221; and Oppenheim, pp. 685–6 on the option found in some cession treaties to retain the previous nationality.

[39] For an account of the dispute over sovereignty of the Falkland Islands, which illustrates some of the complex legal and political factors involved in resolving such disputes, see Shaw, pp. 532–3.

[40] See Cassesse, *Self-Determination of Peoples*, Cambridge, 1995. [41] See p. 24 below.

[42] See p. 24 below. [43] In 1965, Singapore seceded by consent from Malaysia.

[44] See p. 362 below. [45] See p. 16 above.

Although States are naturally cautious about recognising secession, international law does not prohibit it. The independence of fourteen former republics of the Soviet Union (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan, and the Baltic States of Estonia, Latvia and Lithuania) was quickly achieved by 1991, the predecessor State not having seriously opposed it. The Minsk Agreement of 8 December 1991, establishing the Commonwealth of Independent States, and the Alma Ata Declaration of 21 December 1991, together recognised the end of the Soviet Union and the independence of those former republics.[46] It can also be easier if there is no government in effective control of the predecessor State, since that State may then be unable to oppose secession; attempts to secede have generally not been successful when the State concerned has opposed it.[47]

Recognition is also easier if the original State has dissolved, especially if it was a somewhat artificial creation. Therefore, other States soon accepted the fact that the Socialist Federal Republic of Yugoslavia (SFRY) had broken into the States of Bosnia and Herzegovina, Croatia, Macedonia and Slovenia, which were then admitted to the United Nations. (The other Yugoslav State, the so-called Federal Republic of Yugoslavia, raised difficult questions.)[48] These are good examples of international law reflecting the realities. In contrast, in the United Nations and elsewhere, Macedonia is referred to as '*the former* Yugoslav Republic of Macedonia' (emphasis added). This is because Greece objects vehemently to Macedonia calling itself by the same name as a neighbouring northern Greek province. But, the lower-case 't' and 'f' indicates that the name used in the United Nations is *not* the name of the State.[49]

Territorial integrity and *uti possidetis*

The principle of territorial integrity may be seen as an impediment to recognition of secession. But if the particular circumstances merit it, States have shown their willingness to recognise secession even in defiance of that principle, although it helps if there is UN support. Being a matter of political judgement, recognition is largely dependent on whether secession has become a political and irreversible fact. The obvious case is that of Bangladesh.[50]

The principle of *uti possidetis*[51] is not an obstacle to recognition of secession of part of a State. The principle places no obligation on minority groups to stay part of a State if the State maltreats them. If they establish a separate entity that

[46] See ILM (1992) 138 or www.cisstat.com/eng/cis.htm.
[47] See J. Crawford, 'State Practice and International Law in Relation to Secession' (1998) BYIL 85–117.
[48] See p. 21 above and pp. 369 and 372 below.
[49] See M. Wood, 'Participation of the Former Yugoslav States in the United Nations' (1997) YB of UN Law p. 231.
[50] See pp. 40–1 below and, on Bangladesh, Shaw, p. 200. [51] See p. 41 below.

is shown to have permanence, it will eventually be recognised by other States; international law recognises new realities.[52] Eritrea was an Italian colony from 1896, and was occupied by British forces in the Second World War. In 1950, the UN General Assembly decided that it should be an autonomous part of a federation with Ethiopia. That did not work, and a long period of strife with the government in Addis Ababa ensued. In 1993, a referendum in Eritrea was overwhelmingly in favour of independence, and it was declared in April 1993, Eritrea becoming a Member of the United Nations that year.

Recognition of governments

Even though a State and its territory are often seen as synonymous, a State is basically a legal concept; it therefore acts through its government. One must not confuse recognition of States with that of governments. In itself, a change of government does *not* affect the State. Even when the change has been brought about by unconstitutional or violent means, the legal personality of the State is unaffected (as are treaties to which that State is bound).[53] The question of recognition of a government arises only when it has come to power unconstitutionally. Recognition may be limited to recognition *de facto* (see below). Although the new regime may be all too clearly in effective control of the territory, with a reasonable prospect of permanence and with the obedience of the mass of the population, recognition may be withheld as an indication of political displeasure. But since international law is concerned more with realities, if the new regime was not at first recognised because of the way it came to power, yet is clearly in effective control and firmly established, in international law it will be regarded as the government.[54]

Numerous unconstitutional changes of government took place in the 1970s, particularly in developing States. The practice of formally announcing recognition of a usurper regime was often politically embarrassing since recognition was sometimes perceived as approval of the new regime. This predicament led several States to abandon the practice of formal recognition. Following the adroit French principle of recognising only States, since 1980 the nature of the relations which the United Kingdom has with a new regime must be determined and deduced from the particular circumstances. Where previously the British Government would have accorded formal recognition to a new government, now it will – but only if asked – say that it deals with it on a normal government-to-government basis.[55] US practice appears to be more pragmatic: the US Administration may formally recognise an unlawful change of government when it approves of the change, but otherwise usually leaves its view of the

[52] Higgins, pp. 125–6. [53] See p. 364 below.
[54] *Tinoco Claims Arbitration* (*United Kingdom* v. *Colombia*), 2 AD 34.
[55] For the formal statement of the new practice, see (1980) BYIL 367 and C. Warbrick, 'The New British Policy on Recognition of Governments' (1981) ICLQ 568–92. See also Shaw, pp. 458–9.

new government to be deduced from the relations it has with it: diplomatic, consular, or none.[56]

Governments in exile[57]

When a foreign invader or local insurgents have occupied a State, its government may flee abroad and, provided the State of refuge agrees, operate as a government in exile with the same legal status as it had before. But, recognition of a revolutionary government established abroad before it has gained control over the greater part of the territory of the State concerned may well be premature and amount to an interference in the affairs of the State.[58]

De jure and *de facto* recognition

An entity, whether claiming to be a State or a government, may be recognised either *de jure* or *de facto*, which terms qualify the status of the entity, *not* the nature of the recognition. Recognition *de jure* means that the entity fully satisfies the applicable legal criteria; recognition *de facto* is only of the current position of the entity, and is therefore usually provisional, although it can last for a long time. The United Kingdom and other States refused to recognise the illegal annexation by the Soviet Union in 1940 of the Baltic States (Estonia, Latvia and Lithuania) as *de jure*. Instead, they merely recognised that the Soviet Union exercised control of the three States *de facto*. This lasted until 1991 when the re-emergence of the three Baltic States, as independent and sovereign States, was recognised *de jure* by many States, including the Soviet Union (soon to be renamed the Russian Federation).[59] Each Baltic State joined the United Nations in 1991, and later the European Union.

Palestine[60]

Palestine had been part of the Ottoman Empire. From 1922, it was a League of Nations mandated territory entrusted to the United Kingdom. General Assembly Resolution 181 (II) (1947) recommended the partition of Palestine into two independent States, one Arab, one Jewish, and the creation of a special international regime for Jerusalem. But, the plan was never implemented

[56] M. West and S. Murphy, 'The Impact on US Litigation of Non-recognition of Foreign Governments' (1990) *Stanford Journal of International Law* 435–78.

[57] See generally, S. Talmon, *Recognition of Governments in International Law: with Particular Reference to Governments in Exile*, Oxford, 1998.

[58] See Oppenheim, pp. 146–7.

[59] Ibid., pp. 193–4.

[60] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* (2004), paras. 70–8; 129 ILR 37; ILM (2004) 1009; Agora: 'Advisory Opinion on the Construction, etc.' (2005) AJIL 1–141; Oppenheim, p. 131, n. 2, p. 163, n. 9 and pp. 194–6; and Shaw, pp. 246–8.

because the Arab population of Palestine and the Arab States rejected it. The United Kingdom formally relinquished the mandate on 15 May 1948, the day the State of Israel was proclaimed. On that day, an armed conflict broke out between Israel and a number of Arab States. On the basis of Security Council Resolution 62 (1948) of 16 November 1948, general armistice agreements were concluded between Israel and the neighbouring States in 1949. Articles V and VI of the Agreement between Israel and Jordan fixed the armistice demarcation line (called colloquially the 'Green Line' because of the colour used for it on maps) separating Israel and the territory of West Bank of the Jordan river, which was at that time occupied by Jordan. Article VI(8) provided that the provisions of the Agreement would not prejudice any final political settlement, and that the Green Line was without prejudice to future negotiated settlements regarding territory or boundary lines. Israel was admitted as a Member of the United Nations on 11 May 1949.

During the later conflict with Arab States in 1967, Israeli forces occupied all the territories which had constituted Palestine under the League of Nations mandate, including the West Bank and East Jerusalem (from Jordan),[61] as well as the Gaza Strip (from Egypt) and the Golan Heights (from Syria). In Resolution 242 (1967), adopted by unanimity, the Security Council emphasised the inadmissibility of acquisition of territory by war and called for the withdrawal of Israel's armed forces 'from territories occupied in the recent conflict'. The ambiguity of the wording quoted was deliberate.

From 1967, Israel took a number of measures aimed at changing the status of Jerusalem, including purporting to make it the capital of Israel. The Security Council condemned them. In Resolution 298 (1971), the Council confirmed that all legislative and administrative actions taken by Israel to change the status of Jerusalem were invalid and could not change that status. Israel does not claim sovereignty over the territories occupied in 1967. In those territories, it has the status of an occupying power. Subsequent events in them have done nothing to alter that legal position. The continued occupation by Israel is a military occupation subject to the limitations of the Hague Regulations 1907 (Section III) and the Fourth Geneva Convention.[62]

In November 1988, the Palestine National Council, the Parliamentary Assembly of the Palestine Liberation Organization (PLO), declared a State of Palestine. Since 1993, a number of agreements (although, of course, not treaties) were concluded between Israel and the PLO. They required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the occupied territories by its military authorities and civil administration. Some transfers have taken place, but, as a result of subsequent events, they have

[61] In 1988, Jordan announced its disengagement from the West Bank, although it did not renounce any claim it had to sovereignty.

[62] See pp. 242–3 below, and *Legal Consequences* (see n. 60 above). See also UNSC Res. 252 (1968), 465 (1980), 497 (1981); UNGA Res. 2253 and 2254 (1967) and 2949 (XXVII) (1972).

remained partial and limited. In 1994, a nascent Palestinian government, the Palestinian Authority,[63] was established.

Given that Palestine lacks control over so much of the territory it claims, as well as the well-known and profound political problems, including the more recent events in Lebanon and the Gaza Strip, only some Arab States have recognised Palestine as a State. Palestine has not been admitted as a Member of the United Nations, although it does have permanent observer status there,[64] the same as that accorded to non-member States and regional international organisations. At present, any application by Palestine for membership would likely to be vetoed in the Security Council.

Western Sahara

Formerly Spanish Sahara, in 1976 the territory (with a current population of about 270,000) was partitioned between Mauritania and Morocco, Morocco taking over the whole territory when Mauritania withdrew in 1979. The Polisario Front disputes Morocco's sovereignty and fought a guerrilla war with Morocco. That war ended in 1991 with a UN-brokered ceasefire. A UN-organised referendum on the final status of the territory has repeatedly been postponed.[65] It is not *terra nullius*.[66]

Means of recognition

Recognition can be express, as in a diplomatic note or formal public announcement. But, more often it is effected by means of an act that carries the inevitable implication that it would not have been done if the entity were not recognised. Supporting an application for UN membership is the most obvious example of implied recognition; establishment of diplomatic relations or the conclusion of a bilateral treaty, are others. Participation in an international conference in which the entity takes part, or becoming a party to a multilateral treaty to which the entity is also a party, does *not* amount to recognition.[67] When ratifying a multilateral treaty which Israel has ratified, some States formally declare that their ratification does not imply recognition of Israel. Such a declaration is legally unnecessary, and is a political act.

A visit by a high-level official, or a (publicised) meeting with a senior official of the purported government, should not amount to recognition if the position of his or her State is well known, although sometimes it may be prudent to make it clear in advance, and perhaps publicly, that nothing should be inferred.

[63] For details, see Shaw, pp. 246–8.
[64] See UNGA Res. 3210 and 3237 (XXIX) (1974), 3375 (XXX) (1975) and 43/177 (1988).
[65] See www.un.org/Depts/dpko/missions/minurso/.
[66] See *Western Sahara*, Advisory Opinion, *ICJ Reports* (1975), p. 12, paras. 75–83; 59 ILR 14. On *terra nullius*, see p. 37 below.
[67] For numerous examples of acts that do not amount to recognition, see Oppenheim, pp. 170–4.

Overseas territories[68]

The term 'overseas territory' describes a territory which is under the sovereignty of a State ('parent State'), but which is not governed as part of its metropolitan territory. But, under the French Constitution, French Guiana, Guadeloupe, Martinique and Réunion are *départments* of France, that is part of metropolitan France even if they are geographically very far from metropolitan France. Previously, overseas territories were known as colonies or dependent territories. Article 73 of the UN Charter describes overseas territories as 'non-self-governing'. Today, most overseas territories which have a permanent population have considerable internal self-government, with mainly defence and foreign affairs remaining the responsibility of the parent State. With the great wave of decolonisation that began after the Second World War, over one hundred overseas territories gained their independence and became UN Members, thereby transforming the United Nations from a smallish club of mostly developed States into a body truly representative of the world. Therefore, the UN organs concerned with non-self-governing territories are no longer so active.[69]

Today, there is not the great variety in overseas territories that there was only fifty years ago. But Australia, Denmark, France, the Netherlands, New Zealand, Norway, the United Kingdom[70] and the United States still have between them some fifty overseas territories.[71] Quite a few are unlikely ever to be viable as States, having no permanent population, or are small or *very* small; at the last count, Pitcairn had only about forty permanent inhabitants. On the other hand, a larger and more affluent overseas territory, such as Bermuda, could well exist as a State, but chooses to remain a UK overseas territory. The right of self-determination means that a people are free to choose how they should be governed, and for an overseas territory independence is *not* the only option.[72]

British territories

The fourteen remaining British overseas territories are the responsibility of the Foreign and Commonwealth Office, except for the Sovereign Base Areas (see below). There are also three other British territories: the *Channel Islands of Guernsey and Jersey* and the *Isle of Man*. They are thought by most people, including most British citizens, to be part of the United Kingdom, since at first

[68] See, generally, Roberts-Wray, *Commonwealth and Colonial Law*, London, 1966. For their constitutions, see Rayworth, *Constitutions of Dependencies and Territories*, Oceana/Oxford, 1975 (loose-leaf).

[69] For more details, see Oppenheim, pp. 282–95, or www.un.org.

[70] The full name – United Kingdom of Great Britain and Northern Ireland – derives from the uniting in 1801 of the Kingdoms of Great Britain (England, including Wales, and Scotland) and of Ireland, the reference to 'Ireland' being changed in 1922 to 'Northern Ireland' on the independence of the rest of the island.

[71] For a list, see Aust MTLP, pp. 513–14.

[72] See pp. 22–3 above.

sight they appear indistinguishable from the United Kingdom, even if the Channel Islands are geographically much closer to France. But they are *not* part of the United Kingdom. In British law they are known as 'the Crown Dependencies', and are the responsibility of the Ministry of Justice.[73] They have their own directly elected legislative assemblies, administrative, fiscal and legal systems and courts of law. They are not represented in the UK Parliament and UK legislation does not generally extend to them. Although some EU legislation has been applied to the Crown Dependencies, the Common Agricultural Policy and the Common Customs Policy do not apply.

There have been several other more normal types of UK overseas territories.

Colonies

Most overseas territories were, and still are, colonies. A colony is a non-metropolitan territory over which the parent State (the colonial Power) exercises control. The parent State can determine the extent (if any) to which the colony has control of its own affairs. But, even for the most advanced colonies, the parent State will usually retain responsibility for defence and foreign affairs. A colony cannot conclude treaties without the authority of the parent State. Nor can it enter into diplomatic relations, although consular posts may be established in the colony with the permission of the parent State.[74]

But some colonies have been given such extensive responsibilities in foreign affairs that some States dealing with them have failed to appreciate that they are not fully independent. The *Cook Islands* is in 'free association' with New Zealand, but its inhabitants retain their New Zealand nationality. This ambiguous situation has caused such confusion that the Cook Islands have become a member of some international organisations that are open only to States, have become parties to treaties, and have established diplomatic relations with certain States.[75] *Niue* has a similar status to that of the Cook Islands.[76] Both the Cook Islands and Niue are parties to the WHO Framework Convention on Tobacco Control 2003,[77] which is open to all WHO Members, which include the Cook Islands and Niue. In contrast, *Tokelau* is still a colony of New Zealand.[78]

The *Sovereign Base Areas in Cyprus (Akrotiri and Dkehelia)* (SBAs) are those parts of the former colony of Cyprus that were retained by the United Kingdom when Cyprus became independent in 1960. Their legal status is therefore that of

[73] See www.justice.gov.uk/whatwedo/crowndependencies.htm. [74] See pp. 142–4 below.

[75] See www.mfat.govt.nz/Countries/Pacific/Cook-Islands.php. The Cook Islands became a party to UNCLOS under the special provisions of Arts. 305 and 306. In other cases, they seem to have been treated as if they were a State.

[76] See www.mfat.govt.nz/Countries/Pacific/Niue.php. As to Puerto Rico and the Netherlands Antilles and Aruba, see Oppenheim, p. 280, nn. 21 and 22.

[77] 2302 UNTS 16 (No. 41032).

[78] See www.mfat.govt.nz/Foreign-Relations/Pacific/Tokelau/index.php.

a colony, and, unlike Cyprus, they are *not* part of the European Union. Because of their role as military bases in accordance with special treaty arrangements with Cyprus,[79] they are not administered like a normal colony, being instead the responsibility of the UK Ministry of Defence. Together they cover 254 sq km and have about 4,000 British service personnel and their 7,000 dependents. There are also about 8,000 Cypriot inhabitants of the SBAs, including farmers.

Protectorates

This is a term sometimes given to a protected State or colony. It is not a term of art. None are now left.

Protected States

A protected State is an entity that has some of the attributes of a State, but is under the guardianship of another State. The status is now largely of historic interest.[80] Although Andorra is still cited as a protected State, being under the joint protection of the French President and the Bishop of Urgell in Spain, since it became a Member of the United Nations the protection would seem to be of a somewhat formal nature.[81] Monaco[82] and San Marino[83] have special treaty arrangements with France and Italy, respectively, but are now also UN Members.

Condominiums

A condominium is a territory over which (usually only) two States exercise joint sovereignty.[84] It is now largely of historical interest, the last one being the (rather curious) Anglo-French condominium of the New Hebrides. It was established in 1887,[85] and resulted from the two States' naval and other rivalries in the Pacific. Each State retained jurisdiction over their own nationals. On arrival, nationals of *third* States had the novel, and sometimes unenviable, experience of having to opt to be either 'British' or 'French' during their stay, though free to eat where they liked. There were 'native' courts and a final appeal court, the Joint Court, consisting of one British (often Irish) and one French judge, and a president appointed by the King of Spain. By the end of the Spanish Civil War, the presidency was vacant and remained so for the next forty years, the two national judges always being able to reach an 'amicable' agreement on guilt and sentence. The territory became independent, as Vanuatu, in 1980.

[79] See 382 UNTS 8 (No. 5476); UKTS (1961) 4. [80] Oppenheim, pp. 266–74.
[81] Ibid., pp. 271–2. [82] Ibid., p. 271, n. 1(1). [83] Ibid., p. 272, n. 1(3). [84] Ibid., pp. 565–7.
[85] 79 BSP 545 and UKTS (1907) 3, (1927) 28 and (1935) 7; and Shaw, pp. 228–30.

Mandated and trust territories

Again, these are of mainly historical interest. Article 22 of the Covenant of the League of Nations provided for overseas territories of Germany and Turkey to be placed under the administration of certain 'mandatory States'.[86] The term derives from the agreements, called 'mandates', between the League and those States entrusted with the administration of the territories on behalf of the League. A mandate did *not* cede or transfer territory.[87]

Article 75 of the UN Charter replaced mandated territories by trust territories, although the purpose was similar. Alone of the mandatory States, South Africa refused to place the territory of South West Africa under the trusteeship system, although, as Namibia, it eventually gained its independence in 1990.[88] The trust territory system was administered by a principal UN organ, the Trusteeship Council, which suspended operations in 1994 following the independence of the last trust territory, Palau. Although suggestions have been made that certain States or territories might be placed under the Trusteeship Council, Article 75 would not be suitable for this purpose. Instead, action would have to be taken by the Security Council.

[86] Oppenheim, pp. 295–318; Shaw, pp. 224–7.

[87] *International Status of South West Africa*, Advisory Opinion, *ICJ Reports* (1950), p. 132; 17 ILR 47; and *Namibia (South West Africa) Legal Consequences*, *ICJ Reports* (1971), p. 6, paras. 117–27 and 133; 49 ILR 2. See also *Certain Phosphate Lands (Nauru* v. *Australia)*, *ICJ Reports* (1992), pp. 240 and 256; 97 ILR 1; *Cameroon* v. *Nigeria*, *ICJ Reports* (2002), para. 212.

[88] For the long, tortuous history of the struggle with South Africa, see Oppenheim, pp. 300–7.

3

Territory

Es ist die letzte territoriale Forderung, die ich Europa zu stellen habe.[1]

Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 661–718 ('Oppenheim')
Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 487–552 ('Shaw')
Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006 ('Crawford')

Introduction

In international law, to be a State there must be a government in effective control of territory.[2] Territorial sovereignty covers all land, internal waters, territorial sea and the airspace above them. A State does *not* have sovereignty over its continental shelf or the exclusive economic zone (EEZ). Instead, it has 'sovereign rights' over its continental shelf and certain sovereign rights and jurisdiction over its EEZ.[3]

Most of the current international law on territory results from disputes between States as to ownership of land. But, these days, they tend to be more over land or maritime boundaries, and sometimes islands. Although it is not to be found on most maps, Hans Island is a 3 sq km barren, uninhabited island off the northernmost tip of western Greenland (a Danish overseas territory) in the Kennedy Channel between Greenland and Canada. Both Denmark and Canada claim it as theirs. Although the island is ice-covered, the predicted effect of global warming could make the surrounding area more accessible for the exploitation of mineral resources. As assertions of ownership, both States have stepped up naval visits to the island. Canada also has disputes or potential disputes with Russia and the United States over much larger areas of the Arctic.[4]

[1] 'It is the last territorial claim which I have to make in Europe.' Hitler's speech in Berlin on 26 September 1938, referring to the Sudetenland.
[2] See p. 15 above on the criteria for statehood.
[3] See pp. 287 and 284 below, respectively.
[4] See pp. 333–4 below.

For a new State – whether previously an overseas territory or part of the metropolitan territory of the parent State – title to its territory is effectively acknowledged by recognition of its statehood. But, the new State will inherit any existing disputes as to its territorial or maritime boundaries. Many of the boundaries of former overseas territories were not well defined, thus giving rise to many disputes and proceedings in international courts and tribunals.[5]

One of the longest and most contentious territorial disputes has been over *Kashmir*. On the independence of India, there was a dispute as to whether Kashmir should be part of the new State of India or of Pakistan. On three occasions, in 1947–8, 1965 and 1971–2, the two States waged a war over Kashmir, and have also been involved in many skirmishes around the Line of Control (the *de facto* border between India and Pakistan which runs through Kashmir). No settlement has yet been reached.[6]

Boundary, border or frontier?

To describe the limits of territory, all three terms are used, but boundary is used more often, and is also more suitable for describing maritime limits. So, it will be used here.

Delimitation and demarcation

These terms are often confused, even in treaties. *Delimitation* is the process of determining the land or maritime boundaries of a State, including that of any continental shelf or exclusive economic zone, and is generally done by means of geographical coordinates of latitude and longitude.[7] The resulting lines are then usually drawn on a map or chart. The process is naturally done for adjacent States,[8] although unilateral delimitation may be necessary for the maritime limits of an isolated territory. The determination of a boundary may be embodied in a treaty or in the judgment of an international court or tribunal. *Demarcation* is the *further and separate* procedure of marking a line of delimitation (usually only on land) with physical objects, such as concrete posts, stone cairns, etc. In practice, demarcation often involves some degree of delimitation, since a line on a map may look rather different on the ground, and so reasonable adjustments may need to be made. The task of the UN Iraq–Kuwait Boundary Demarcation Commission also involved determining certain geographical coordinates, which required new mapping.[9]

[5] See, for example, M. Shaw, *The International Law of Territory*, Oxford, 2009; and *Land and Maritime Boundary between Cameroon and Nigeria, ICJ Reports* (2002), p. 303.

[6] See www.stimson.org/southasia/?SN=SA2001112045.

[7] As to maritime delimitation, see pp. 288 – 90 below.

[8] And see p. 287 below on the Commission on the Limits of the Continental Shelf.

[9] See UNSC Res. 678 (1991), paras. 2–4, S/25811 (containing the Commission's final report of 20 May 1993) and UNSC Res. 833 (1993). See also the Statement of the Eritrea–Ethiopia Boundary Commission of 2006 in M. Shaw, 'Title, Control, and Closure? The Experience of the

Intertemporal rule[10]

In the leading case of the *Island of Palmas*, in his award the single arbitrator, Max Huber, in deciding which State had established its claim to the territory, stated that one must assess the facts in the light of the international law at the 'relevant time', not the law at the time the issue falls to be decided.[11] He therefore had to decide whether in the early sixteenth century the mere discovery by Spain of the 2.4 sq km island was sufficient to give it good title *at that time*. (See also Critical date (below) and Discovery, p. 36 below.)

Critical date[12]

The resolution of all territorial disputes turns on complex facts extending over many years, or even centuries. The doctrine of the critical date is by no means easy to apply. Depending on the circumstances, in essence it is the date by which the rights of the parties to a territorial dispute have so crystallised that what they do afterwards does not affect the legal position. In the *Island of Palmas*, the arbitrator (Huber) had to decide if Spain *still* had title to the island in 1898, so that it could by a treaty of that date pass sovereignty to the United States. So, 1898 was the critical date, and Huber decided that by that date the Netherlands had acquired a better title than Spain.[13]

Means of acquisition

The traditional classification of the ways in which territory can be validly acquired has been criticised as simplistic, in that it does not take sufficient account of the interaction of various principles. Nevertheless, the usual method is good enough for present purposes. If the reader is ever lucky enough to advise on a territorial dispute, he or she will soon find that the starting point is an exhaustive collection of all the relevant facts and documents, territorial disputes being very much fact-driven. Examination and assessment of the facts will inevitably suggest which legal arguments best support the client's case. Unlike land disputes in domestic law, there is no detailed set of rules to decide who has ownership. Instead, international courts and tribunals study and weigh up all the evidence to decide which of the parties to the dispute has the better claim.[14]

Eritrea–Ethiopia Boundary Commission' (2007) ICLQ 755–96. See also the unusual case of the *Abyei Arbitration* (*Sudan* v. *Sudan People's Liberation Movement*) before a tribunal organised by the PCA: see *International Law in Brief* (an ASIL electronic newsletter) of 1 May 2009. On the PCA, see p. 408 below).

[10] See R. Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) ICLQ 501.

[11] (1928) 2 RIAA 831; 4 AD 103. For a concise description of the case, see J. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963, pp. 163–9. An almost complete text of the award is in H. Briggs (ed.), *The Law of Nations*, 2nd edn, New York, 1952, pp. 239–47.

[12] See Shaw, pp. 509–10; Oppenheim, pp. 710–12. [13] See n. 11 above.

[14] See the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, *ICJ Reports* (2008), p. 1.

Even that depends so much on the particular circumstances; so no attempt will be made to repeat here the lengthy treatment of the subject in leading textbooks. It is sufficient to mention some of the main points.

Discovery

For a time in the fifteenth and sixteenth centuries, the mere sighting of a previously unknown territory may have been enough to give good title to a State, although even this is doubtful. But it soon became established that a symbolic act, such as the planting of a flag or a formal proclamation, was also required to confirm title. And, by the mid-sixteenth century, discovery was seen as conferring no more than an inchoate (provisional) title that needed to be completed by effective occupation (see below).

Conquest and annexation

In the past, conquest (sometimes called subjugation), followed by annexation, was a means of acquiring a valid title to territory. Whether annexation now provides good title will therefore depend on (a) the international law at the time (the intertemporal rule), (b) (possibly) whether the annexing State had established effective control over the territory and (c) whether other States had recognised the annexation. Even in the period between the two World Wars, it was not clear if a State could acquire good title by conquest and annexation. Now Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity of another State and therefore the acquisition of territory by force.[15] In 1945, the Soviet Union terminated the 1941 Neutrality Pact with Japan and on 9 August 1945 opportunistically declared war on Japan, invading the Japanese Kuril (or Northern) Islands nine days later. The war between the allies and Japan formally ended twelve days later. Because the Soviet Union/Russia has consistently refused to return the islands, there is no peace treaty between Japan and the Soviet Union/Russia. The UN Charter entered into force on 24 October 1945.

The so-called Friendly Relations Declaration 1970,[16] is seen as a more detailed statement of the rights and obligations under the UN Charter. It confirmed that territory cannot be validly acquired by force or the threat of force, although this does not affect any treaty concluded before the UN Charter and valid under international law (in practice, a treaty of cession). Accordingly, in Resolution 662(1990), the UN Security Council rejected Iraq's purported annexation of Kuwait in 1990. Later, the International Court of Justice advised

[15] Regarding occupied territory, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* (2004), para. 87; 129 ILR 37; ILM (2004) 1009.

[16] UNGA Res. 2625 (XXV), Part 1.

the UN General Assembly that the building of the wall by Israel in occupied Palestinian territory, while professing it to be a temporary security measure, may prejudge the future boundary between Israel and Palestine, in that Israel may seek to integrate into its territory the Israeli settlements, and their means of access. If the wall were to become permanent, it would be tantamount to annexation.[17]

Cession

Even in the past, it was not simply conquest that conferred title, but a subsequent treaty of cession (sometimes part of a peace treaty). In 1704, Anglo-Dutch forces seized Gibraltar from Spain, the territory then being ceded by Spain to Great Britain (*sic*)[18] by the Treaty of Utrecht of 13 July 1713,[19] although there is a dispute over part of the isthmus linking Gibraltar and Spain. Despite sovereignty having been validly transferred by the Treaty – which obliges the United Kingdom to offer to return the territory to Spain were it ever minded to relinquish sovereignty – from the 1960s Spain pressed for the whole of Gibraltar to be returned to it now.

Despite the circumstances in which many old treaties of cession were concluded, they remain good roots of title. Many were entered into quite voluntarily, and several involved payment: Alaska by Russia to the United States in 1867 for US$7.2 million, and the Danish West Indies to the United States in 1916 for US$25 million. Territory can also be exchanged, particularly as part of the realignment of a boundary.

Cession will include all aspects of territorial sovereignty, including airspace and territorial sea, and sovereign rights over the continental shelf and certain rights and jurisdiction over the exclusive economic zone. Cession does not affect the rights of third States, such as State servitudes (see page 40 below).

Occupation and prescription

These are more conveniently dealt with together, as they have an important common factor: the exercise by a State of effective control.[20]

Terra nullius is vacant land that belongs to no State. The clearest case is the unclaimed sector of Antarctica.[21] There may also be some uninhabited islands and other territories that are still *terrae nullius*. But territory inhabited by peoples with a social or political organisation is not *terra nullius*.[22] *Terra nullius* can be acquired by any State (but, unless acting on behalf of a State, not by a private person or company) which has the intention to claim sovereignty and

[17] Ibid., paras. 119–21.
[18] For an explanation of the difference between 'Great Britain' and 'United Kingdom', see p. 29, n. 70 above.
[19] 28 CTS 325; 1 BSP 611. [20] Shaw, pp. 502–9. [21] See p. 328 below.
[22] *Western Sahara*, Advisory Opinion, *ICJ Reports* (1975), p. 12, paras. 75–83; 59 ILR 14.

occupies the territory by exercising effective and continued control. Occupation is thus a peaceful means of acquiring territory.

In contrast, prescription is the acquisition of territory that is not *terra nullius*, but was obtained by means that may have been of doubtful legality, or patently illegal. Although international law is not keen to legalise unlawful conduct, the aim of international law is always stability and certainty. Thus, provided territory has been under the effective control of a State, and that has been uninterrupted and uncontested for a long time, international law will accept that reality. But timely protests by the 'former' sovereign will usually bar the claim. How long effective control must last depends entirely on the circumstances of each case. Often, there will be sovereign activities (*effectivités*) in relation to the territory by the disputing States. In the case of remote or uninhabited territory, they may be physical (visits by military or government officers) or formal (legislation for the territory).[23]

Acquiescence, estoppel and recognition

In judging whether a territorial claim is good, especially one based on prescription, protests by the former sovereign or, in contrast, its acquiescence would obviously be important. A rival claimant may also be estopped[24] by its previous conduct.[25] Recognition by third States, or the former sovereign, of a claim will also be important. India's seizure in 1961 of Goa, a Portuguese colony on the west coast of India, and its incorporation into India in 1962, was not condemned by the United Nations, there being much bitterness at Portugal's colonial policy. The incorporation was soon recognised by most States, and eventually by Portugal.[26]

Boundary treaties

A treaty that establishes or confirms a boundary creates a regime that all other States must recognise.[27] A party to the treaty cannot invoke a fundamental change of circumstances as a ground for terminating it,[28] except perhaps where the conditions for the legitimate operation of the principle of self-determination exist.[29]

[23] On *effectivités*, see Shaw, pp. 511–15; and *Nicaragua* v. *Honduras*, *ICJ Reports* (2007), p. 1, paras. 168–208; ILM (2007) 1053.
[24] See p. 8 above. [25] *Temple of Preah Vihear*, *ICJ Reports* (1962), p. 6; 33 ILR 48.
[26] See Oppenheim, p. 196.
[27] On objective or *erga omnes* regimes, see pp. 10 above and 90 and 327 below.
[28] Article 62(2)(a) of the VCLT, see p. 97 below.
[29] See the ILC Commentary on draft Article 59 (later Article 62 of the VCLT), para. (11), of the final draft Articles on the Law of Treaties, in A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, pp. 764–5.

Leases

Although no longer common, a State can by treaty lease part of its territory to another State. During the term of the lease, the territory then comes under the sovereignty of the lessee State. Although the island of Hong Kong, and the lower part of Kowloon on the mainland of China, were in the mid-nineteenth century ceded by China to the United Kingdom in perpetuity,[30] the much larger New Territories extending up from Kowloon were leased by China to the United Kingdom in 1898 for ninety-nine years.[31] During that period, the whole of Hong Kong was regarded by the United Kingdom, and other States, as coming under British sovereignty. All of Hong Kong was restored to China at midnight on 30 June 1997.[32]

The US naval base at Guantánamo Bay was leased by treaty from Cuba in 1903. It gave the United States the right to 'exercise complete jurisdiction and control' over the leased land and waters, but recognised the continuance of the 'ultimate sovereignty of the Republic of Cuba'.[33]

Because such treaties transfer sovereignty, at least *de facto*, they should be distinguished from leases granted to foreign States under the domestic law of the grantor State, such as for military bases,[34] although today the land may be made merely 'available'.[35] Such leases involve no transfer of sovereignty.

Rivers

If a boundary between two States is a river, and unless a treaty provides otherwise, where the river is *not* navigable, the boundary is generally its mid-line. If it is navigable, the boundary is generally the midline of the *thalweg* (the principal channel), although it all depends on the particular facts.[36] Territory may also be enlarged or made smaller by the processes of accretion and erosion, which can also be man-made.[37]

[30] 30 BSP 389 and 50 BSP 10. [31] 90 BSP 17. See p. 100 below on so-called unequal treaties.

[32] Joint Declaration on the Question of Hong Kong 1984,1399 UNTS 33 (No. 23391); ILM (1984) 1366; UKTS (1985) 26.

[33] 96 BSP 546–7 and 551–3; (1910) AJIL 4, Suppl. 177. The text of the treaty was on the US Navy website of the base (the website has since disappeared), which explained that 'ultimate sovereignty' meant that Cuban sovereignty is 'suspended' during the period of US occupancy. In *Rasul* v. *Bush* (542 US _ (2004); ILM (2004) 1207) the US Supreme Court held (6–3) that *habeas corpus* extended to aliens in territory over which the US exercises 'plenary exclusive jurisdiction', which included the base. See also, Lazar, '"Cession in Lease" of the Guantanamo Bay Naval Station and Cuba's "Ultimate Sovereignty"' (1969) AJIL 116; Whiteman, vol. 2, p. 1216.

[34] For example, the so-called UK–US Lend–Lease Agreements of 1940–1, 203 LNTS 201 and 204 LNTS 15; UKTS (1940) 21 and (1941) 2.

[35] See the UK–US Exchange of Notes of 30 December 1966 concerning the availability for defence purposes of the British Indian Ocean Territory (which includes the Chagos Archipelago which contains Diego Garcia), 603 UNTS 273 (No. 8737); UKTS (1967) 15; as amended in 1976, 1032 UNTS 323 (No. 8737); UKTS (1976) 88; and in 1987, UKTS (1988) 60.

[36] See Oppenheim, pp. 664–6. [37] Ibid., pp. 696–8.

State servitudes[38]

A State servitude is a legal right over the whole or part of territory granted by one State to another, such as a right of passage.[39] The right is *in rem*, in that it is not merely personal to the States by and to which it is granted, but remains in force even if sovereignty over the territory changes.

Res communis

This term refers to territory over which no State has sovereignty *and* which cannot be appropriated by any State (cf. *terra nullius*, p. 37 above). A State must respect its use by any other State and not do anything that might adversely affect their use of it. Obvious examples include the high seas,[40] outer space and the celestial bodies.[41] But the term may also be used to describe legal regimes established by treaty to administer resources common to two or more States, such as an oilfield,[42] or, perhaps more controversially, a special region like Antarctica.[43]

Common heritage of mankind

The Moon Treaty 1979 provides for the Moon and other celestial bodies to be 'the province of all mankind'.[44] Articles 136 and 137 of the UN Convention on the Law of the Sea 1982 go slightly further and provide that 'the Area' (the deep seabed beyond the limits of national jurisdiction) and its mineral resources is 'the common heritage of mankind', so that no State may claim or exercise sovereignty or sovereign rights over them. The rights in the resources are vested in 'mankind as a whole, on whose behalf the [International Sea-Bed] Authority shall act'.[45] The concept of the common heritage is controversial[46] and has not yet been used in other contexts, although it has sometimes been misused.

Territorial integrity and *uti possidetis*

Article 2(4) of the UN Charter requires all Members to refrain from the threat or use of force against, *inter alia*, the 'territorial integrity' of any State. Although the Charter does not define that term, it is now well established. To be a State one has to have a defined territory, and so the concept of territorial integrity reflects the fundamental international objective in the stability of boundaries. It

[38] Ibid., pp. 673–6. [39] *Right of Passage over Indian Territory*, *ICJ Reports* (1960), p. 6; 31 ILR 23.
[40] See p. 219 below. [41] See p. 339 below.
[42] The Norway–UK Agreement relating to the Exploitation of the Murchison Field Reservoir of 16 October 1979, 1249 UNTS 174 (No. 20387); UKTS (1981) 39, provides for the Reservoir, which straddles the boundary of the parties' continental shelves, to be exploited as a single unit.
[43] See p. 327 below. [44] On the Moon Treaty and outer space, see pp. 339 et seq. below.
[45] See p. 290 below. [46] See B, B & R, pp. 197–8.

later became prominent during the major period of decolonisation. In particular, the boundaries of African territories were drawn with little regard for the inhabitants, so that people of the same ethnic group were often divided by a colonial boundary. But rather than embarking on the immensely difficult and politically hazardous task of seeking to redraw numerous boundaries, it was decided to leave them as they were on independence. Paragraph 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples 1960 declared that any attempt aimed at the partial or total disruption of the territorial integrity of a country is incompatible with the purposes and principles of the United Nations.[47]

The principle of territorial integrity is complemented by the doctrine of *uti possidetis*. It was originally devised so that the administrative divisions of the Spanish Empire would be regarded as the boundaries of the newly independent Latin American States, and, or so it was hoped, this would prevent boundary disputes between them.[48] The African Union (previously the Organization of African States) also upholds the doctrine, for the reasons given in the preceding paragraph.[49] In 1986, a chamber of the International Court of Justice considered the principle as one of general international law.[50] It was followed by the so-called Badinter Commission in relation to the former Yugoslav republics: 'whatever the circumstances, the right of self-determination must not involve changes to existing frontiers at the time of independence'.[51]

(The relationship between the two principles and that of self-determination is discussed at page 22 above.)

[47] UNGAR 1514 (XV). For Europe, see the Helsinki Final Act 1975, Questions Relating to Security in Europe, Part 1, IV ILM (1975) 1293.

[48] Oppenheim, pp. 669–70. See the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, *ICJ Reports* (2007); ILM (2007) 1053.

[49] Article 4(b) of the Constitutive Act of the African Union: see www.africa-union.org.

[50] *Burkino Faso* v. *Republic of Mali*, *ICJ Reports* (1986), p. 554; 80 ILR 459. Paras. 20–6 may have been the work of the Argentine judge, Ruda. See also *Libya* v. *Chad*, *ICJ Reports* (1994), p. 6; 100 ILR 1. As to general international law, see p. 9 above.

[51] Opinion No. 2; ILM (1992) 1497; 92 ILR 167. The Commission was necessarily referring to the *internal* boundaries of the former Socialist Federal Republic of Yugoslavia.

4

Jurisdiction

The long arm of the law.

(Anon.)

Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 456–78 ('Oppenheim')
Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 645–88 ('Shaw')
Higgins, *Problems and Process*, Oxford, 1994, pp. 56–77 ('Higgins')

Introduction

We are here concerned with the extent to which international law permits a State to exercise its domestic jurisdiction over persons (natural or legal) or things in its territory and, sometimes, abroad. This issue is an aspect of the sovereignty of States, as reflected in the principles of the equality of States and non-interference in another State's domestic affairs. Domestic jurisdiction takes two main forms: prescription (the making of law) and enforcement (implementation of the law by the judiciary or the executive). Having been developed over the years, mostly by judgments of domestic courts, the principles are fairly well established. Conflicts of jurisdiction in civil matters are generally resolved by applying rules on conflict of laws.[1] Disputes over jurisdiction occur more often in the enforcement of laws of a regulatory nature. The main problem today is when the assertion of jurisdiction by a State unduly may affect adversely the commercial or economic interests of foreign nationals, whether natural or legal persons, such as corporations.

International law leaves a fair measure of jurisdictional discretion to States, which can assert jurisdiction if this can be justified by a rule of international law, which is generally permissive. Although jurisdiction will be discussed according to traditional principles, it may be that a general principle has now emerged that a State may exercise jurisdiction if there is a sufficiently close connection between the subject matter and the State to override the interests of a competing State.[2]

[1] See p. 1 above. [2] And see n. 15 below.

Territorial principle

This is the primary basis for jurisdiction. A State is free to legislate and enforce that legislation within its territory, the main exception being when that freedom is restricted by a rule of international law. A State is generally free to apply its legislation to any person within its territory, including foreign nationals; and a constructive presence (a certain degree of contact with the territorial State) may be enough, especially for legal persons, such as corporations.

A State can also apply its laws to ships flying its flag or aircraft registered with it, and persons on board. Although a State has sovereignty over its airspace, acts committed on board foreign-registered aircraft are primarily subject to the jurisdiction of the State of registration if they are committed when the aircraft is in flight.[3] Jurisdiction in the territorial sea, in an exclusive economic zone or on the high seas is different and is dealt with elsewhere.[4]

Officials of a foreign State cannot take evidence or exercise other jurisdiction without the consent of the territorial State.[5] Such activities may not be done without such consent even in the foreign State's embassy, since it is *not* foreign territory.[6] Nor can legal process be served directly in another State, but only by means acceptable to the two States, and this often set out in a treaty. A court must be careful about demanding that a defendant produce documents held in another State.[7] Only in exceptional circumstances could a criminal court of one State sit in another State.[8] The exercise of local criminal or disciplinary jurisdiction over members of the foreign armed forces will depend on agreement with the host State, and this will usually be in a status-of-forces agreement.[9] The immunity of foreign diplomats from the jurisdiction of domestic courts does not mean that there is no territorial jurisdiction over them, just that it cannot be exercised unless immunity is waived.[10]

Nationality principle

A State can legislate to regulate activities of its nationals abroad, whether resident there or merely visiting. One of the advantages of nationality is that the tax laws of your own State may still apply to you if you live abroad, or if you have investments or conduct business activities abroad. It all depends on the tax laws of your State. Similarly, legislation governing the conduct of government officials will apply to what they do abroad. To varying degrees, States have legislation that provides that

[3] See p. 267, n. 18 below on the Tokyo Convention. [4] See pp. 281 et seq. below.
[5] See p. 245 below on mutual legal assistance. In 2005, an English judge went to Cuba, with the consent of its government, to hear evidence in a civil copyright dispute being heard in the English High Court.
[6] See p. 115 below.
[7] On such extraterritorial discovery, particularly in US antitrust cases, see pp. 44–5 below, and Oppenheim, pp. 464–6.
[8] See p. 275 below on the Lockerbie criminal trial, *not* the ICJ case.
[9] See p. 159 below. [10] See pp. 130 et seq. below.

their nationals who commit certain offences abroad may be prosecuted at home,[11] and for this purpose extradition may be available.[12] But, unless a treaty allows for it,[13] legislation cannot be enforced *within* another State.

Passive personality principle

The assertion of jurisdiction by a State over acts committed abroad by foreign nationals against its own nationals ('victim jurisdiction') is contentious. *The Lotus*[14] is often cited as the basis for the principle, but this is doubtful. Its *dictum*, that a State can assert jurisdiction unless there is a rule prohibiting it, went much too far.[15] Although previously opposed to it, in response to the growing number of terrorist attacks on US nationals abroad, in the 1980s the United States enacted legislation under which such crimes can be tried in the United States.[16] The legislation seems to have been used only to deal with terrorist offences, and the principle is now found in various counter-terrorism conventions.

Protective principle

In certain circumstances, a State may establish its jurisdiction over a foreign national who commits an offence abroad which is prejudicial to that State's security, even if the act is not an offence under the law of the other State. The scope of this principle is not well defined,[17] but is most clearly seen in some of the treaties that provide for quasi-universal jurisdiction (see below).

Universal and quasi-universal jurisdiction

It is exceptional for States to have jurisdiction under their law over crimes committed abroad by foreign nationals against foreign nationals. But certain crimes – piracy, slavery, torture, war crimes, genocide and other crimes against humanity – are so prejudicial to the interests of all States, that customary international law (in this case, often derived from treaty law)[18] allows any State to exercise jurisdiction over them, wherever they take place and whatever the nationality of the alleged offender or victim. This is known as 'universal' jurisdiction, although States have generally been reluctant to exercise it in cases where they have no connection with the persons involved.[19] However, certain

[11] For example, the Offences Against the Person Act 1861, s. 4 (conspiracy abroad to commit murder).
[12] See p. 246 below. [13] See p. 159 below on status-of-forces agreements.
[14] 1927 PCIJ Ser. A, No. 10; 4 AD 5.
[15] On this, and the principle in general, see Higgins, pp. 65–9; and Shaw, pp. 664–6.
[16] See p. 49, n. 34 below. [17] Shaw, pp. 666–8. [18] See, for example, genocide, p. 251 below.
[19] See paras. 19–65 of the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* (Congo v. Belgium), *ICJ Reports* (2002), p. 3; ILM (2002) 536; and Reydams, *Universal Jurisdiction*, Oxford, 2004. In *Obligation to Prosecute or Extradite (Belgium* v. *Senegal),*

treaties dealing with terrorism, have also incorporated the concept.[20] But since it only applies to parties to those treaties, the concept is known as *quasi-universal jurisdiction*.[21] So, under the quasi-universal jurisdiction provisions of the Torture Convention 1984, in 2004–5, an Afghan national, Zardad, was tried, and convicted, in London for torture of non-UK nationals which had been carried out in Afghanistan between 1992 and 1996.[22] The principle is found not only in such areas, but also in multilateral treaties on other scourges, such as in treaties dealing with the problems of drug trafficking and corruption.[23]

In the past, it was questioned whether the parties can agree to extradite or put on trial nationals of States that are not parties to such treaties, since no treaty obligation can be imposed on a third State without its written consent. Moreover, application of the principle places no obligation on a third State; the obligation is on the party in whose territory the person is found. In addition, the conventions were adopted within universal international organisations, either by consensus or by big majorities. This represents a sufficient degree of general acceptance (both political and legal) by States that, in these circumstances, the exercise of such extensive jurisdiction is not contrary to international law.

Effects doctrine

Some of the principles discussed above clearly have extraterritorial effect in that the State asserts jurisdiction over persons present, or matters occurring, *outside* its territory. But in the last half-century, 'extraterritorial' has become synonymous with certain controversial US legislation expressed to apply to persons abroad, including non-US nationals,[24] in respect of acts done abroad that are considered to have a substantial and harmful effect in the United States (the so-called effects doctrine).

The doctrine has been applied especially to overseas subsidiaries of US companies, even when the subsidiary is locally incorporated (here referred to as 'foreign subsidiaries'),[25] on the basis that they are still 'US' companies and should therefore still be subject to US laws. This might not matter so long as the

ICJ Reports (2009), p. 1, Belgium based the jurisdiction of the ICJ on Art. 30 of the Torture Convention (see n. 22 below) and reciprocal declarations under Art. 36(2) of the ICJ Statute.

[20] See p. 265 et seq. below. [21] See p. 270 below.

[22] Convention against Torture 1984, 1465 UNTS 85 (No. 24841); ILM (1984) 1027; UKTS (1991) 107; BGG 229 1984, 1465 UNTS 85 (No. 24841); ILM (1984) 1027; UKTS (1991) 107; BGG 229. See also Art. 10(4) of the Convention on the Safety of United Nations and Associated Personnel 1994, 2051 UNTS 363 (No. 35457); ILM (1995) 484. See also p. 270 below.

[23] See Art. 6(9) of the Vienna Drugs Convention 1988, 1582 UNTS 165 (No. 27627); ILM (1989) 493; UKTS (1992) 26; and Arts. 42–44 of the UN Convention Against Corruption 2003, 2349 UNTS 41 (No. 42146); ILM (2004) 37.

[24] First enunciated in *US* v. *Aluminium Company of America*, 148 F 2d 416 (1945); *American International Law Cases*, vol. 9, p. 13.

[25] See p. 166 below on the nationality of companies.

legal obligations do not conflict with the legal regime of the other State. But legislation that seeks to impose domestic policy constraints on companies incorporated and operating abroad may well conflict with the laws of other States. This is particularly so when it is devised to further US national policy by imposing strict regulatory requirements accompanied by severe criminal penalties or penal damages, such as treble damages. In 1979, after the seizure of US embassy staff in Tehran, the United States purported to freeze all Iranian assets, including US dollar accounts held abroad by foreign subsidiaries. After martial law had been imposed in Poland, in 1982 US legislation prohibited foreign subsidiaries from supplying material for the building of the Siberian pipeline. While COCOM existed to supervise technological exports to the communist bloc, the United States sought to impose its export controls on foreign subsidiaries. More recently, the so-called Helms – Burton and D'Amato legislation of 1996, first, authorised legal proceedings in US courts against foreign companies (not just foreign subsidiaries) 'trafficking' in property of US nationals expropriated by Cuba, and, second, imposed sanctions on foreign companies taking part in the development of the oil industries in Iran and Libya.[26]

Many Western States and the European Union opposed these extravagant assertions of jurisdiction. However, the European Court of Justice has adopted an effects doctrine similar to that of the United States, holding that EU competition law applies to anti-competitive agreements reached abroad by foreign companies, provided they are implemented within the European Union.[27]

There has also been considerable resentment at attempts to apply US antitrust legislation, such as the so-called Sherman Act, against foreign companies operating also in, but not based in, the United States (such as foreign airlines), and in particular demands for the wide-ranging production of documents held abroad, and awards of treble damages. This led to States enacting 'blocking' legislation under which a State could prohibit the production of documents in the courts of the other State. The UK legislation also allows a UK national or resident to sue in the United Kingdom to recover multiple damages awarded by a foreign court.[28] But the US courts have developed a balancing test that takes into account various matters in deciding whether they should assert jurisdiction in such cases. They include conflicts with foreign law or policy, whether the conduct was prohibited in the other State, the availability of a foreign remedy, the importance of intent to harm US commerce and the effect on foreign relations.[29] Happily, such disputes are now rare. This may be due to the

[26] See ILM (1996) 357 and 1273, respectively.

[27] *ICI* v. *Commission* (Dyestuffs case) [1972] ECR 619; 48 ILR 106; *Ahlstrom* v. *Commission* (Wood Pulp cases) [1988] ECR 5193; 96 ILR 148.

[28] Protection of Trading Interests Act 1980. See *British Airways* v. *Laker* [1984] 3 All ER 39; 74 ILR 65; and *Midland Bank* v. *Laker* [1986] 2 WLR 707; 118 ILR 540.

[29] *Timberlane*, 549 F 2d 597 (1976); 66 ILR 270; *Mannington Mills*, 595 F 2d 1287 (1979); 66 ILR 487.

United States having become a member of the World Trade Organization where various trade disputes can be submitted to arbitration.[30]

Alien Tort Claims Act 1789[31]

The date *is* correct, although it was only in the 1980s that the Act was resurrected as a means of avoiding the limitation in the Foreign Sovereign Immunities Act that prevents US courts hearing claims based on torts committed outside US territory. In 1980 in *Filartiga*,[32] a US Federal Appeals Court held that, under the Act, a foreign national could sue in the United States an official of a foreign State (but not the State itself)[33] for torture committed by him in that foreign State. This was on the tenuous basis that he had been served with the proceedings in the United States and torture was an international crime that all States have the right to prosecute wherever it is committed. This led to rather newer legislation, including an amendment to the 1789 Act (made by the Anti-Terrorism and Death Penalty Act 1996),[34] which removed State immunity for murder, or terrorist acts causing personal injury or death, done anywhere in the world on behalf of a State that has been designated as a State sponsor of terrorism, unless neither the claimant nor the victim is a US national. In 2004, in *Sosa* v. *Alvarez-Machain*,[35] the US Supreme Court restricted the use of the Act when harm was caused by acts of foreign officials that did not amount to a violation of customary international law. The Act has been used unsuccessfully to bring cases against foreign companies based on historical human rights abuses that have little or no connection with the United States.

Abduction[36]

Abduction is the seizure (kidnapping) of a person for trial abroad, so bypassing any extradition treaty or procedure.[37] (Sometimes it is described as 'rendition', but that term also covers lawful means of obtaining a fugitive from justice.) Abduction clearly breaches local law. And, since the laws of one State cannot be enforced in another State without its permission, it also violates international law, including that on human rights, such as the right to security of the person and due process.[38] Thus the injured State can protest and claim compensation.[39]

[30] See p. 353 below on the WTO.
[31] See now 28 USC s. 1350 (1982). See generally H. Fox, *The Law of State Immunity*, 2nd edn, Oxford, 2008, pp. 356–62; Shaw, pp. 683–86; Higgins, pp. 211–12.
[32] 77 ILR 169. On universal jurisdiction, see p. 44 above.
[33] On this, see *Argentine Republic* v. *Amerada Hess*, 488 US 428 (1989); 81 ILR 658.
[34] AJIL (1997) 187. [35] 127 ILR 669.
[36] Oppenheim, vol. 1, pp. 387–9; Higgins, pp. 69–73; Shaw, pp. 680–3.
[37] On extradition, see p. 246 below. [38] But see p. 208 below on self-defence.
[39] See pp. 376 et seq. below on State responsibility.

The person is usually seized from foreign territory, although occasionally he may be seized on board a foreign ship on the high seas. The most dramatic example is still the abduction from Argentina in 1960 by Israeli agents of Adolf Eichmann for trial in Israel for crimes against humanity committed during the Nazi period.[40] Since then, there have been other abductions.

The other important issue is whether the courts of the abducting State will accept jurisdiction over the person despite the violation of international law. Much depends on the particular circumstances, courts being more willing to accept jurisdiction if the abduction was not from foreign territory or the offence was an international crime (as in the case of Eichmann). Current US law is that jurisdiction will not be accepted if torture or similar outrageous conduct by the abductor has been involved.[41] But in 1992, in *Alvarez-Machain*, the US Supreme Court held that the circumventing of an extradition treaty would not, in itself, prevent jurisdiction being exercised unless abduction was prohibited by the terms of the treaty.[42] In contrast, the UK courts will not accept jurisdiction if the person was brought forcibly into the United Kingdom in violation of international law and in disregard of any extradition treaty or process.[43]

There is not enough space here to deal with so-called extraordinary rendition. But one point does need to be made, since it is often overlooked. Even if in some cases extraordinary rendition may have been lawful in international law (although this must be questionable), even when it was done with the informed consent of the foreign State, it would almost certainly have been done in violation of that State's *domestic law* guaranteeing the human rights of the person rendered.

[40] See UNSC Res. 138 (1960); and A. Aust, 'The Security Council and International Criminal Law' (2002) NYIL 23, at 26.

[41] *US* v. *Yunis*, ILM (1991) 403. [42] 504 US 655 (1992); 95 ILR 355; ILM (1992) 901.

[43] *Bennett* [1993] 3 WLR 90; 95 ILR 380. See also the South African case of *Ebrahim*, ILM (1992) 888; 95 ILR 417.

5

The law of treaties

Les traités, voyez-vous, sont comme les jeunes filles et comme les roses: ça dure ce que ça dure.[1]

Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007 ('Aust MTLP')

McNair, *The Law of Treaties*, 2nd edn, Oxford, 1961 ('McNair')

O'Connell, *International Law*, 2nd edn, London, 1970, pp. 195–280 ('O'Connell')

Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, Manchester, 1984 ('Sinclair')

Blix and Emerson, *The Treaty Maker's Handbook*, Dobbs Ferry, 1973 ('Blix and Emerson')

Multilateral Treaties Deposited with the Secretary-General (UN Treaty Collection: http://treaties.un.org/Pages/>Status of Treaties) ('*UN Multilateral Treaties*')

Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties 1999 (ST/LEG/7/Rev.1 or http://treaties.un.org/>publications >Summary of Practice ('*UN Depositary Practice*')

Introduction

Anyone who is interested in international law may have heard the above-quoted cynical – and sexist – cliché. They may also want to know more about the law of treaties, the subject being so important to international law. This chapter is therefore the longest, although the author's book on treaties should be consulted for much more detail, as well as for aspects that are not covered here. The Vienna Convention on the Law of Treaties 1969 ('the Convention' or 'the 1969 Convention') is essential reading,[2] in particular the definitions in Article 2, of which the following should be especially noted:

[1] President Charles de Gaulle, in a speech at the Elysée Palace, 2 July 1963.

[2] 1155 UNTS 331 (No. 18232); ILM (1969) 689; UKTS (1980) 58. The text in also in Aust MTLP, p. 453 et seq.

> 'negotiating State' means a State which took part in the drawing up and adoption of the text of the treaty;
>
> 'contracting State' means a State which has consented to be bound by the treaty [e.g. by ratifying it], *whether or not the treaty is in force*; [emphasis added]
>
> 'party' means a State which has consented to be bound by the treaty *and for which the treaty is in force*. [emphasis added]

(Unless otherwise indicated, references in this chapter to *numbered* Articles are to Articles of the Convention.)

The Vienna Convention on the Law of Treaties 1969

The Convention codified the law of treaties, that is the rules and procedures for making and applying treaties and their legal effect. The rights and obligations created by a treaty are more properly known as 'treaty law'.[3] By its fortieth anniversary in 2009, it still had only 109 parties, but the Convention is regarded by the International Court of Justice (and other international and national courts and tribunals) as in almost all respects stating customary international law. Despite the Convention not having retroactive effect (Article 4), for practical purposes the Convention is nevertheless an authoritative statement of the customary international law on treaties and so can be applied to treaties, including those which pre-date the Convention by many years.[4]

But, the Convention does not apply to oral agreements (which are in any case *very* rare). Nor does it cover succession to treaties,[5] responsibility for breach of treaties,[6] or the effect of hostilities on treaties.[7]

What is a treaty?

Article 2(1)(a) of the Convention defines 'treaty' as:

> an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

The Convention uses 'treaty' as a generic term, and so includes treaties that may be described as universal or regional, intergovernmental, inter-ministerial or administrative. A treaty can be made between only two States (*bilateral*) or three or more States (*multilateral*), and almost all of the Convention applies to both types. A *plurilateral* treaty is one made between a limited number of States

[3] The title of the author's *Modern Treaty Law and Practice* (MTLP) is therefore not really accurate, but sounded better to the publisher.

[4] See further, Aust MTLP, pp. 9–10. But Art. 66 (which is very different in nature from the other articles) does not reflect customary international law: see the judgment in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda), ICJ Reports* (2006), p. 6, para. 125; ILM (2006) 562.

[5] See p. 364 below. [6] See p. 382 below. [7] See p. 97 below.

with a particular interest in the subject matter.[8] A *constituent* treaty establishes and regulates an international organisation. A *universal* treaty is one intended to apply to all States. A *regional* treaty is self-explanatory.

To be a treaty, the agreement must have an international character. It will therefore have to satisfy the following criteria, and be:

Concluded between States

An agreement between a State and a multinational company, such as an oil concession, is not a treaty,[9] even if it says that it shall be interpreted in whole or in part by reference to rules of international law.[10] Treaties between States and international organisations, or between international organisations, are not covered by the Convention (Article 3), but are the subject of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 ('the 1986 Convention').[11] The 1986 Convention follows the 1969 Convention very closely.

In written form

Even though the original text of a treaty is usually typed or printed, it can also be contained in a telegram, telex, fax message or email, or an exchange of them.

Governed by international law

This means that there must be an intention to create obligations under international law.[12] The intention must be gathered from the terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention.[13]

Although a treaty can be in any form, government lawyers, in particular, use carefully chosen words to indicate that, rather than creating a treaty, the participants intend only to record their mutual *understandings*. Such instruments are an important means for doing business between States, and a large number, both bilateral and multilateral, are made every year covering a wide range of subjects.[14] Most are never published. Such instruments have been described by using various terms, including 'gentlemen's agreements', 'political agreements' and even

[8] See the Estonia Agreement, 1890 UNTS 176 (No. 32189); UKTS (1999) 74.
[9] *Anglo-Iranian Oil Company (United Kingdom* v. *Iran)* (Preliminary Objections), *ICJ Reports* (1952), p. 89, at p. 112; 19 ILR 507.
[10] See C. Greenwood, 'The Libyan Oil Arbitrations' (1982) BYIL 27–81. See p. 55 below on agreements between States which are governed by domestic law.
[11] ILM (1986) 543. It is still not yet in force, lacking as it does one State to ratify it. See p. 56 below.
[12] *Aegean Sea Continental Shelf* case, *ICJ Reports* (1978), p. 3, at pp. 39–44; 60 ILR 562.
[13] *Qatar* v. *Bahrain, ICJ Reports* (Jurisdiction and Admissibility) (1994), p. 112, paras. 26–7; ILM (1994) 1461; 102 ILR 1.
[14] See Aust MTLP, p. 489; and ILM (1982) 1.

'diplomatic assurances', but are now most commonly referred to by the abbreviation 'MOU' (see below), which is short for 'Memorandum of Understanding'.

Embodied in a single instrument or in two or more related instruments

The classic form of a single instrument treaty has for a long time been joined by treaties drawn in less formal ways, such as exchanges of (diplomatic) notes (or letters), which usually consist of one initiating note and one reply note. They can be on matters of national importance or the mundane. Although they are often self-standing, they can be supplementary to another treaty. In fact a treaty can consist of several instruments.[15]

Given any name

International instruments are not designated (named) systematically, and so the name, in itself, does not determine legal status. What is decisive is whether the negotiating States intend the instrument to be (or not to be) legally binding. Although it is reasonable to assume that an instrument called a Treaty, Agreement or Convention is a treaty, one should still examine the text to make quite sure. Most other names are problematic. Both the UN Charter and the Charter of the Commonwealth of Independent States 1991 (CIS)[16] are treaties, but the OSCE Charter of Paris 1990[17] and the Russia – United States Charter of Partnership and Friendship 1992[18] are MOUs. Calling an instrument a 'Memorandum of Understanding' does not establish its status, since – and most confusingly – some treaties are also given that name.[19] Only by studying the text can one (it is hoped) determine its legal status.

An exchange of notes (or letters) may constitute either a treaty or an MOU. If the exchange is intended to be a treaty, it is customary to provide expressly that it '*shall constitute an agreement between* our two Governments'; if intended as an MOU, it is usual to specify that the exchange *'records the understanding of* our two Governments' (emphasis added).

So, the name given to an instrument is not decisive. Treaties have been given a variety of names, including less common ones like Compact, Solemn Declaration, Protocol of Decisions, Platform, Concordat, Agreed Minute and Terms of Reference. In 1992, a treaty between Lithuania and Russia on the withdrawal of Russian forces from Lithuania was concluded with the simple title 'Timetable'.[20] It is quite common to refer to a treaty by reference to the

[15] See p. 410 below on the establishment of the Iran – US Claims Tribunal.
[16] 1819 UNTS 58 (No. 31139); ILM (1992) 138. [17] ILM (1991) 193. [18] ILM (1992) 782.
[19] See Aust MTLP, pp. 25–7.
[20] 1690 UNTS 395 (No. 29146). When the treaty was registered in the UNTS in 1992, the title was lengthened and improved to: 'Agreement on the rules of conduct and functioning of units, subunits and servicemen of the armed forces of the Russian Federation being withdrawn from the Republic of Lithuania.'

place where it was negotiated or concluded. For example, the Convention on International Civil Aviation 1944 is usually called 'the Chicago Convention.'

Signed?

Signature is not necessary to make an instrument a treaty, the Convention's definition of a treaty not mentioning signature. So, a treaty can be constituted by an exchange of third-person diplomatic notes, which, by custom, are initialled but not signed. And an unsigned, and uninitialled, instrument may be preferred for purely political reasons.[21]

MOUs

> Open covenants of peace, openly arrived at …[22]

The practice of States shows that they indicate their intention to conclude a treaty by consciously employing terminology such as 'shall', 'agree', 'undertake', 'rights', 'obligations' and 'enter into force'. These terms suggest strongly that the instrument was intended to be a treaty. In contrast, when States intend to conclude an MOU (which is merely shorthand for the most common name for a non-treaty: a Memorandum of Understanding), instead of 'shall' they use a term such as 'will'. Terms like 'agree' or 'undertake' (or the other treaty terms mentioned above) are avoided. Instead of 'enter into force' an MOU is expressed to 'come into operation' or 'come into effect'. Furthermore, most of the final clauses usually found in treaties, and the testimonium (the final, formal wording of a treaty beneath which the diplomatic representatives sign),[23] are omitted. Although, an MOU will normally be called a 'Memorandum of Understanding' or 'Arrangement', some, like the Helsinki Final Act 1975,[24] lack any indication in the title as to its status, but may have an express provision to the effect either that it is not eligible for registration (as a treaty) under Article 102 of the UN Charter, or that it is only 'politically binding'.[25] Problems can arise when States later differ on the status of an instrument, chiefly bilateral. It is therefore *essential* that the status is clearly understood during the negotiation; a note to the other side can be useful. (A useful table of treaty terms and their equivalents for MOUs is to be found at p. 496 of Aust MTLP.)

The over fifty Members of the Commonwealth tend to use MOUs, bilateral or multilateral, even in those cases where other States might employ a treaty.

[21] For an EU example, see UKTS (1994) 2.
[22] Woodrow Wilson, from his unworldly speech to the US Congress, 8 January 1918.
[23] See Aust, MTLP, pp. 441–4.
[24] ILM (1975) 1293, see the end. As to Art. 102, and the legal effect of registration or non-registration, see pp. 103–4 below.
[25] ILM (1987) 191, at p. 195, para. 101.

The Commonwealth schemes for mutual legal assistance in criminal matters and extradition are set out only in MOUs.[26] The Member States of the European Union also use MOUs,[27] as do most other States.

In US practice, use of non-treaty language does not necessarily preclude the instrument from being a treaty. To overcome some of the problems this caused in the defence field, the United Kingdom, Canada and Australia have concluded 'chapeau agreements' with the United States.[28]

Today, MOUs are employed in most areas of international relations – diplomatic, defence, trade, aid, transport, etc. In many cases, a treaty could be used, but, for the reasons given below, an MOU is used instead. Frequently, an MOU will supplement a treaty.

A common reason for preferring an MOU is *confidentiality*. Many arrangements, particularly in the defence field, must be kept confidential and are therefore found only in MOUs. Often, a defence treaty will be supplemented by numerous MOUs.[29] MOUs do not need elaborate final clauses or the formalities (international or national) which surround treaty-making. Most often, an MOU will become effective on signature. Not being a treaty, an MOU is generally not subject to any constitutional procedures, such as presentation to parliament, although that will depend on the constitution, laws and practice of each State. The lack of formalities also means that an MOU is easier to amend.

So, the entry for 'M.O.U.' in the Glossary at the end of the UN *Treaty Handbook*, is seriously misleading in that it demonstrates a misunderstanding of the true nature of an MOU.[30]

But are MOUs really treaties?

Some doubt has been expressed as to whether the distinction between MOUs and treaties is valid, since each may be said to embody an agreement of sorts.[31] But, this theoretical approach ignores the abundant and constant State practice over many decades. A State is free to conclude, or not to conclude, treaties. When one does not wish to conclude a treaty, this will be made clear by a deliberate and careful choice of words.[32]

But can an MOU sometimes have legal consequences? Although this will depend on the circumstances and the precise terms of the MOU, in exceptional cases the intention of a State as expressed in an MOU may have legal consequences. In general, when a clear statement is made by one State to another, and the latter relies upon that statement to its detriment, the first State is

[26] See p. 246, n. 5, below.
[27] See EU Doc. PESC/SEC 899 of 9 August 1996. See also the Opinion of the Advocate-General of the European Court of Justice in *France* v. *Commission* [1994] ECR I-3641; 101 ILR 29.
[28] See Aust MTLP, pp. 41–2.
[29] Ibid., pp. 44–5.
[30] Go to http://treaties.un.org >Publications > Treaty Handbook, p. 61.
[31] J. Klabbers, *The Concept of Treaty in International Law*, The Hague, 1996.
[32] See Aust MTLP, pp. 33–4, 489–92 and 495–6.

estopped from going back on its statement and thus may be liable for the consequences. Underlying this is the fundamental international law principle of *good faith*.[33]

Agreements between States governed by domestic law

States also contract with each other under domestic law, if, for example, the subject matter is exclusively commercial, such as the purchase of commodities in bulk. If a State leases land from another State for an embassy, there will be an instrument under domestic law, such as a lease, even though this may be granted pursuant to a treaty.[34]

Capacity to make treaties

Treaties are made between subjects of international law, that is, States; between States and international organisations; and between international organisations. Every State possesses the capacity to conclude treaties (Article 6). There is no difference in international law between a treaty concluded on behalf of a State and one concluded on behalf of a government or its ministries (including other agencies of the State), but generally not public bodies which have legal personality separate from that of the State).[35] A treaty entered into by a government or ministry binds the State, and changes of government or ministries will *not* affect its binding force on the State.[36]

Federations

Federal constitutions vary as to whether their constituent units have the power to enter into treaties. The Australian States, the Canadian provinces and the States of the United States have no such power.[37] Some federal constitutions authorise their constituent units to enter into treaties on certain matters, or if they have the specific consent of the federation.[38] But, in international law, ultimately such treaties will be the responsibility of the State.

Overseas territories[39]

Overseas territories do not have the power to conclude treaties in their own right, but they may be authorised by the State to which they belong to enter into treaties either ad hoc or in certain specific subject areas. But, the parent State

[33] On good faith and estoppel, see p. 8 above. See also Aust MTLP, pp. 53–5.
[34] See p. 114, n. 15, below. [35] See pp. 379–80 below and Oppenheim, pp. 346–8.
[36] See also p. 25 above.
[37] B. Opeskin, 'Federal States in the International Legal Order' (1996) NILR. 353–86, n. 45 and generally.
[38] Oppenheim, pp. 248–55. [39] See p. 29 above.

remains ultimately responsible for the performance of the treaties. The Hong Kong Special Administrative Region is a party to many treaties.[40]

Some multilateral treaties permit territorial entities that are not independent to be parties to the treaty. Article 305 of the UN Convention on the Law of the Sea 1982 permits certain self-governing associated states (that is overseas territories which have considerable of autonomy) and internally self-governing territories to become parties, provided they have competence over matters governed by the Convention, including competence to enter into treaties on such matters.[41]

International organisations

An international organisation has the capacity to conclude treaties if this is provided for in its constituent instrument or if it is indispensable for the fulfilment of its purposes.[42] There are now numerous treaties between international organisations and States (e.g. headquarters agreements), and between international organisations. The rules governing such treaties are set out in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986,[43] and which are essentially the same as the 1969 Convention.

Increasingly, multilateral treaties, especially in fields such as the environment, trade and commodities, provide for certain international organisations to become parties. The UN Convention on the Law of the Sea 1982 allows this if the Member States have transferred competence to the organisation (including the competence to enter into treaties) over matters governed by that Convention.[44]

Credentials and full powers

Credentials

Credentials are issued by a State, usually by the foreign minister, to a delegate to an international conference at which a multilateral treaty is to be negotiated, authorising him to represent that State. They are then presented to the host government or international organisation.[45] But the representative only has authority to negotiate and adopt the text of the treaty and to sign the final act.[46] He will need specific instructions from his government before he can sign the treaty itself, as well as full powers if these are required. Credentials and full powers can be combined in one document.

[40] See p. 374 below.
[41] UN Convention on the Law of the Sea 1982, 1833 UNTS 397 (No. 31363); ILM (1982) 1261; UKTS (1999) 81. The Cook Islands and Niue are parties (see p. 30 above). See also p. 353 below about WTO membership.
[42] *Reparations*, Advisory Opinion, *ICJ Reports* (1949), p. 174; 16 ILR 318.
[43] ILM (1986) 543. See n. 11 above. [44] See Art. 305(1)(f) and Annex IX.
[45] See R. Sabel, *Procedure at International Conferences*, 2nd edn, Cambridge, 2006, pp. 58–67.
[46] See p. 59 below.

Full powers

Article 2(1)(c) defines 'full powers' as:

> a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.

Full powers are simply written evidence that the person named in them is authorised to represent the State in performing certain acts in relation to the treaty, and normally only for its adoption, authentication and signature. Their production is a fundamental safeguard for the other representatives, and for the depositary of a multilateral treaty, that they are dealing with a person with the necessary authority. But, before doing any act covered by full powers, the holder should still obtain specific instructions from his government.

It is only those acts that are actually specified in the full powers that will be authorised. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty if he produces appropriate full powers or if it appears from the practice of the States concerned, or from other circumstances, that their intention was to *dispense* with full powers (Article 7(1)).

The general trend towards rather more informality in treaty-making does not mean that full powers are now seldom needed, although there is a tendency to dispense with them for bilateral treaties and, in practice, full powers are usually dispensed with for an exchange of notes. Full powers are required to sign a multilateral treaty, unless the negotiating States agree to dispense with them. The UN Secretary-General will insist on full powers being produced for the signature of treaties for which he is to be the depositary. Heads of State or government or foreign ministers (the 'Big Three') do *not* need full powers to sign or ratify a treaty (Article 7(2)).

A State may issue its permanent representative to an international organisation, especially the United Nations, with continuing full powers, known as *general full powers*.

(For full powers procedure, see Aust MTLP, pp. 80–3.)

Adoption and authentication

Adoption

Once the negotiations are complete, it is necessary for the negotiating States to adopt the text. A bilateral treaty is often adopted by initialling the text. The act of adoption does *not* amount to consent to be bound by the treaty. Unanimity for adoption (Article 9(1)) is now restricted to bilateral treaties or treaties drawn up by only a few States (plurilateral treaties). Adoption at an international conference requires a two-thirds vote of the States 'present and

voting' (which excludes abstentions) unless, by the same majority, they decide to apply a different rule (Article 9(2)). In practice, consensus, or 'general agreement', is now the norm for the adoption of most multilateral treaties.

Consensus

Consensus is often incorporated in the rules of procedure of an international conference.[47] Its three main features are that it is not the same as unanimity, a State can join a consensus even if it could not vote in favour of the treaty; and it is not incompatible with 'indicative voting' (a straw poll). It has been expressed succinctly as 'the absence of any formal objection'.[48] Even when rules of procedure provide for adoption by a specified majority, it is normal for there first to be an attempt to reach consensus, voting being used only as a last resort.

Authentication

Before a negotiating State can decide whether to consent to be bound by a treaty, it needs to have the adopted text thoroughly checked and cleaned up (the *toilette finale*), and then authenticated by a document certifying that it is the definitive and authentic text and thus not susceptible to alteration. Initialling the text of a *bilateral treaty* is normally regarded as amounting to both adoption *and* authentication, at least if the treaty is to be in only one authentic language. However, in practice each State is free to suggest technical, or even substantive, changes at any time before signature.

The business of negotiating a *multilateral treaty* is often a confused affair. In the final hectic stages, errors and inconsistencies invariably creep into the text. It is not unusual for the basic negotiating text to be in English, and only at the end of the conference will some of the other language texts be available in final form. There is then a need not only to check the adopted text for typographical inconsistencies and errors, but also to check the translations into other authentic languages.[49] It is common for a treaty adopted within an international organisation to be authenticated by a resolution by an organ of the organisation, such as an assembly, or by an act of authentication performed by the president of the assembly or the chief executive officer of the organisation.[50]

[47] See generally R. Sabel, *Procedure at International Conferences*, Cambridge, 2nd edn, 2006, pp. 335–46.

[48] Article 161(8)(e) of the UN Convention on the Law of the Sea 1982, 1833 UNTS 397 (No. 31363); ILM (1982) 1261; UKTS (1999) 81.

[49] See also p. 102 below.

[50] See Aust MTLP, p. 91 for UN practice.

Final act

A final act is a formal statement or summary of the proceedings of a diplomatic conference. Treaties adopted by the conference and other related documents, such as resolutions and agreed or national interpretative statements, will be attached to the final act. It is usual for each negotiating State to sign the final act, although this is optional, and anyway signature does *not* commit the State to sign or ratify a treaty attached to the final act. Full powers are not needed to sign a final act, the credentials of the representative being enough. The Convention mentions final acts only in Article 10(b).

The Final Act of the Helsinki Conference on Co-operation and Security in Europe 1975 is an MOU. There is no treaty attached. But, unlike most final acts, it contains many provisions of great (albeit political) importance.[51]

Consent to be bound

A 'contracting State' is one that has consented to be bound by a treaty, even though it may not yet have entered into force (Article 2(1)(f)). A 'party' is a State that has consented to be bound by a treaty *and* for which the treaty is in force (Article 2(1)(g)). At that point, and only at that point, is the State bound by the treaty (Article 26). To consent to be bound is therefore the most significant act that a State can take in relation to a treaty. Although two steps are necessary to become a party (consent to be bound plus entry into force) sometimes they take place simultaneously.

A State can express its consent to be bound by signature, by an exchange of instruments constituting a treaty, by ratification, by acceptance or approval, by accession or by any other agreed means (Article 11). Either the treaty will specify how consent is to be expressed or it will be implicit.

Signature only

Provided that a treaty does not need prior parliamentary approval or new legislation, signature alone is quite a common means by which a treaty between two or a few States enters into force.[52] It is normally evident from the terms of the treaty when signature expresses consent to be bound (Article 12(1)(a)), the entry-into-force clause providing that the treaty shall enter into force on the date of signature, or on the date of second or last signature, or sometimes at a later date.

'Open for signature'

Many multilateral treaties, especially UN treaties, provide that they will be 'open for signature' until a specified date, after which signature will no longer be possible. Thereafter, a State may only accede (see 'accession' below).

[51] ILM (1975) 1293. And see pp. 53 above and 178 below. [52] See Aust MTLP, pp. 96–100.

Witnessing

Because of the political importance of some treaties, such as the Camp David Accords 1979 or the Dayton Agreement 1995, the signing may be witnessed by Heads of State of third States, or their heads of government or foreign ministers. But the signature of a witness has no legal effect. In itself, it will *not* make the witness's State a guarantor of performance of the treaty.

Exchange of instruments

It is the act of exchange that constitutes consent to be bound if the instruments so provide, or the States so agree (Article 13). The exchange usually takes the form of an exchange of notes or letters.

Ratification

Ratification is 'the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty' (Article 2(1)(b)). Although parliamentary approval of a treaty may well be required – and be referred to, most misleadingly, as 'ratification' – it is a quite different, purely *domestic*, process. Ratification is an *international* act. It consists of (1) the execution of an instrument of ratification by or on behalf of the State and (2) either its exchange for the instrument of ratification of the other State (bilateral treaty) or its lodging with the depositary of the treaty (multilateral treaty).

The normal reason for requiring ratification is that, following signature, one or more of the negotiating States needs time before it can give its consent to be bound. The treaty may require new implementing legislation, which should be done before the treaty enters into force for the State. Even if no legislation is needed, the constitution may require parliamentary approval of the treaty or some other procedure, like publication, before the State can ratify. Or, the government of the State may just need time to consider the political and legal implications of becoming a party.

It is another common misconception that once a treaty has been ratified it is then legally binding on the ratifying State. However, the situation is quite different from the coming into force of legislation. Ratification does not make the treaty binding on the State *unless and until the treaty has entered into force for that State*. When that happens, the State becomes a 'party' to the treaty (Article 2(1)(g)). So, whether ratification will bring the treaty into force for the ratifying State depends entirely on the provisions of the treaty.[53]

[53] See pp. 73–4 above.

Who can sign the instrument of ratification?

An instrument of ratification has to be signed on behalf of the State. Usually either the Head of State, head of government or foreign minister (the 'Big Three') sign. Anyone else needs full powers in order to sign the instrument.

Acceptance or approval

Consent to be bound can be expressed by 'acceptance' or 'approval' under similar conditions to those which apply to ratification (Article 14(2)). There is no substantive difference between acceptance or approval and ratification. It is now common for multilateral treaties to provide that signature shall be 'subject to ratification, acceptance or approval'. The rules applicable to ratification apply equally to acceptance or approval, and, unless the treaty provides otherwise, acceptance and approval have the same legal effect as ratification.

Accession

Accession is the primary means for a State to become a party to a multilateral treaty if, for whatever reason, it is unable to sign it. The treaty may restrict signature to certain, or a specified category of, States, or a deadline (if any) for signature may simply have passed. No State has a right to accede unless the treaty so provides or the parties agree to it (Article 15)). Multilateral treaties that are subject to ratification – which is most of them – will almost always include an accession clause; and the right to accede will usually be exercisable even *before* the entry into force of the treaty. This is commonly done by making entry into force conditional on the deposit of a certain number of instruments of ratification (or acceptance or approval) *or* accession. The rules on deposit of instruments of ratification apply also to instruments of accession, which have the same legal effect as instruments of ratification.

Any other agreed means

Article 11 is a good example of the flexibility of the law of treaties in providing that the consent of a State to be bound may be expressed by 'any other agreed means'. Thus, it is possible for a treaty to be adopted, without signature[53] or any other particular procedure, and to enter into force *instantly* for all the adopting States. The treaty which established the Preparatory Commission of the Comprehensive Nuclear Test-Ban Treaty 1996 (CTBT) was adopted by a resolution of the States which had signed the CTBT and was binding in international law immediately without any further action by those States.[54]

[53] See p. 53 above. [54] UKTS (1999) 46.

'Signatory', 'party' and 'adherence'

All too often one reads or hears that a State is a 'signatory' of a treaty, with the implication that it is a party. Signature is only one way of consenting to be bound, and is often subject to ratification. But, even when a treaty has been ratified, that does not mean that it has entered into force, so making the ratifying State a party. 'Signatory' is therefore a loose and misleading term, and should be avoided except when it is clear from the context that it refers only to the fact that a State has signed, and nothing more. Similarly, one should avoid the English colloquial term 'signed up to' which *may* imply that the State is bound, even if it is not. It may have only signed or ratified, and the treaty may not yet have entered into force. Therefore, a slightly more acceptable generic alternative may be to say that the State has 'adhered' to the treaty. But this may lead to still more misunderstandings, although the term will sometimes be used in this book.

(*Note*: unless otherwise indicated, in this book the terms 'ratification', 'consent to be bound' and 'adherence' are used for simplicity only. They cover also approval, acceptance and accession.)

The 'all States' and 'Vienna' formulas

During the Cold War, problems arose over treaties which provided that 'all States' could become parties. There were some entities over which there were disputes as to whether they were States, for example, the German Democratic Republic (East Germany), North Korea and North Vietnam.[55] So, the so-called 'Vienna formula' was included in new treaties. Article 81 of the Convention is typical: a disputed entity was entitled to become a party if it was a member of at least one of a number of specified international organisations. There has been no need for such a formula since 1973.[56] Many older treaties will still have the formula, but in most cases this will, as in the past, cause no problem. 'All States' clauses should therefore now be used for all treaties that are intended to have universal application.

Rights and obligations before entry into force

In the period before the entry into force of a treaty, the acts of adopting, signing and ratifying will create certain rights and obligations for the negotiating States. The most obvious relate to those matters that have to be dealt with so that the treaty can enter into force. Thus, from the adoption of the text the provisions on

[55] See pp. 16–17 above.

[56] See M. Wood, 'The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents' (1974) ICLQ 791, at 816–17; UN Juridical YB (1974) 157 and (1976) 186.

depositary functions, authentication, consent to be bound, reservations, and other matters arising necessarily before entry into force, will apply (Article 24(4)).

Obligation not to defeat the object and purpose of a treaty before its entry into force

Article 18 requires a State 'to refrain from acts which would defeat the object and purpose of a treaty' before its entry into force for that State. When the treaty is subject to ratification, this obligation lasts until the State has made clear its intention not to become a party. This is what the United States did when it famously 'unsigned' the Statute of the International Criminal Court by sending a note to the UN Secretary-General saying that it did not intend to become a party.[57] When a State has already ratified, the Article 18 obligation continues pending entry into force of the treaty, provided that event is 'not unduly delayed'.

But, there is uncertainty as to the extent of the obligation, and one can determine whether the obligation applies only by examining the treaty in the light of all the circumstances. There is virtually no practice. Nevertheless, it is sometimes argued (especially by students) that a State that has not yet ratified a treaty must, in accordance with Article 18, nevertheless comply with it, or at least do nothing inconsistent with its provisions. This is clearly wrong because the act of ratification would then have no purpose since the obligation to perform the treaty would not then be dependent on ratification. All that the signatory State must not do is anything which would affect its *ability* to comply fully with the treaty once it has entered into force; it does not have to abstain from all acts which would be prohibited after entry into force.[58]

Withdrawal of consent to be bound before entry into force

A State which has consented to be bound may nevertheless withdraw its consent before the treaty enters into force. This does occasionally happen.[59]

Development of treaties

There is sometimes a need for provisions which allow for the development of a legal regime created by a treaty. This can be done in two main ways: by framework treaties and by legally binding measures adopted by organs of international organisations. The term 'framework' is used particularly in connection with environmental treaties. A *framework treaty* is a multilateral treaty which is no different in its legal effect from other treaties, but which provides a

[57] See *UN Multilateral Treaties*, Ch. XVIII.10, note to US entry.
[58] For a fuller discussion, see Aust MTLP, pp. 117–19.
[59] *UN Depositary Practice*, paras. 157–9.

framework for later, and more detailed, treaties (sometimes called Protocols) or other things, such as guidelines, that elaborate the principles declared in the treaty.[60]

It is not unusual when establishing an international organisation for the constituent instrument to give one of its organs the power to impose on the Member States legally binding *measures* by which the object and purpose of the organisation can be more effectively achieved. If the Security Council determines under Chapter VII of the UN Charter that there is a threat to international peace and security, it can impose measures (e.g. trade sanctions) to try to maintain or restore international peace and security.[61] Article IX of the Antarctic Treaty 1959 provides for the adoption of measures in furtherance of the principles and objectives of the Treaty.[62] Similar provisions are found in fisheries treaties.[63]

Reservations

Article 2(1)(d) defines a reservation as:

> a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.

Reservations must be distinguished from 'derogations', which are statements authorised by the treaty by which a party is able to exclude certain provisions in their application to it during a particular period, such as a public emergency.[64]

Bilateral treaties

A reservation cannot be made to a bilateral treaty, all the terms of which must be agreed before it can bind the parties. To make a 'reservation' to a bilateral treaty which has not yet entered into force therefore amounts to a request for a modification of the text. So, the treaty cannot become binding unless and until the modification is agreed. The reservations regime of the Convention is therefore inapplicable. The United States has a long history of making its ratification of bilateral treaties conditional on modifications being made.[65]

Multilateral treaties

A State may, by means of interpretative declarations or reservations, seek to fine-tune or adjust the way in which a multilateral treaty will apply to it. The

[60] See B, B & R, p. 17; and the WHO Framework Convention on Tobacco Control 2003, see esp. Art. 7 (2302 UNTS 166 (No. 41032); ILM (2003) 518).
[61] See p. 195 below. [62] See pp. 329–30 below. [63] See pp. 297–99 below.
[64] See p. 228 below. [65] See Aust MTLP, pp. 131–2.

need for either derives from the nature of the multilateral treaty-making process. Negotiating States have many different constitutions, legal systems, cultures, languages and religions, and differing national policies. These pose problems for the successful negotiation of even a regional, let alone a universal treaty. Reaching agreement requires many compromises. Now that most multilateral treaties are adopted by consensus,[66] inevitably some of the negotiating States will be dissatisfied with at least some aspects of the text. But, for political reasons, a State may be reluctant to stand in the way of reaching consensus, and may even sign a treaty despite its unhappiness at the result. Whether it will ratify the treaty must then be problematic.

Interpretative declarations

Interpretative declarations are as widely used as reservations. Their purpose is often to establish an interpretation of a particular provision of a treaty that makes that provision acceptable to the State concerned. Often, it is used merely to make the provision consistent with existing domestic law. If other parties do not make conflicting declarations or indicate their disagreement, they can be regarded as having tacitly accepted it. When acceding to the Convention, Syria declared that in Article 52 (Coercion) the reference to 'force' included economic and political coercion. Other parties formally rejected this.[67] The vast majority of interpretative declarations do not produce any response.[68]

Disguised reservations

As the definition of reservation makes clear, it does not matter how a declaration is phrased or what name is given to it – one must look at the *substance*. On ratification of the Chemical Weapons Convention 1992,[69] the United States stated that, for the purposes of the Annex on Implementation and Verification, it would be a 'condition' that no sample collected by an inspection team could be removed from the United States for analysis. The Annex does not envisage any such restriction. The statement went beyond mere interpretation and amounted to a reservation.[70]

Reservations generally *not* prohibited

A State may seek to *adjust* certain provisions of a treaty *in their application to itself*. Sometimes, as a condition of its approval of ratification, its legislature will require such adjustments. But, except perhaps for some human rights treaties, reservations are generally not so numerous or so extensive as to jeopardise the

[66] See p. 58 above. [67] *UN Multilateral Treaties*, Ch. XXIII.1.
[68] As to other declarations made on ratification of the Convention, see Sinclair, pp. 63–8.
[69] 1974 UNTS 317 (No. 33757); ILM (1993) 800; UKTS (1997) 45.
[70] See *UN Multilateral Treaties*, Ch. XXVI.3.

effectiveness of a treaty. Despite the impression one may get from the immense amount of writing on the subject, most reservations can be dealt with by application of the provisions in Articles 19–23.

Nor is there anything inherently wicked or even undesirable in formulating a reservation. It would be quite wrong to think that the world is divided into reserving States and objecting States. Many States make reservations, and most are not objected to. Many States have made reservations to the Convention on the Rights of the Child 1989, only some of which were objected to.[71]

Article 19 states the basic rule that a State *may* formulate a reservation *unless*:

(*a*) the reservation is prohibited by the treaty. (This is increasingly common for treaties, particularly on human rights, or those that result from a 'package deal', so that they often provide expressly that reservations are not permitted.)
(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made. (Typically, a reservation may be made in respect of one or more specified articles, such as an article providing for the submission of disputes to the International Court of Justice.);[72] or
(*c*) in cases not falling under subparagraphs (*a*) or (*b*), the reservation is incompatible with the object and purpose of the treaty. (This is known as the 'compatibility test'.)

Although only paragraph (a) expressly uses the term 'prohibited', paragraphs (b) and (c) in effect specify the other situations in which reservations are prohibited. But, whereas it is relatively easy to determine whether a reservation is prohibited under paragraphs (a) or (b), when a treaty is silent about reservations it can be difficult to assess whether a reservation passes the compatibility test.[73] Many differing views have been expressed as to how the test should be applied, especially to human rights treaties,[74] and the practice of States is patchy and uncertain. Today, as treaties become longer and more complex, identifying the object and purpose of a treaty like the UN Convention on the Law of the Sea 1982[75] is virtually impossible given its 320 Articles and nine annexes, unless perhaps one breaks that treaty down into its various subjects, such as the high seas, straits, the continental shelf, etc.

Acceptance of, and objection to, reservations

Even when a reservation is not prohibited under Article 19(a), (b) or (c), other contracting States can still object to it for any reason of law *or* policy. By

[71] See *UN Multilateral Treaties*, Ch. IV.11.
[72] See the TIR Convention 1975, 1079 UNTS 89 (No. 16510).
[73] There is a *considerable* literature. See, for example, L. Lijnzaad, *Reservations to UN Human Rights Treaties*, Dordrecht, 1995.
[74] See p. 70 below.
[75] 1833 UNTS 397 (No. 31363); ILM (1982) 1261; UKTS (1995) 81.

formulating a reservation, the reserving State is consenting to be bound subject to a condition. It makes an offer which is subject to acceptance by the other contracting States. Therefore, the reservation will not be legally effective in relation to another contracting State unless that State has accepted it either expressly or by necessary implication. (The only exceptions are where a reservation has been expressly authorised by the treaty (Article 20(1)).) But, in practice, most objections are made on the ground that the reservation is prohibited, and usually because it fails the compatibility test (see the following paragraphs).

'Plurilateral treaties'

This term describes a treaty negotiated between a limited number of States with a particular interest in the subject matter. Article 20(2) provides that if it appears from the object and purpose of the treaty that the application of the treaty in its entirety, and between all the parties, is an essential condition for the consent of each of them to be bound by it, any reservation will require the acceptance of *all* the parties. Examples might include the Antarctic Treaty 1959, which had only fifteen negotiating States and created a special regime, for which the integrity of the Treaty is vital.[76]

Constituent instrument of an international organisation

Where a treaty forms the constituent instrument of an international organisation, it is also essential to preserve its integrity. Article 20(3) provides that a reservation to that instrument will require the acceptance of the competent organ of the organisation – usually the assembly of the members – unless the constituent instrument otherwise provides.

All other cases

Before 1951, generally the rule was unanimity: a reservation was only effective if it had been accepted by all the negotiating States, expressly or tacitly, and usually *before* signature. This changed after the 1951 International Court of Justice advisory opinion on certain reservations which had been made to the Genocide Convention 1948.[77] Article 20(4) sets out the residual rules to be applied when one is *not* dealing with an expressly authorised reservation, a plurilateral treaty or the constituent instrument of an international organisation. The rules were intended to be a flexible means of accommodating the different needs of the reserving State and the other contracting States:

(*a*) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

[76] See p. 328 below. [77] *ICJ Reports* (1951), p. 15; 18 ILR 364.

(*b*) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
(*c*) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

It is rare for a contrary intention to be 'definitely' (explicitly) expressed (paragraph (b)), and Article 20(5) provides that acceptance of a reservation can be *tacit*. The combined effect of Article 20(5) and paragraph (c) is that the reserving State will become a contracting State unless *all* the other contracting States (1) object to the reservation *and* (2) explicitly object to the reserving State becoming a contracting State. *This is most unlikely ever to happen.* The Convention puts the onus on an objecting State both to express its objection and, if it does not want the treaty to enter into force between it and the reserving State, to say so explicitly. But this did not take sufficiently into account the actual practice of States. Very few States object even when a clearly objectionable reservation has been made.

It is thus possible that not every party to a multilateral treaty will be bound by the treaty to every other party. A reserving State A may be a party to a treaty in relation to State B (which raised no objection), but not State C (which did raise objections, and said expressly that it precluded the treaty entering into force between it and State A), although States B and C may themselves be mutually bound. However, although such a result is not surprising if the reservation is not prohibited, there is good reason to believe that the scheme of Article 20(4) and (5) does *not* apply when the reservation is prohibited, including when it has been objected to even by one contracting State on the ground that it fails the compatibility test (see below).

The legal effects of reservations and of objections to reservations

Article 21(1) sets out the rules governing the legal effects of a reservation which has been established (i.e. in accordance with the requirements of Articles 19, 20 and 23 (see below)) with regard to another party: that is to say a reservation which is legally effective in relation to another party, not being prohibited under Article 19(a), (b) or (c) or objected to by the other party. Such a reservation:

(*a*) modifies for the reserving State *in its relations with that other party* the provisions of the treaty to which the reservation relates to the extent of the reservation; and
(*b*) modifies those provisions to the same extent for *that other party* in its relations with the reserving State. [emphasis added]

Thus, a party is bound only to the extent to which it has agreed to be bound – so that if a party has made an effective reservation it will operate reciprocally

between it and any other party which has not objected to it, modifying the treaty to the extent of the reservation for them both in their mutual relations. But, as between the other parties, the treaty is unaffected (Article 21(2)).

Unresolved issues

The main unresolved issue is whether the regime constructed by Articles 20 and 21 applies to *all* reservations. Certainly, it works satisfactorily with respect to permissible reservations. But severe problems arise if one attempts to apply it to reservations prohibited under Article 19(a), (b) or (c). Nevertheless, there is a view that there is nothing in the scheme that precludes its application to a prohibited reservation; provided it has been accepted under Article 20(4). This could be done under Article 20(5), and (as pointed out) is usually done tacitly, the reserving State becoming a party in relation to those States that do not object.

But, the argument must necessarily seek to draw a distinction between reservations prohibited by Article 19(a) and (b) and those prohibited by (c), on the basis that the question whether a reservation passes the compatibility test is a matter for each contracting State. Yet, Article 19 makes no such distinction. It authorises the formulation of reservations subject to three exceptions. It is most unlikely that Articles 20 and 21 were intended to apply to reservations which Article 19 says may not be made. It is not argued that, if a treaty prohibits the making of reservations, or allows only specified ones, a contracting State could nevertheless accept (perhaps even tacitly) a prohibited reservation. The rules in Article 21 on the legal effects of reservations refer to reservations 'established' in accordance with Articles 19, 20 and 23, and it is hard to see how one could validly establish a reservation when it is prohibited.

When a treaty is silent about reservations, the determination whether a reservation passes the 'compatibility test' is not at all easy, but there is no reason why the reservation should be treated differently from the other classes of possibly prohibited reservations. The compatibility test should be applied objectively, even if in most cases it has to be applied by States rather than by a court, a very common situation in international law. If a reservation has been objected to by even one contracting State for failing the test, the reserving State has an obligation to consider the objection in good faith. If the two States (there may of course be more) cannot agree, the question then becomes a matter of concern to the other contracting States, whether or not they have objected.

Objections to reservations show a divergence of views by States on the question of whether a *prohibited* reservation can be disregarded. Some do not say what effect its objection would have. Some say their objections do not preclude the entry into force of the Convention between them and the reserving State, so leaving ambiguous the effect of the reservation on its obligations under the Convention.

Some say that, although their objections do not preclude the entry into force of the Convention between them and the reserving State, it would do so without

the latter benefiting from the reservation. This ignores the plain fact that the reserving State had made it clear that it was willing to be bound only subject to a condition. The better view is that, if one or more contracting States have objected to the reservation as being prohibited, it is the reserving State that must decide whether or not it is prepared to be a party without the reservation; and until it has made its position clear it cannot be regarded as a party. There is an express provision to this effect in the European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport 1970 (AETR II Agreement).[78]

Reservations to human rights treaties[79]

In the case of a human rights treaty, there may be weighty political reasons why a State is reluctant to object to the entry into force of the treaty between it and a reserving State, even when it has objected to the reservation. Most objecting States are reluctant to take the position that the treaty will not be in force between it and the reserving State unless and until the reservation is withdrawn. In fact, when faced with a questionable reservation to a human rights treaty, most parties just stay silent. And those that do formally express views frequently take differing positions. There have been a variety of responses, particularly by Western European States, to general reservations to human rights treaties made by the United States to the effect that nothing in the treaty requires or authorises legislation or other action by the United States that would be prohibited by the Constitution of the United States as interpreted by the United States (the 'constitutional reservation'). Another pernicious general reservation is one that seeks to subordinate a human rights treaty to the domestic law of the reserving State, in particular to Sharia law (the 'religious reservation').

There is a related question: if a State has made a prohibited reservation, is it then bound by the treaty, but without the benefit of the reservation? In *Belilos*, the European Court of Human Rights held that a declaration by Switzerland to the European Convention on Human Rights (ECHR) was an invalid reservation, but that it could be disregarded, Switzerland remaining bound by the ECHR in full.[80] However, *Belilos* needs to be seen in the light of the particular circumstances. The issue arose within a regional system dedicated to adherence to common social and political values. The ECHR has a special character and must be interpreted in the light of contemporary conditions, its enforcement machinery and its object and purpose.

[78] See p. 71, n. 84, below.

[79] There is a *huge*, and increasing, literature. For one survey, see J. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out*, BIICL, London, 1997.

[80] ECHR Pubs. Series A (Preliminary Objections), vol. 132 (1988); (1988) 10 EHRR 466; 88 ILR 635. See also *Loizidou* (Preliminary Objections) ECHR Pubs. Series A, vol. 310 (1995); (1995) 20 EHRR 99; 103 ILR 621; and S. Marks, 'Reservations Unhinged: the *Belilos* Case before the European Court of Human Rights' (1990) ICLQ 300.

Treaty-monitoring bodies

The problem of determining whether a reservation is permissible, and in particular whether it passes the compatibility test, is further compounded by the absence in most cases of a standing tribunal or other organ with competence to decide such matters. Although the European Convention on Human Rights, the American Convention on Human Rights and the African Charter of Human and People's Rights[81] each have a permanent court, most modern universal human rights treaties establish no more than a committee of (albeit of mostly distinguished and independent) experts to monitor the way in which the parties carry out their obligations. The best known is the Human Rights Committee established by the International Covenant on Civil and Political Rights 1966.[82] The Committee is not empowered to give decisions binding on the parties. Nevertheless, in its General Comment No. 24 in 1994,[83] the Committee said that it must necessarily take a view as to the status and effect of a reservation if this is required in order for it to carry out its functions, in particular considering reports from parties. The Committee gave the impression that it could in such circumstances make an authoritative determination. This view has been severely criticised. It, and similar committees, cannot be equated to international courts or tribunals that reach decisions binding on the parties after hearing full legal argument on the facts and the law.

Some ways of minimising the problem of reservations

If express provision is made in each new treaty, many of the problems of reservations may be avoided. The celebrated European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport 1970 (AETR II Agreement) provides that a non-authorised reservation shall be deemed to be accepted if, within six months of being notified of it, *none* of the parties has opposed it. Otherwise, the reservation shall not be admitted, and, if it does not withdraw the reservation, the reserving State shall not become a party.[84]

A rather more recent formulation is found in the FAO Compliance Agreement 1993:[85] reservations become effective only upon *unanimous* acceptance by all the parties; parties not having replied within three months from the date of notification are deemed to have accepted; *failing unanimous acceptance, the reserving State does not become a party to the Agreement*. In most cases, acceptance by the other parties is deemed. If it is not, then the reserving State

[81] See p. 232 below. [82] See p. 232 below.
[83] See ILM (1995) 839; 107 ILR 54. The text, and the observations of France, the United Kingdom and the United States, are in J. Gardner (n. 79 above), pp. 185–207.
[84] 993 UNTS 143 (No. 14533), see Art. 21(2).
[85] 2221 UNTS (No. 39486); ILM (1994) 968; B&B Docs. 645.

can always withdraw the reservation or deposit a fresh acceptance without the reservation.

Procedure

A statement made during the negotiation of the treaty or on its adoption, even if recorded formally, has to be made again if it is to be effective as a reservation. If it is made on signature of a treaty that is subject to ratification, etc., to be effective it must be formally confirmed by the reserving State when expressing its consent to be bound (Article 23(2)).

Since a reservation can be withdrawn, it may in certain circumstances also be possible to modify, or even to replace, a reservation, provided the result is to *limit* its effect. Some treaties make express provision for this.[86]

Late reservations

Although the Convention does not authorise the making of reservations other than when a State consents to be bound, if the UN Secretary-General is the depositary of the treaty and he subsequently receives a late reservation (and provided the treaty either does not prohibit reservations, or the substance of the late reservation is authorised specifically by the treaty) he will circulate it. If no objection is received within twelve months, he will treat it as a valid reservation. The Secretary-General's practice deviates from the strict requirements of the Convention, but reflects the fact that if *no* State objects to the late reservation, it would be unrealistic to reject it. The same practice is applied by the Secretary-General when a reserving state withdraws an original reservation and tries to substitute a new or modified one. He will then circulate the text. If *no* objection has been received within twelve months, he treats this as tacit acceptance of the new or modified reservation. This practice has been criticised, although there should be no objection if a State only wishes to *restrict* the scope of the original reservation.

The International Law Commission study

Since 1993, the International Law Commission (ILC) has had on its agenda 'Reservations to Treaties', for which Professor Alain Pellet was appointed Special Rapporteur. Since 1995, he has so far produced some thirteen reports. Instead of proposing amendments to the Convention, early on the ILC decided to produce a draft set of 'Guidelines' for consideration by the Sixth Committee of the UN General Assembly.[87] In August 2008, the ILC produced more draft

[86] See Article 13(2) of the European Convention on the Suppression of Terrorism 1977, 1137 UNTS 93 (No. 17828); ILM (1976) 1272; UKTS (1978) 93.

[87] See his reports, and those of the ILC, at www.un.org/law/ilc/.

Guidelines. At its 2008 session, the General Assembly asked States to give their views on, in particular, the specific issues identified in the ILC's 2008 report on reservations to treaties and invited governments to provide by January 2010 information to the ILC on their practice with regard to reservations (see A/RES/63/123, paras. 1, 3 and 4). It may be some time before the General Assembly decides finally what to do.

Entry into force

A treaty is not like national legislation which, once in force, applies to all within the jurisdiction to whom it is directed. A treaty is much closer to a contract: even when it has entered into force it is in force *only for those States that have consented to be bound by it*. Each of them is then a 'party' to the treaty (Article 2(1)(g)), and should never be referred to by the ambiguous term 'signatory'.[88] But, when a State expresses its consent to be bound, that does not necessarily mean that the treaty will enter into force for it at that time; it depends on whether the treaty is already in force or whether further consents are needed to bring it into force.

Express provisions

A treaty enters into force in such manner and on such date as provided for in the treaty or as the negotiating States may agree (Article 24(1)). There are various ways:

1 On a date specified in the treaty.
2 On signature by both or all the States. This is common for bilateral treaties that do not have to be approved by parliaments or require new legislation.[89]
3 On ratification by both (or all) States.
4 Conditional on ratification by certain States specified by name or category. The Comprehensive Nuclear Test-Ban Treaty 1996 cannot enter into force until the forty-four States named in Annex 2 to the Treaty have ratified.[90]
5 On ratification by a minimum number of States.
6 As in 4 or 5, but the minimum number of States must also fulfil other conditions, often financial or economic, designed to ensure that the treaty does not enter into force until all States that have a significant interest in the subject matter have ratified.[91]
7 On the exchange of instruments of ratification (bilateral treaties).
8 On notification by each State to the other (or others) of the completion of its constitutional requirements. This is more common for bilateral treaties.
9 In the case of a treaty constituted by an exchange of notes, on the date of the reply note, although a further stage (such as in 8) is frequently added.

[88] See p. 62 above. [89] See, for example, p. 77, para. (2), below. [90] ILM (1996) 1443.
[91] See pp. 313–14 below on the Kyoto Protocol.

Date of entry into force

For *multilateral* treaties it is usual to provide that entry into force will be after a specified period following the deposit of the last instrument of ratification needed to bring the treaty into force (see Article 84(2) of the Convention itself). The range is generally from thirty days to twelve months.

When a State ratifies after the entry into force of the treaty, it will enter into force for that State on the date of deposit of the instrument of ratification or, more usually, after a specified period, which is usually the same period as for the original entry into force of the treaty.

Provisional application

The subject of Article 25 is sometimes loosely described as provisional 'entry into force', but it is concerned only with the *application* of a treaty on a provisional basis pending its entry into force. The growing need for provisional application clauses is caused by the need to bring into force early those treaties (or at least certain substantive parts) which are subject to ratification and the problem of achieving that objective. This is especially so for treaties which require a substantial number of ratifications for entry into force.[92]

Preparatory commissions

An approach, which is increasingly employed, is to establish a preparatory commission ('prepcom'). This is usually a body composed of all the negotiating or signatory States which is entrusted with the task of making the necessary arrangements for when the treaty enters into force. The need for a prepcom is particularly acute when the treaty establishes an international organisation.[93]

Treaties and domestic law[94]

Once a treaty has entered into force for a State, it does not necessarily become part of its law.[95] Treaty law and domestic law operate on different legal levels. A treaty creates rights and obligations binding on States and other *international* legal persons. But, when a treaty confers rights or imposes obligations on natural or legal persons, the rights can be given effect only if they have been made part of the domestic law of a party.

[92] See Aust MTLP, pp. 172–5.
[93] See pp. 178–83 below, and the example of the International Criminal Court Prepcom, UN Doc. A/CONF.183/C.1/L.76/Add.14; and p. xxv above.
[94] As to international law and domestic law, see pp. 11–12 above.
[95] Cf. customary international law, pp. 6–8 above.

Duty to perform treaties

Article 26 contains the fundamental principle of the law of treaties: every treaty in force is binding upon the parties to it and must be performed in good faith (*pacta sunt servanda*). Article 27 is the corollary: a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Thus, if new legislation or modifications to existing law are necessary in order to comply with a new treaty, the State must ensure this has been done by the time the treaty enters into force for it. Otherwise, the State risks being in breach of its treaty obligations and will be liable in international law if, as a result of that omission, another party, or one of its nationals, is harmed.[96] That a legislature is slow to legislate is no excuse. Nor can a State plead in its defence that there has been a change of government, since the treaty binds the *State*, not its government.[97] And, it is very difficult to plead that a treaty is invalid because its consent to be bound was expressed in violation of its law.[98]

Constitutional provisions

Some treaties, such as treaties of alliance, should not need to have effect in domestic law. For other treaties, it may be necessary to create new criminal offences or other enforcement mechanisms. How this is done depends on the constitution of each State. Although no two constitutions are the same, there are two general approaches: 'dualism' and 'monism'. Both are doctrines developed by scholars to explain the different approaches. Although dualism is often presented as the opposite of monism, this is misleading: many constitutions contain both dualist and monist elements. The United Kingdom has perhaps the purist form of dualism; Switzerland perhaps the most developed form of monism. In between there are many variations.[99]

Dualism

Under the dualist approach, the constitution accords no special status to treaties; the rights and obligations created by them have no effect in domestic law except in so far as legislation gives effect to them. When legislation is specifically made for this purpose, the rights and obligations are then said to be 'incorporated' into domestic law. This approach reflects, on the one hand, the constitutional power of the executive generally to bind itself to a treaty without the prior consent of the legislature and, on the other hand, the supreme power of the legislature under the constitution to make law. But, treaty provisions that have been incorporated by

[96] See pp. 376 et seq. below. [97] See p. 25 above. [98] See p. 99 below.

[99] See Aust MTLP, pp. 181–99; and the constitutions of several States in Hollis, Blakeslee and Ederington (eds.), *National Treaty Law and Practice*, Leiden, 2005; Wolfrum and Grote (eds.), *Constitutions of the Countries of the World*, Oxford (loose-leaf), updated about eight times a year, is an invaluable source for the texts of constitutions.

the legislature then have the status only of *domestic* law and can be amended or repealed by later legislation, even if this would be a breach of the treaty.

Monism

The essence of the monist approach is that, without legislation, a treaty may become part of domestic law once it has been concluded in accordance with the constitution and has entered into force for the State. However, in many cases some legislation will be needed. When legislation is not needed the treaty is commonly described as 'self-executing'. Although there are many variations, there are usually three main common features. First, the constitution requires the treaty to be first approved by the legislature, although there are exceptions for certain types of treaty or for certain circumstances. Second, a distinction is made between treaties according to their nature or subject matter, some being regarded as being self-executing, others requiring legislation. Third, a self-executing treaty may constitute supreme law and override any inconsistent domestic legislation, whether existing or future.

United Kingdom

United Kingdom constitutional practice

The UK form of dualism was bequeathed to most of the former overseas territories of the United Kingdom, and so has been followed in almost all of the over fifty other Commonwealth States.[100] The treaty-making power of the United Kingdom is exercised by the Secretary of State for Foreign and Commonwealth Affairs (foreign minister). Although the UK Parliament does not have to consent to the Government entering into a treaty, under a constitutional practice known as the Ponsonby Rule (which may now be enshrined in legislation) a treaty which is subject to ratification (or analogous procedure) is communicated to Parliament with a short explanatory memorandum. Twenty-one sitting days are then allowed for Parliament to decide if it wishes to debate the treaty. This seldom happens unless implementing legislation is needed or the treaty is of major political importance, in which case the Government would normally arrange for a debate.

Implementing legislation can take three main forms:

(1) An Act of Parliament (statute). The text of the whole, but more often only part of[101] the treaty, may be scheduled (annexed) to the Act, which will provide that the scheduled provisions shall have the force of law in the United Kingdom. Alternatively, the Act will merely make such changes to the law as are necessary to give effect to the treaty.[102]

[100] See the detailed account of United Kingdom treaty law and practice in Aust MTLP, pp. 187–95; Oppenheim, pp. 56–63; (1992) BYIL 704. See also van Ert, *Using International Law in Canadian Courts*, Toronto, 2008, esp p. 228 et seq.

[101] Such as the Diplomatic Privileges Act 1964.

[102] See the State Immunity Act 1978, which mainly implements the European Convention on State Immunity 1972: see p. 148 below.

(2) An Act of Parliament conferring all the powers necessary to carry out obligations under *future* treaties. For example, bilateral air services agreements can be concluded without the need for fresh legislation each time. Existing legislation, both primary and secondary, is sufficient to implement them.
(3) An Act of Parliament that provides a *framework* within which *secondary legislation* can be made to give effect to a certain category of treaty, usually bilateral. The Act can either:
    (a) authorise the Crown to make secondary legislation *incorporating the treaties into domestic law*. This is usually done by an Order made by The Queen in Council ('Order in Council') to which the text of the treaty is attached. Such legislation is frequently made for bilateral double taxation conventions[103] and social security conventions.[104] Normally, the Order does not have to be approved in draft by Parliament, although once made it can be annulled by Parliament (*negative* resolution procedure), or
    (b) authorise the Crown to make secondary legislation *to implement obligations imposed by certain categories of treaty*. The treaty is not attached. Instead, its provisions are 'translated' into the language of the Act. Orders in Council made under the International Organisations Act 1968 give effect to treaties conferring privileges and immunities on international organisations and tribunals, and persons connected with them.[105] The Orders have to be approved, in draft, by both Houses of Parliament. This requires a short debate in each House (*affirmative* resolution procedure).

Interpretation and application of treaties by United Kingdom courts

In the past at least, British judges were not always at their happiest when confronted by a treaty. Admittedly, they are not helped by the strict separation of treaties from domestic law inherent in the dualist approach. The British courts have, however, developed certain principles that alleviate some of the strictness of dualism:[106]

- If the language of legislation implementing a treaty is *un*ambiguous, the court will not look behind the legislation to the treaty; but if it is ambiguous the court will examine the treaty and, if it finds it helpful, will try to give meaning to the legislative language.

[103] Income and Corporation Taxes Act 1988, s. 788(10); SI 1991 No. 2876 (Czechoslovakia).
[104] Social Security Act 1975, s. 143; SI 1991 No. 767 (Norway).
[105] See the Tribunal for the Law of the Sea (Immunities and Privileges) Order 1996 (SI 1996 No. 272).
[106] Oppenheim, pp. 56–63 and p. 1269, n. 2 (significantly, perhaps the longest footnote in that noteworthy work; do not forget to turn over the page!); R. Gardiner, 'Treaty Interpretation in the English Courts since *Fothergill* v. *Monarch Airlines*' (1995) ICLQ 620.

- Ambiguous legislation will be interpreted in the way that is most consistent with the international obligations of the United Kingdom, including *un*incorporated treaties (such as the European Convention on Human Rights even before it was effectively incorporated into law by the Human Rights Act 1998).
- In so far as a treaty has been incorporated, by attaching all or part of it to legislation, the courts should interpret it according to the rules of international law, in particular Articles 31–33 of the Convention, even though the Convention has not been incorporated.[107]

The courts of most other Commonwealth States take a similar approach.

European Union law

Because the United Kingdom is dualist, EU law is enforceable in the United Kingdom only because United Kingdom legislation so provides.[108] But, when applying EU law, the British courts must construe it as EU law, *not* as United Kingdom law, and must follow decisions of the European Court of Justice. However, decisions taken under the Common Foreign and Security Policy (CFSP) and Police and Judicial Co-operation in Criminal Matters (PJCCM)[109] need specific implementing legislation as they are not directly applicable in the domestic law of the Member States.

United States

The way in which treaties are dealt with under the US Constitution reflects both dualist and monist approaches, and has rightly been described as 'remarkably complex'.[110] To put it more bluntly, it is a legal mess. So, any non-American lawyer (or for that matter any American lawyer) who has to deal with the effect of a treaty in US law would be well advised to consult a good US law firm which is experienced in this area.

Under Article II, Section 2(2), of the Constitution, the President may ratify a 'Treaty' only with the 'Advice and Consent' of the Senate, which is signified by the affirmative vote of two-thirds of the members present. This is sometimes referred to, misleadingly, as 'ratification', since only the President can carry that out, *not* the Senate. Although the Constitution mentions only one type of international agreement (a 'Treaty'), from the earliest days of the Constitution an alternative form was employed by the US Government in order to avoid the problems inherent in obtaining Senate approval. These

[107] *Sidhu* v. *British Airways* [1997] 1 All ER 193, at pp. 201–12.
[108] See the European Communities Act 1972, esp. s. 3.
[109] See p. 441 below.
[110] J. Jackson, in Jacobs and Roberts (eds.), *The Effect of Treaties in Domestic* Law, London, 1987, vol. 7, pp. 141–69; and L. Henkin, *Foreign Affairs and the US* Constitution, 2nd edn, Oxford, 1996. For a critical commentary on compliance by the United States with treaties, see D. Vogts, 'Taking Treaties Less Seriously' (1998) AJIL 458–62. Unfortunately, the article on US law in *National Treaty Law and Practice*, n. 99 above, can *not* be recommended.

so-called 'executive agreements' were (and are) regarded by both the US and other governments as treaties in international law. Under a federal statute, known as the 'Case Act',[111] all executive agreements have to be notified to congress within sixty days of entry into force and published annually. (So, unless otherwise indicated, a reference in the following paragraphs to a 'treaty' includes an executive agreement; and a reference to a 'Treaty' is to a treaty that needs Senate approval.)

Most treaties entered into by the United States have been, and still are, executive agreements. They can be broken down into four categories:

1. those authorised by a prior Act of Congress;
2. those subsequently approved by Act of Congress;
3. those entered into by the President in exercise of his executive power (a controversial and ill-defined area); and
4. those authorised by a previous Treaty or executive agreement.

'Self-executing' treaties

Under Article VI, Section 2, of the Constitution, all Treaties are the 'supreme law of the land', and the Supreme Court has interpreted this as applying also to executive agreements. The provision is often, and misleadingly, described as making treaties 'self-executing'. By this is meant that the treaty, once it has entered into force, is directly applicable as if it were an Act of Congress. But, contrary to what is sometimes asserted, whether it is self-executing does not depend on whether it is a Treaty or an executive agreement. The self-executing concept has led inevitably to considerable confusion and uncertainty, since there is no sure method for determining in advance whether a treaty is self-executing. In each case of uncertainty, the matter may have to be decided by the US federal courts. There is now considerable jurisprudence, but it is not easy even for American lawyers to advise whether a particular treaty, or part of it, is self-executing. The crucial factor is the intention of the parties, as decided by a US court. It is usually necessary to consider various factors such as language and purpose, the specific circumstances, the nature of the obligations and the implications of permitting a private right of action without the need for legislation. However, a treaty will not be self-executing if it clearly envisages implementing legislation. And, in some cases, the non-US party to the treaty may have to intervene in legal proceedings in the United States to protect its position.

Hierarchy of norms

If a treaty is self-executing, it may come into conflict with US domestic law. Whenever possible, the courts will seek to reconcile the two, but that is not always possible. When this happens, the general residuary rules are:

[111] Public Law 92–403, as amended by I USC 112b; ILM (1972) 1117 and ILM (1979) 82.

- treaties prevail over common law;
- treaties prevail over the law of a state of the United States;
- the Constitution prevails over *all* treaties; this rule may, in part, have led in recent years to the Senate requiring the President to attach a reservation when ratifying certain human rights treaties;[112]
- in the case of a conflict between a treaty and an Act of Congress, the later in time prevails. However, there is still considerable uncertainty as to whether a later executive agreement prevails. The judicial decisions do not give clear guidance, although it is probably fair to say that generally an executive agreement concluded in exercise only of the executive power of the President will not prevail over a prior Act of Congress.

Interpretation of treaties by US courts

US courts tend to have regard less to the text and more to the intention of the parties and the object and purpose of the treaty. Where there is more than one reasonable interpretation, the one which is more favourable to private rights will be adopted. The courts do not follow the formal scheme of Articles 31 and 32 of the Convention (to which the United States is not yet a party). The courts will give weight to an interpretation given by the US government in *amicus curiae*[113] briefs and, when applicable, to any understanding expressed by the Senate when giving advice and consent.

Implementation by states of a federation

The performance of treaties by states of a federation can give rise to problems. Although Article 29 provides that, unless there is a different intention, a treaty is binding upon each party in respect of its entire territory,[114] it may be difficult for the government of a federation to ensure that a treaty is fully implemented in all its constituent states. Under a federal constitution, certain powers, such as taxation and criminal justice, may be shared with the states, so that if the latter have to legislate there could be delays or even obstruction. When powers have to be exercised in performance of a treaty obligation, the federal constitution may then provide for such matters to be vested exclusively in the federal government, or, under a monist-type constitution, a treaty once ratified may override any inconsistent law of a state of the federation. This is a particular problem under the US Constitution. In practice, it is not always easy for the US Government to convince the government of a state of the Union (and their legislatures) that it is obliged to comply with treaty obligations.[115] This happens most frequently with treaty provisions on exemption from taxes.

[112] See, for example, p. 70 above.
[113] In the United States, a written Statement filed with the court by someone who is not a party to the case but has an interest in the outcome and wishes to influence the court.
[114] See Chapter 3 above.
[115] See Aust MTLP, p. 199; and also *Medellin*, US Supreme Court (No. 06–984); ILM (2008) 28.

Territorial application

Some treaties, such as the Outer Space Treaty 1967,[116] naturally apply to the activities of a party or its nationals outside its territory. But all treaties will require *some* action within the territory of the parties, although not always legislation. Territory comprises the metropolitan territory of a State and its overseas territories.[117] Unless it appears otherwise from the treaty, references to territory include the territorial sea, but not the continental shelf or an exclusive economic zone or a fisheries zone.[118]

In most cases a treaty will be silent as to its territorial scope. This is not usually a problem unless a party has overseas territories and the content of the treaty is capable of applying to them. Because of their very nature, treaties such as the Charter of the United Nations have to apply to *all* the territory of the parties. Article 29 lays down merely a residual rule: a treaty is binding upon each party in respect of its entire territory, *unless* a different intention appears from the treaty or is otherwise established. A different intention can be established in various ways.

Territorial extension clauses

Bilateral treaties

Some bilateral treaties have a provision that they may be extended, as may be agreed by the parties in an exchange of notes, to such territories for whose international relations the government of X is responsible.[119]

Multilateral treaties

Before the era of decolonisation, it was common to include a similar provision as that just mentioned in multilateral treaties.[120] But, from the 1960s, such 'colonial clauses' fell out of favour. Other means were therefore established by which States could extend treaties to their overseas territories (see below). Colonial clauses are now more likely to be found in treaties on matters such as customs and extradition.

Declaration on signature or ratification of a multilateral treaty

When a multilateral treaty does not by its nature clearly apply to all the territory of a party, yet is silent as to its territorial scope and lacks a territorial clause, there is a well-established practice by which a State can decide to which, if any, of its overseas territories the treaty will extend. At the time of signature or ratification, the State declares either that the treaty extends only to the

[116] See p. 339 below. [117] See p. 29 above. [118] See p. 33 above.

[119] See the South Africa–United Kingdom Investment and Protection Agreement 1994, UKTS (1998) 35.

[120] See Art. XII of the Genocide Convention 1948, 878 UNTS 277 (No. 1021); UKTS (1970) 58.

metropolitan territory, or that it extends (and may later be extended further) to an overseas territory or territories. The UN Secretary-General views this constant practice of States, and acquiescence by other States, as having established a different intention for the purposes of Article 29.[121] The practice is based on the premise that, unless the treaty has to apply to all overseas territories in order to be effective, it does not apply to them unless specifically extended. Today, many territories are small (some very small), but those with some permanent inhabitants would usually have internal self-government. Given their circumstances, small territories with internal self-government do not necessarily need, or even wish, every multilateral treaty to apply to them. Some are just too complex for them.

Political subdivisions of metropolitan territory

Many States, such as federations, have constitutions that divide the metropolitan territory into political subdivisions. Even when it is only the federation that can be party to treaties, their implementation may require action by the governments and legislatures of the subdivisions, yet the federation remains responsible in international law for the due performance of all treaties.[122] There are certain methods by which these problems can be reduced: territorial clauses, federal clauses and federal reservations.[123]

Successive treaties

A particularly difficult problem is posed when a treaty is followed by another one or more treaties that are wholly or partly on the same subject matter and could be said therefore to overlap. When the treaty is bilateral, or all the parties to two or more multilateral treaties are the same, there should be no particular problem. But, the parties to multilateral treaties are hardly ever the same, and the issue is growing in importance given the increasing number and complexity of multilateral treaties. The problems (which are related to the rules on amendment of treaties) can be alleviated by an express 'conflict clause'; otherwise the residual rules in Article 30 apply.[124]

Interpretation

Treaties represent negotiated compromises reconciling often wide differences. The greater the number of negotiating States, the greater the need for

[121] *UN Depositary Practice*, paras. 273–85.

[122] See p. 55 above. See generally B. Opeskin, 'Federal States in the International Legal Order' (1996) NILR 353–86. See *Paraguay* v. *US (Breard)*, *ICJ Reports* (1998), p. 248; 118 ILR 1; ILM (1998) 810 (ICJ); ILM (1998) 824 (US Supreme Court).

[123] See Aust MTLP, pp. 209–13.

[124] For examples of such clauses and a discussion of Art. 30, see Aust MTLP, pp. 215–29.

imaginative and subtle drafting to bridge the gap between opposing interests. Inevitably this produces texts that may be unclear or ambiguous. There is no treaty that cannot raise some question of interpretation, and most disputes submitted to international adjudication involve a problem of interpretation. Although Articles 31 and 32 are concerned with interpretation, they contain much that is of practical value to the treaty-maker or to anyone involved in implementing a treaty.

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (*c*) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Paragraph 1

The International Court of Justice has held in several cases that the principles embodied in Articles 31 and 32 reflect customary international law.[125] Paragraph 1 gives no greater weight to one particular factor, such as the text ('textual' or 'literal' approach), or the supposed intentions of the parties, or the object and purpose of the treaty ('effective' or 'teleological' approach). Placing undue emphasis on the text, without regard to what the parties intended, or on what the parties are believed to have intended, regardless of the text; or on the perceived object and purpose in order to make the treaty more 'effective', irrespective of the intentions of the parties, is unlikely to produce a satisfactory result.

[125] See, for example, *Libya* v. *Chad*, *ICJ Reports* (1994), p. 4, at para. 41; 100 ILR 438. Generally on this subject, see R. Gardiner, *Treaty Interpretation*, Oxford, 2008.

The first principle – interpretation *in good faith* – flows directly from the principle of *pacta sunt servanda* (Article 26). Even if the words of the treaty are clear, if applying them would lead to a result which would be manifestly absurd or unreasonable (to adopt the phrase in Article 32(b)), one must seek another interpretation. When in 1991 the Union of Soviet Socialist Republics (mentioned specifically in Article 23(1) of the UN Charter) was renamed the Russian Federation, no UN Member suggested that the Charter would have to be amended before the Russian Federation could occupy the former Soviet seat.[126]

It is important to give a term its *ordinary meaning* since, at least unless the contrary is established, it is reasonable to assume that the ordinary meaning is most likely to reflect what the parties intended. As McNair wisely put it, the task of interpretation is:

> the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of surrounding circumstances*.[127]

The determination of the ordinary meaning can be done only within the *context* of the treaty and in the light of its *object and purpose*. The latter concept, as we have seen in relation to reservations to treaties,[128] can be elusive. Fortunately, the role it plays in interpreting treaties is less than the search for the ordinary meaning of the words in their context, but an interpretation that is incompatible with the object and purpose may well be wrong.

Paragraph 2 (context)

Paragraph 2 specifies what comprises the context. When a treaty refers to an 'aircraft', does that include all aircraft, civil and military; and what about microlights, hovercraft or balloons? For this purpose, one must look at the treaty as a whole, including the title, preamble and any annexes. For example, Article I of the Comprehensive Nuclear-Test-Ban Treaty[129] prohibits 'any nuclear weapon test explosion *or any other nuclear explosion*'. The thought that this might ban the *use* of nuclear weapons is, however, quickly dispelled by the unambiguous title of the treaty.

Paragraph 2 also provides that, in addition to the text, including the preamble and annexes, the context comprises:

(*a*) *any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty*.

The agreement does not have to be part of the treaty, or be itself a treaty; but it must be a clear expression of the intention of the parties. When the ENMOD

[126] Access *UN Multilateral Treaties* (see p. 49 above), and then go to Historical Information.
[127] McNair, p. 365. For once, the emphasis is his. [128] At p. 68 above.
[129] Find the text at www.ctbto.org/ > THE TREATY, or in ILM (1996) 1443. The treaty is not in force.

Convention 1976 was negotiated, a series of 'Understandings' were agreed regarding its interpretation or application.[130]

(b) *any instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*.

Such agreements and instruments are usually made at the conclusion of the treaty, or soon afterwards. EU constituent treaties have many such instruments, which have been agreed in advance by all parties. The explanatory reports which are approved by government experts involved in drafting conventions of the Council of Europe, and adopted at the same time as the conventions and published with them, provide an invaluable guide to their interpretation and should be seen as part of the 'context' in which the conventions were concluded.[131] As such, they must be distinguished from 'official' commentaries which are later produced and, depending on the circumstances, may come to be regarded as authoritative, such as the *Handbook on Procedures and Criteria for Determining Refugee Status*,[132] published by the UN High Commissioner for Refugees (UNHCR). The detailed Commentaries of the International Law Commission (ILC) on its draft Articles are especially valuable.[133] Commentaries published by organisations, such as the ICRC on the Geneva Conventions of 1949, are highly persuasive.[134]

Paragraph 3(a) (subsequent agreements)

Sub-paragraph (a) provides that, together with the context, there shall be taken into account any '*subsequent agreement*' between the parties regarding the interpretation of the treaty or the application of its provisions. There is no need for a further treaty; the paragraph refers deliberately to an 'agreement', not a treaty. So, the agreement can take various forms,[135] including a decision adopted by a meeting of the parties, provided this is clearly its purpose.[136] Where a treaty needs a small modification that is essentially procedural, it may be possible to embody it in an agreement as to the application of the treaty. This technique is particularly useful if there is a need to fill a lacuna, to update a term

[130] 1108 UNTS 151 (No. 17119); ILM (1977) 16; TIAS 9614. See also the Understandings in the UN Convention on State Immunity 2004, p. 146 below.
[131] Sinclair, pp. 129–30. For an example, see ILM (1994) 943.
[132] See www.unhcr.org/doclist/publ/3d4a53ad4.html.
[133] Although they must be used with care, since the final version of a draft article may differ materially. See A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, which includes the full text of draft articles with their Commentaries and the final adopted text.
[134] J. Pictet (ed.), *The Geneva Conventions 1949: Commentary*, Geneva, 1952–60. See also S. Rosenne, *Practice and Methods of International Law*, New York, 1984, pp. 50–1.
[135] See the example given in R. Gardiner, 'Treaties and Treaty Materials: Role, Relevance and Accessibility' (1997) ICLQ 643, at 648–9. See also, p. 274 below on the UN Declaration on refugees and terrorism.
[136] See pp. 434–5 below.

or to postpone the operation of a provision. The date for the first election of judges of ITLOS (International Tribunal for the Law of the Sea) was specified in UNCLOS, but the date turned out to be premature and the election was postponed by a consensus decision of the Meeting of Parties.[137] These techniques are of great practical importance for treaty implementation.

Paragraph 3(b) (subsequent practice)

Sub-paragraph (b) provides that, together with the context, there shall be taken into account any *subsequent practice* in the application of the treaty that establishes the agreement of the parties regarding its interpretation. Reference to practice is well established in the jurisprudence of international tribunals. However precise a text appears to be, the way in which it is actually applied by the parties is usually a good indication of what they understood it to mean. For this purpose, the practice needs to be consistent, and common to, or accepted by, all the parties.[138]

Article 37(1) of the Vienna Convention on Diplomatic Relations 1961[139] refers to the 'members of the family of a diplomatic agent forming part of his household'. The phrase is not defined, and even in 1961 there was doubt as to exactly which persons formed part of a diplomat's household: did it include a 30-year-old daughter or son who is a 'perpetual student'? Given the changes in society since then (to which even diplomats are not entirely immune), might other persons now be considered members of the family? Does it now include unmarried partners? And, if so, what about partners of the same sex? In interpreting the phrase, great weight must necessarily be given to the practice of States, most States having to face such problems.[140] In practice, the matter varies from State to State.

Perhaps the most dramatic, and often quoted example of interpretation by subsequent practice is the way in which Members of the United Nations have interpreted and applied Article 27(3) of the Charter in relation to the veto.[141]

Paragraph 3(c) (relevant rules of international law)

Sub-paragraph (c) provides that, together with the context, there shall be taken into account any relevant rules of international law applicable in the relations between the parties. For example, in certain cases, reaching an interpretation which is consistent with the intentions (or perceived intentions) of the parties may require regard to be had not only to international law at the time the treaty was concluded (the 'inter-temporal rule'),[142] but also to

[137] SPLOS/3 of 28 February 1995.
[138] See the *US – France Air Services Arbitration*, 1963, 38 ILR 182.
[139] 500 UNTS 95 (No. 7310); UKTS (1965) 19.
[140] See further p. 134 below. [141] See p. 194 below. [142] See p. 35 above.

contemporary law.[143] In interpreting today a reference to the continental shelf in a treaty of, say, 1961, it would probably be necessary to consider not only the Geneva Convention on the Continental Shelf 1958, but also the United Nations Convention on the Law of the Sea 1982.[144]

Paragraph 4 (special meaning)

A special meaning must be given to a term if it is established that the parties so intended (paragraph 4). Notwithstanding the apparent meaning of a term in its context, it is open to a party to invoke any special meaning, but the burden of proof rests on that party.[145]

Supplementary means of interpretation

Article 32

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable.

The preparatory work (*travaux préparatoires*, or *travaux* for short) of a treaty is an important supplementary means of interpretation. By its nature it is less authentic, often being incomplete and misleading. Nevertheless, in certain circumstances, recourse may be had to *travaux* to 'confirm' the meaning resulting from the application of Article 31, and international tribunals have long done so.[146] In order to understand what the negotiating States intended, recourse to the *travaux* and the circumstances of the conclusion of the treaty may be necessary.[147] In *Lockerbie*, the United Kingdom maintained that it was not intended that the UN Charter should give the International Court of Justice a power of judicial review over Security Council decisions, and this is clearly supported by the *travaux* of the Charter.[148]

The rest of Article 32 provides that recourse may also be had to the same supplementary means of interpretation when reliance on the primary means produces an interpretation which (a) leaves the meaning

[143] See R. Higgins, 'Some Observations on the Inter-temporal Rule in International Law', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century*, The Hague, 1996, pp. 173–81; and R. Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) ICLQ 501–20.

[144] See Sinclair, pp. 138–40; and Oppenheim, para. 633(11).

[145] See Sinclair, pp. 126–7. See also the example given in Aust MTLP, p. 244.

[146] See, for example, McNair, p. 413, n. 3, and p. 422, n. 4. [147] O'Connell, p. 263.

[148] Lockerbie (*Libya* v. *UK*) (Preliminary Objections), ICJ Reports (1998), p. 9; 117 ILR 1 and 644; ILM (1998) 587; and the submissions of the Lord Advocate (CR 97/17, para. 5.46), and the dissenting opinion of President Schwebel.

'ambiguous or obscure' or (b) leads to a result which is 'manifestly absurd or unreasonable'. In this case, the purpose is not to confirm, but to determine, the meaning.

When the ordinary meaning appears to be clear, the primary duty to interpret a treaty in good faith means that if it is evident from the *travaux* that the ordinary meaning does not represent the intention of the parties, a court may 'correct' the ordinary meaning.[149] This is how things work in practice; for example, the parties to a dispute will always refer the tribunal to the *travaux*, and the tribunal will inevitably consider them along with *all* other material put before it.

The *travaux* are generally understood to include successive drafts of the treaty, conference records, explanatory statements by an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee and ILC Commentaries. Their value will depend on several factors, the most important being authenticity, completeness and availability. The summary record of a conference prepared by an independent and experienced secretariat will carry more weight than an unagreed record produced by a host State or a participating State. However, even the records of a conference served by a skilled secretariat will generally not tell the whole story. The most important parts of negotiating and drafting often take place informally, with no agreed record being kept. The reason why a particular compromise formula was adopted, and what it was intended to mean, may be difficult to establish.[150] This will be especially so if the form of words was deliberately chosen to overcome a near irreconcilable difference of substance. The final drafting of new Article 3*bis* (prohibition on use of force against civil aircraft) of the Chicago Convention 1944 was done by hectic, highly visible and informal (literally back-of-the-envelope) negotiations during a mayoral reception near to the end of a three-week conference.[151]

Other supplementary means of interpretation

It is also legitimate to assume that the parties to a treaty did not intend that it would be incompatible with customary international law.[152] There are several other means of interpretation, although it is not always easy to distinguish them from familiar legal techniques, often based on common-sense or grammatical rules. Many derive from principles of domestic law, especially Roman Law.[153]

[149] S. Schwebel, 'May Preparatory Work Be Used to Correct Rather than Confirm the "Clear" Meaning of a Treaty Provision?', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century*, The Hague, 1996, pp. 541–7.

[150] See p. 116 below on whether service of legal process can be made on a diplomatic mission.

[151] 2122 UNTS (No. 36983); ILM (1984) 705; UKTS (1999) 68. A young Danish diplomat watched the informal negotiations with much professional amusement, and later married the author.

[152] O'Connell, p. 261. [153] See Aust MTLP, pp. 248–9.

Implied terms

Although it is not for an international tribunal to revise a treaty by reading into it provisions that it does not contain by necessary implication, it is sometimes necessary to imply a term, and this has been the approach of the International Court of Justice.[154] At the end of the Falklands conflict, there was not enough accommodation on the islands for the approximately 10,000 Argentine prisoners of war (POWs) captured on land in the final stages, the ship carrying the tents having been sunk by the enemy. Following consultations with the ICRC, it was decided that the POWs could be kept on merchant ships and warships in Falklands waters until they could be repatriated. Article 22 of the Third Geneva Convention[155] prohibits holding on ships POWs who are captured on land. But, given that the object and purpose of that Convention is the welfare of POWs, one could properly imply a term to the effect that: when, for reasons beyond its control, a party to a conflict is unable to comply with Article 22, it may hold POWs on ships if that is preferable to leaving them on land without sufficient protection from the elements. Good interpretation is often just common sense.

Thus, one has to look at the treaty as a whole, plus all other relevant materials, assessing their respective weight and value. This is, in fact, what international lawyers and international courts and tribunals do when confronted by a difficult question of interpretation.

Interpretation of treaties in more than one language

Many treaties, bilateral as well as multilateral, are bilingual or plurilingual. The language of one of the negotiating States may not be widely spoken, and to produce a draft and hold the negotiations in that language may be unduly burdensome. Bilateral negotiations are therefore frequently held in the language of only one of the States, or in a third language with which both are comfortable; these days it is often English. This may be reflected in the languages in which a treaty is concluded and in the choice of a language text to prevail in the case of a difference. The Kuwait Regional Marine Environment Convention 1978 was concluded in Arabic, English and Persian, but provides that in the case of divergence the English text prevails.[156] The Convention was almost certainly drafted, and possibly even negotiated, in English.

Multilateral negotiations are more likely to be held in more than one language, although there are notable exceptions. Although the proceedings of the General Assembly of the United Nations and its committees are conducted

[154] The Court will not 'revise' a treaty on the pretext that it has found an omission: see S. Rosenne, *The Law and Practice of the International Court of Justice*, 3rd edn, The Hague, 1997, pp. 172–3.

[155] 75 UNTS 3 (No. 972); UKTS (1958) 39.

[156] ILM (1978) 511. See also the Japan – Pakistan Cultural Agreement 1957, 325 UNTS 22 (No. 4692).

in the six official languages, informal meetings (of which there are many) are often held, and drafting done, only in English.

Treaties that have been concluded in more than one language can cause problems of interpretation if there are material differences between the language texts even after the *toilette finale*.[157] But, if there is still a discrepancy, the problem can be overcome if the treaty provides that in the case of inconsistency the text in one language shall prevail.

These treaty practices are reflected in Article 33. But, if the treaty was negotiated and drafted in only one of the authentic languages, it is natural to place more reliance on that text, particularly if it is unambiguous. The Dayton Agreement 1995 was negotiated entirely in English, even though there are supposedly authentic texts in Bosnian, Croatian and Serbian.[158] Although such texts are equally authentic, in practice they may not carry quite the same weight as the original. This approach is not incompatible with paragraph 4, and the jurisprudence of the International Court of Justice would seem to support this approach in suitable cases.[159]

Third States

A third State is one that is 'not a party to the treaty' (Article 2(1)(h)), and therefore can range from a State that is not eligible to become a party to a State that has ratified the treaty that is not yet in force. A treaty does not impose obligations on or create rights for a third State without its consent (Article 34).

Two conditions must be satisfied before a third State can be bound by a treaty *obligation*: first, the parties must intend the provision to be the means of establishing the obligation of the third State; and, second, the third State must have *expressly accepted* the obligation in writing (Article 35). Conduct consistent with acceptance of the obligation is not enough. But, even if a third State has duly accepted an obligation in a treaty, it does *not* thereby become a party to the treaty.

There is nothing in international law to prevent two or more States creating by treaty a *right* in favour of a third State (a sort of trust). Thus, a right arises for a third State (or a group of States to which it belongs) if the parties to the treaty so intend and the third State assents. Since the third State is not required to do anything, unless the treaty provides otherwise its assent is presumed as long as the contrary is not indicated (Article 36(1)). When exercising a right conferred on it, the third State must comply with the conditions for its exercise (Article 36(2)).

The Convention does not deal with *erga omnes* rights and obligations as such, but the rule in Article 36(1) (by which a right can be accorded to 'all States') furnishes a sufficient legal basis for the establishment of treaty rights and obligations valid *erga omnes*.[160]

[157] See Aust MTLP, p. 252. [158] ILM (1996) 75. [159] Sinclair, pp. 147–52.
[160] See p. 10 above for more on *erga omnes*.

Amendment

Amendment needs always to be thought about seriously when drafting and negotiating a treaty; afterwards it is just too late. Although amending a bilateral treaty causes no great technical difficulty, amending a multilateral treaty can raise a multitude of problems. It may have as many as 190, or even a few more, parties and be of unlimited duration. These factors lead to two basic problems. First, the process of agreeing amendments and then bringing them into force for all the parties can be even more difficult than negotiating and bringing into force the original treaty. Second, because of their long life multilateral treaties often need amendment.

Before the Second World War, treaty amendment usually required unanimity. This is generally still the rule for the *constituent* treaties of regional international organisations like the Council of Europe and the European Union. But in other cases a practice has developed by which an amendment enters into force only for those parties willing to accept it. This means that the *original* treaty still remains in force (1) as between the parties that do *not* accept the amendments and (2) between those parties and the parties that *do* accept them. This results in a dual treaty regime. This highly unsatisfactory result is made much worse when there is a series of amending treaties. The several failed attempts to modernise the Warsaw Convention 1929 meant that the parties to the various amending and supplementing instruments all vary, thus preventing the implementation of a uniform compensation scheme throughout international civil aviation.[161] However, although the Montreal Convention 1999[162] was intended to replace the Warsaw Convention system, it has no effective amendment article either.

Therefore, today, many treaties, especially multilateral, now have built-in amendment mechanisms.

Bilateral treaties

The parties to a bilateral treaty can always agree to an amendment, the only question is the way in which this is expressed in the treaty. Often, it is to the effect that any amendments or modifications agreed by the parties shall come into effect when confirmed by an exchange of notes.

Multilateral treaties

It is essential to include in most multilateral treaties an *effective* amendment mechanism. The constituent instruments of international organisations especially need to have built-in amendment procedures under which, once an amendment has been finally endorsed by a specified percentage of the

[161] See p. 324 below. [162] 2242 UNTS 350 (No. 39917); UKTS (2004) 44.

members, it is then binding on *all* members. Article 108 of the Charter of the United Nations has perhaps the most succinct, and elegant, procedure:

> Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

(*Note*: The number of members of the General Assembly might change between the vote and the when the amendment might come into force, hence the second reference to the 'Members of the United Nations'.)

The essential characteristic of this procedure is that once an amendment has entered into force it also binds *even those who did not vote for or ratify it*.

Other amendment procedures included in treaties in recent years are often elaborate. No two are the same, each being tailored to suit the particular needs of the organisation or treaty,[163] but they usually provide for:

- the number of parties, or votes in the plenary body or meeting, needed to support an amendment before it has to be put to the vote of the parties;
- the majority needed for adoption of the amendment;
- whether the adopted amendment needs to be ratified or accepted;
- if applicable, the number of parties which need to ratify or accept the amendment for it to enter into force;
- where ratification is not required, whether the amendment can be adopted by tacit agreement; and
- whether the amendment binds those parties that have not accepted it (the *crucial* issue).

Under Article XIII of the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993 (Compliance Agreement),[164] a proposed amendment requires the approval of the FAO Conference by two-thirds of the votes cast, and comes into force *for all* after acceptance by two-thirds of the parties.[165] However, if an amendment involves new obligations for parties (which is assumed unless the Conference decides otherwise by consensus) it comes into force for each party only when it has been accepted by it. The subject matter of the Agreement is not only important, but also contentious. The amendment procedure reflects the understandable reluctance of States to be bound by amendments which they have not agreed. To be fully effective therefore, any amendments are likely to need at least approval by consensus.

[163] Blix and Emerson, *The Treaty-maker's Handbook*, Dobbs Ferry, NY, 1973, pp. 225–39, has many examples from before 1966. See also the UN *Handbook of Final Clauses* (http://treaties.un.org/Pages/UNTSOnline.aspx > Publications).

[164] 2221 UNTS (No. 39486); ILM (1996) 1443; B&B Docs. 645.

[165] For the FAO acceptance procedure, see Aust MTLP, p. 110.

Contrast the amendment procedure in the Compliance Agreement with Article VII of the Comprehensive Nuclear Test-Ban Treaty 1996.[166] In the latter case any party can propose amendments. If a majority of the parties support consideration of the proposal, a conference must be held. An amendment is adopted by the vote of a simple majority of the parties at the conference, provided no party casts a negative vote (i.e. a veto). The amendment the enters into force for *all* parties thirty days after *all those parties that voted for the amendment* have deposited their instruments of ratification.[167]

Duration and termination

Denunciation is a unilateral act by which a party seeks to terminate its participation in a treaty. Lawful denunciation of a *bilateral* treaty *terminates* it. Although the term denunciation is sometimes used in relation to a multilateral treaty, the better term is *withdrawal*, since if a party leaves a multilateral treaty that will not normally result in its termination. Also, 'withdrawal' does not carry the same negative implication of 'denunciation'.

Express provisions

These days, most treaties contain specific and comprehensive provisions on duration and termination or withdrawal. There are a great variety.[168]

Indefinite duration with *un*conditional right to terminate

Many *bilateral* treaties make no provision for duration, but include a termination clause that provides that either party may terminate the treaty by means of written notice to the other, termination taking effect on the expiry of a specified period.[169] Most *multilateral* treaties of unlimited duration will allow a party an unconditional right to withdraw. A UN treaty will often provide that any party may withdraw by giving twelve months' written notice to the UN Secretary-General.

Indefinite duration with *conditional* right to withdraw

Article XVI of the Chemical Weapons Convention 1993 States that the Convention shall be of unlimited duration,[170] but provides for withdrawal,

[166] See n. 129 above. Article VII of it is modelled on Art. XV of the Chemical Weapons Convention 1993, 1974 UNTS 317 (No. 33757); ILM (1993) 800; UKTS (1997) 45.
[167] See further, Aust MTLP, p. 268.
[168] See also Blix and Emerson (above n. 163), pp. 96–113.
[169] UK–US Treaty on Mutual Legal Assistance in Criminal Matters 1994 as amended 1997, 1967 UNTS 102 (No. 33632) and 2114 UNTS 392 (No. 36773); UKTS (1997) 14 and UKTS (2002) 8. For the special provision found in air services agreements, see Aust MTLP, pp. 278–9.
[170] 1974 UNTS 317 (No. 33757); ILM (1993) 804; UKTS (1997) 45.

albeit subject to special conditions based on those in the Nuclear Non-Proliferation Treaty 1968 (NPT):[171]

> Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention *if it decides that extraordinary events, related to the subject matter of this Convention, have jeopardized the supreme interests of its country*. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. *Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests*. [emphasis added]

Given that a treaty must be performed in good faith,[172] even though the above provision gives the withdrawing party a discretion, it must nevertheless have grounds for its decision. Furthermore, the extraordinary events must be 'related to the subject matter' of the Convention. The need for these elements is reinforced by the requirement to state what are the extraordinary events.[173]

Duration with conditions on termination

Conventions adopted within the International Labour Organization often require a lengthy period of notice and impose strict conditions on when notice can be given, for example that a party cannot denounce until the convention in question has been in force for ten years, and, if it does not then denounce it within twelve months, it may not then denounce it until the expiration of a *further* ten-year period, and so on.[174]

Comprehensive clauses

When the parties are not sure how long they envisage the treaty lasting, they will often include a clause which provides for an initial term which can be extended, either expressly or tacitly, as well as for withdrawal. Such flexible provisions enable the parties to keep their options open, and are normally found in bilateral treaties. The Slovenia–United Kingdom Cultural Co-operation Agreement 1996 provides that it:

> shall remain in force for a period of five years and *thereafter* shall remain in force until the expiry of six months from the date on which either Contracting Party shall have given written notice of termination to the other through the diplomatic channel. [emphasis added][175]

[171] 729 UNTS 161 (No. 10485); ILM (1968) 809; UKTS (1970) 88; TIAS 6839 (Art. X(1)).
[172] See p. 75 above.
[173] See Aust MTLP, pp. 281–2 on North Korea's first attempt to withdraw from the NPT. It announced its purported final withdrawal on 10 January 2003. This seems to have been accepted, at least politically, as a *fait accompli*.
[174] See ILM (1987) 633–67.
[175] UKTS (1996) 14, Art. 18. For a discussion of the meaning and effect of 'thereafter', see Aust MTLP, pp. 284–6.

Termination or withdrawal by consent

A treaty may of course be terminated, or a party withdraw from it, at any time with the *consent* of all the other parties (Article 54(b)). This can be done even if the treaty provides for a minimum period of notice.[176]

No provision for termination or withdrawal

Some general law-making conventions are naturally silent as to their duration, but, perhaps surprisingly, have provisions for denunciation or withdrawal. One cannot imply a right of denunciation or withdrawal unless it is established that the parties intended to admit the possibility of it, or it may be implied by the nature of the treaty (Article 56(1)). Since it is now very common to include provisions on withdrawal, when a treaty is silent it may be that much harder for a party to establish the grounds for the exception. The same may apply in the case of some codification conventions. In any event, in many cases the rules of such conventions reflect, or have become accepted as, customary law, and so withdrawal may make little, or even no, legal difference.[177]

A party will not be able to withdraw from a treaty transferring territory or establishing a boundary (cf. Article 62(2)(a)).[178] Other treaties that are unlikely to be capable of withdrawal are treaties of peace or disarmament, and those establishing permanent regimes, such as for the Suez Canal.[179] Most human rights treaties do not provide for withdrawal.[180]

Termination or suspension for breach[181]

Like the violation of any other international obligation, breach of a treaty obligation may entitle another party to terminate or withdraw from the treaty or suspend its operation. If it causes harm to another party, that party may have the right to take reasonable countermeasures, or to present an international claim for compensation or other relief.[182]

Material breach

A 'material' breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part (Article 60(1)). The material breach must be of the treaty itself,

[176] See the 1996 Exchange of Notes between Armenia and the United Kingdom to terminate the Soviet Union–United Kingdom Visa Abolition Agreement 1964, 2068 UNTS 3 (No. 35808); UKTS (1998) 57.
[177] See, pp. 7–8 above. [178] See Aust MTLP, pp. 289–90 and 370. [179] See p. 335 below.
[180] See the Human Rights Committee's General Comment No. 26 (61), ILM (1995) 839.
[181] See generally S. Rosenne, *Breach of Treaty*, Cambridge, 1985. [182] See Chapter 21 below.

not of another treaty or of rules of general international law.[183] Multilateral treaties pose different problems, since a material breach by one party may not affect all other parties, but the interests of the latter must also be taken into account.[184] Determining what is a 'material breach' will depend upon the circumstances of each case. Article 60(3) defines a material breach as a repudiation of the treaty not sanctioned by the Convention or the violation of a provision 'essential to the accomplishment of the object and purpose of the treaty'.[185] This last quoted phrase is not the same as a 'fundamental' breach (see below). It can therefore be a breach of an important ancillary provision. If a party to the Chemical Weapons Convention (CWC)[186] obstructs the conduct on its territory of international inspections to verify that it is complying with the CWC, this would be a material breach since the inspection regime is an essential means of monitoring the effectiveness of the CWC.

Fundamental breach

A fundamental breach is one that goes to the root of a treaty. Although it is not mentioned expressly in the Convention, the concept is contained within that of a material breach. On 1 September 1983, Soviet forces unlawfully shot down Korean Airlines flight 007. Several States which had air services agreements with the Soviet Union (authorising the take-off and landing in those States of civil aircraft of the Soviet Union) unilaterally suspended the agreements for varying periods and with immediate effect. They were entitled to do this because the Soviet action undermined the fundamental basis of all air services agreements: that each party will ensure the safety of the others' civil aircraft.[187]

Supervening impossibility of performance

If an *object* is indispensable for the execution of a treaty and disappears permanently or is destroyed, thereby making performance of the treaty impossible, a party can invoke this as a ground for terminating or withdrawing from the treaty (Article 61(1)). There are very few precedents, and in *Gabčikovo* the International Court of Justice rejected the plea.[188] Possible examples of impossibility of performance are the permanent drying-up of a river or the submergence of an island, which global warming (if it is to be believed) may now make a practical possibility.

[183] *Gabčikovo*, *ICJ Reports* (1997), p. 7, para. 106; 116 ILR 1.
[184] See Art. 60(2); and Aust MTLP, pp. 294 – 5.
[185] See the use of 'material breach' by the UNSC in e.g. UNSCR 1441 (2002), paras. 1 and 4.
[186] 1974 UNTS 317 (No. 33757); ILM (1993) 800; UKTS (1997) 45.
[187] See G. Richard, 'KAL 007: The Legal Fallout' (1983) *Annals of Air and Space Law* 146, at 150; K. Chamberlain, 'Collective Suspension of Air Services' (1983) ICLQ 616, at 630–1.
[188] *ICJ Reports* (1997), p. 3, paras. 102–3; 116 ILR 1; ILM (1998) 162.

Fundamental change of circumstances (*rebus sic stantibus*)

The principle, recognised by domestic law, that a person may no longer be bound by a contract if there has been a fundamental change in the circumstances which existed at the time it was signed (in English common law, the doctrine of frustration),[189] has been acknowledged to apply also to treaties. Article 62 is in restrictive terms, strictly defining the (cumulative) conditions under which a change of circumstances may be invoked as a ground for terminating a bilateral treaty or withdrawing from a multilateral treaty. The principle has been invoked many times, and is recognised by treaties,[190] but so far it has not been applied by an international tribunal.[191] In *Gabčikovo*, the International Court of Justice rejected the argument that profound political changes, diminishing the economic viability of a project, progress in environmental knowledge and the development of new norms of international environmental law constituted a fundamental change of circumstances. The Court emphasised that the stability of treaty relations requires that Article 62 be applied only in exceptional cases.[192] Furthermore, Article 62 (2)(a) provides that the principle cannot be invoked if the treaty establishes a boundary.

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations does not affect the legal relations established by a treaty, except in so far as those relations are indispensable for the application of the treaty (Article 63). This rule applies to both bilateral and multilateral treaties. In practice, the severance of diplomatic relations may not make a substantial difference.[193]

Outbreak of hostilities

The legal effect of the outbreak of hostilities between parties to a treaty is still uncertain,[194] and the only comprehensive treatment of the subject is now out of date.[195] The topic is outside the scope of the Convention (Article 73). The situation is somewhat analogous to that of severance of diplomatic relations, so that treaties may continue to apply except in so far as their operation is not possible during a period of hostilities. It is clear that there is no presumption that hostilities, however intensive or prolonged, will necessarily have the effect

[189] See *Halsbury's Laws of England*, 4th edn, reissue, vol. 9(1), 1998, para. 897.
[190] Oppenheim, para. 651, n. 2. [191] Ibid., para. 651, n. 8.
[192] *ICJ Reports* (1997), p. 3, para. 104; 116 ILR 1; ILM (1998) 162.
[193] See p. 139 below. [194] Oppenheim, para. 655.
[195] Oppenheim, *International Law: A Treatise*, 7th edn., vol. II, 1952, London, para. 99. See also McNair, pp. 693–728; and O'Connell, pp. 268–71.

of terminating or suspending the operation of all treaties, especially bilateral, between the parties to the conflict.

Certain commercial treaties, such as air services agreements, may be suspended; treaties creating special regimes or fixing boundaries will continue in force. As between even the belligerent parties, multilateral treaties whose purpose is to regulate the affairs of belligerents (such as the Geneva Conventions 1949) will of course apply. Once the conflict is over, the parties will need to assess to what extent the hostilities have affected their treaty relations. They may have to go through a joint process similar to that which some States carry out on a succession of States.[196]

In 2004, the International Law Commission appointed Mr (now Sir) Ian Brownlie as Special Rapporteur on this subject, and he submitted four reports.[197] In 2008, he left the ILC and was replaced by Professor Caflisch.

Can one validly withdraw from a treaty and immediately become a party again?

Trinidad and Tobago acceded to the International Covenant on Civil and Political Rights 1966 (ICCPR) in 1978, and to the Optional Protocol to it in 1980.[198] Parties to the Protocol agree to individuals communicating with (i.e. petitioning) the Human Rights Committee established by the Covenant. By 1998, Trinidad and Tobago had decided that this procedure was being increasingly 'abused' by prisoners sentenced to death. That year it withdrew from the Protocol, but at the same time deposited an instrument of re-accession. This included a reservation that the Human Rights Committee would not be competent to receive and consider communications from such prisoners. Guyana did the same in 1999. The stratagem may be seen as a single transaction, the only purpose of which was to enter a late (i.e. an invalid) reservation.[199] Following objections to the reservation,[200] in 2000 Trinidad and Tobago withdrew from the Optional Protocol. Despite some objections, Guyana did nothing.

Desuetude

A treaty may be regarded as no longer in force by virtue of disuse[201] or obsolescence.[202] In 1990, Austria declared that certain provisions of the Austrian State Treaty 1955[203] had become obsolete. There were no

[196] See, for example, p. 370 below.
[197] See www.un.org/law/ilc/.
[198] ICCPR and Optional Protocol, 1999 UNTS 171 (No. 14668); ILM (1967) 368; UKTS (1977) 6.
[199] But see p. 72 above on late reservations.
[200] See *UN Multilateral Treaties*, Ch. IV.5, note on Trinidad and Tobago.
[201] See McNair, pp. 516–18 and 681–91.
[202] But see H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' (1992) BYIL 94–6.
[203] 217 UNTS 223 (No. 2249); UKTS (1957) 58; TIAS 3298.

objections.[204] In Uppsala in April 2004, Sweden and the United Kingdom celebrated the 350th anniversary of the 1654 Treaty of Peace and Commerce concluded by Queen Christina and Oliver Cromwell, and never terminated. Although the treaty was expressed to be of indefinite duration, subsequent treaties, such as the Treaty of Rome, the WTO Agreement, etc., may well have overtaken it so making the 1654 Treaty no more than of historical interest.

Invalidity

This is the least important part of the law of treaties. An invalid treaty is a rarity, there being a presumption that a treaty is valid.

The violation of an internal law on competence to conclude treaties is probably the one basis for invalidity that may be of some practical importance. Given the overriding need for certainty in treaty relations, Article 46 provides that:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent *unless* that violation was manifest and concerned a rule of its internal law of fundamental importance. [emphasis added]
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

The negative formulation emphasises the exceptional character of the rule. There are a number of procedures in treaty-making, such as ratification, which enable a State to reflect fully before deciding whether or not to become a party, and to comply with any constitutional requirements. States are entitled to regard other States as having acted in good faith when its representatives express their consent to be bound. A State cannot claim that its consent has been expressed in violation of its internal law regarding competence to conclude treaties if the consent has been expressed by its Head of State, head of government or foreign minister, since they each have indisputable authority to express consent (Article 7(2)). If a State seeks to invoke constitutional defects after the treaty has entered into force, and after it has been carrying it out, it will be estopped (prevented) from asserting the invalidity of its consent.[205]

There could, however, be occasions when an overseas territory has concluded a treaty in its own name and without any authority from the parent

[204] Kennedy and Specht, 'Austrian Membership in the European Communities' (1990) *Harvard International Law Journal* 407.

[205] See p. 8 above.

State.[206] Whether the territory's lack of competence to conclude the treaty was manifest will depend on the circumstances, but the foreign ministry of the other side should be able to distinguish an overseas territory from its parent State and enquire whether the territory has the necessary power to enter into a treaty.

Article 46 must be distinguished from Article 27, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[207] That rule will always apply, unless the treaty has been held to be invalid.

Articles 47–53 contain other grounds for invalidity, including error, fraud, corruption, coercion and conflict with a *jus cogens* norm.[208]

'Unequal treaties'

So-called 'unequal' or 'Leonine' treaties are those which are said to have been forced upon a weaker State by a stronger one. The Convention does not mention them, and the idea has never been accepted in international law. In discussing it, most writers have generally relied on certain nineteenth-century treaties, such as the so-called capitulation treaties,[209] and were heavily influenced by the effect of decolonisation, and to some extent by the views of the Soviet Union and other communist regimes of Eastern Europe.[210] It is a cornerstone of international law that all States are equal: that is equal before the law, even if not equal politically, economically or militarily. One has to accept that very few States are ever equal in power. To allow a State to avoid its treaty obligations on the ground of inequality would undermine the stability of treaty relations. The presumption that treaties are valid is not easy to rebut, especially if one cannot find facts to satisfy one of the many specific grounds of invalidity in the Convention, and there are *very* few examples of those grounds being successfully invoked.

The depositary

The exacting and thankless role of a depositary (*not* depository) is vital to the effective functioning of multilateral treaties, in ensuring that the necessary formalities and procedures are properly performed, recorded and notified. The rules are in Articles 76–79.

[206] As to authority, see p. 55 above. [207] See p. 75 above.
[208] See further Aust MTLP, pp. 315–20. For *jus cogens*, see also p. 10 above.
[209] See McNair, pp. 514, 527–31 and 662–4; Chiu, 'Communist China's Attitude towards International Law' (1966) AJIL 239–67.
[210] See Koshevnikov, *International Law*, Moscow, p. 281; Sinha, 'Perspective of the Newly Independent States on the Binding Quality of International Law' (1965) ICLQ 123. See also, Caflisch, 'Unequal Treaties' (1992) GYIL 52–80.

Designation of a depositary

A depositary is only needed for a multilateral treaty. The depositary may be a State or an international organisation. When it is a State, since the duties need to be carried out by specialists in international law, they should be done only by the foreign ministry, *never* subcontracted to another government department, or public or private agency. Being a depositary neither prevents the State of the depositary becoming a party, nor does it oblige that State to become one.

Most multilateral treaties are now adopted within an international organisation or at an international conference convened by one, and then the chief administrative officer of the organisation will usually be designated the depositary. Where a State hosts the conference at which the treaty was adopted, sometimes that State is named as the depositary.

The UN Secretary-General is the depositary of treaties adopted within the United Nations or at conferences convened by it. But, just because all treaties have to be *registered* with the United Nations does not mean that the UN Secretary-General is willing to be the depositary of just any multilateral treaty: registration and depositary functions are quite separate. But, in the past he has, though rarely and exceptionally, agreed to be the depositary of certain non-UN treaties, including even some that are open to only a limited number of States, for example, the Agreement on Succession Issues 2001.[211] He is the most experienced depositary, over 552 multilateral treaties having been deposited with him. The *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1 go to http://treaties.un.org > Publications > Summary of Practice) is an invaluable guide on the depositary practice of the United Nations, and essential reading for any depositary.

Multiple depositaries

During the Cold War, for political reasons[212] certain treaties, such as the Partial Test-Ban Treaty 1963[213] had three depositaries: the Soviet Union, the United Kingdom and the United States.[214] A State wishing to sign, ratify or accede to such treaties was (and still is) able to do so with any one of them.

Duty to act impartially

It is a fundamental principle that a depositary must at all times act impartially. A depositary State must keep a clear distinction between its views and national

[211] 2262 UNTS (No. 40296). [212] See pp. 16–18 above.
[213] 480 UNTS 43 (No. 6964); UKTS (1964) 3; TIAS 5433.
[214] See Schwelb, 'The Nuclear Test Ban Treaty and International Law' (1964) AJIL 642, at 651–3; Oppenheim, vol. I, para. 50, n. 6; (1980) *UN Juridical YB* 207–8.

interests as a State and its functions as depositary. When a depositary receives an instrument from an entity which it does not recognise as a State, it must not seek to judge the validity of the instrument. Instead, it must notify interested States without comment. It is for the latter to form a view as to the legal position. But, where it is indisputable that an instrument is unacceptable, the duty of the depositary is simply to refuse it: if, for example, only UN Members are eligible to become parties to the treaty and the entity is without doubt not one. The corollary of impartiality is that nothing that a State does as a depositary will prejudice it as a State.

Functions of the depositary

Subject to any provisions in the treaty, or as may be agreed by the contracting States, the principal functions are listed in Article 77. Now that depositary functions are so well established, and largely codified in the Convention, it should be enough simply to designate a depositary on the understanding that the duties will be performed in accordance with the law of treaties and established practice.

Correction of errors

Due to their length and complexity, and the time pressure under which today many multilateral treaties are negotiated, it is common for them to have textual errors: typographical, spelling, punctuation, numbering or cross-referencing, or a lack of concordance between the authentic language texts. There may be a simple drafting mistake, such as use of inconsistent terminology. But correcting anything that is more than an obvious 'physical' error or mistake of spelling or numbering may affect the substance. Attention may be drawn to an error by a State or the depositary. If there is a dispute as to whether there is an error, the problem may have to be decided in accordance with Article 48 (Error),[215] *not* Article 79 that deals with corrections only where there is no dispute as to the existence of an error. It is more likely, however, that there will be no dispute, merely a difference of view as to how to deal with the matter. Since the subject of corrections is discrete, the reader is referred to the text of Article 79 in which the procedure for correcting errors is set out in detail.

Registration and publication

Registration

Article 102(1) of the UN Charter requires that 'every treaty and every international agreement' entered into by any Member of the United Nations is

[215] See p. 100, n. 207, above.

registered with the Secretariat as soon as possible, and then published by it. By the end of 2008, over 58,000 treaties had been so registered, more than 1,200 being registered each year.

The term 'international agreement' embraces unilateral engagements of an international character. Thus, declarations under Article 36(2) of the Statute of the International Court of Justice[216] are registered.

Regulations and procedure

Detailed regulations and guidance on registration have been adopted by the UN General Assembly in consultation with the Secretariat, and are explained in detail in the UN *Treaty Handbook*.[217] The main ones are:

- A treaty cannot be registered until it has *entered into force*. But, there is no time limit.
- Registration may be done by any party and relieves all other parties of the obligation to register.
- All subsequent actions effecting changes in a treaty, such as amendment or termination, must also be registered.

To register a treaty, one must file certain documents with the Treaty Section of the Office of Legal Affairs of the United Nations. These are described in detail in the *Treaty Handbook*.

Associated documents

Provided it meets the basic conditions of the Regulations, any document lodged with the Secretariat for registration will be registered. Protocols, annexes, maps, etc. that are integral to the treaty must be registered and will be published with the treaty in the *United Nations Treaty Series* (UNTS) even if they are ephemeral. Care must be taken with MOUs.[218] Even when one is referred to in a treaty, or associated with it, an MOU should *not* be supplied to the Secretariat. But, its non-treaty status should, if necessary, have been first confirmed in writing by all the States concerned.

Legal effect of registration or non-registration

Although the vast majority of instruments presented for registration are without doubt treaties, on rare occasions some MOUs are registered.[219] But, the act of registration has no effect on the status of the instrument. It does not confer any status that the instrument does not already have, and *a non-registered treaty is still a treaty*.[220]

[216] See pp. 416–17 below. [217] Go to http://treaties.un.org >Publications >Treaty Handbook.
[218] See p. 51 above. [219] See Aust MTLP, p. 36.
[220] See generally D. Hutchinson, 'The Significance of the Registration or Non-registration of an International Agreement in Determining Whether or Not It Is a Treaty' (1993) *Current Legal Problems* 257–90.

But, when there is a dispute as to the legal status of an instrument, the fact that it has (or has not) been submitted for registration may, depending on the circumstances, be evidence as to its status. Registration by one party (which is usual) is evidence only that that party regards the instrument as a treaty. The lack of any protest about the registration is not necessarily evidence that another party accepts that the instrument is a treaty; States do not routinely monitor registrations. Equally, in itself, non-registration is not evidence that the instrument is not a treaty. There are many reasons why what are obviously treaties are not registered: ignorance, inertia, lack of staff or simple oversight.

Article 102(2) of the UN Charter provides that no party to a treaty entered into by a UN Member, and which has not been registered, may invoke it before any organ of the United Nations. However, the principal judicial organ of the United Nations, the International Court of Justice, does not apply the provision strictly, or perhaps at all. In *Qatar* v. *Bahrain*, the 1987 parallel Exchanges of Notes that the parties agreed constituted a treaty were invoked before the Court, which gave full regard to their terms even though they had not been registered.[221] Other organs of the United Nations have on occasion allowed States to invoke an unregistered treaty; and it is unthinkable that the Security Council would ignore a treaty that is relevant to a matter of international peace and security just because it had not been registered.

Publication

There is no international rule requiring a State to publish a treaty. Finding its text, especially that of a recent treaty, or even finding proof of a treaty's existence, is not at all easy, although the Internet has made it much simpler.[222] The problem affects legal practitioners as much as scholars and students. Because a treaty cannot be published in the UNTS until it has entered into force and been registered, one has to rely heavily on national or commercial sources. However, the UN Treaty Collection website has the texts of all multilateral treaties for which the UN Secretary-General is the depositary, including those that are not yet in force and therefore not yet published in the UNTS.[223] Although this is limited to those deposited with the UN Secretary-General, it does allow one to access certain treaties well before they enter into force.

Publication by the United Nations

Article 102 requires the Secretariat of the United Nations to publish treaties registered with it. They are published in the single series of the UNTS, although

[221] *ICJ Reports* (1994), p. 112; ILM (1994) 1461; 102 ILR 1.

[222] R. Gardiner, 'Treaties and Treaty Materials: Role, Relevance and Accessibility' (1997) ICLQ 643–66; S. Rosenne, *Practice and Methods of International Law*, New York, 1984, pp. 48–51.

[223] Go to http://treaties.un.org >Additional Databases > Certified True Copies.

it no longer publishes in full (a) treaties of assistance and cooperation on financial, commercial, administrative or technical matters, (b) some ephemeral treaties and (c) treaties that are published by a UN specialised or related agency (e.g. the IAEA). Publication is done in all the authentic languages of the treaties and, if these do not include English and French, with translations into those two languages. By the end of 2008, the UNTS consisted of over 2,400 paper volumes, containing over 58,000 treaties. Publication on paper takes some time, but information relating to all treaties that have been registered is available almost immediately on-line.

The UNTS Cumulative Index is now also available on the website, although it does not cover treaties registered in the last three years. Unfortunately, searching for a treaty on the website is not always that easy unless one knows that it has been registered and, if so, the registration number or at least the date of adoption or signature. In fact, since September 2008, searching for treaties and related information on the new website (http://treaties.un.org) is now much easier. Multiple search criteria of treaty, the choice of a variety of treaty action/attributes, as well as having the texts in pdf format, make searches less time-consuming. Therefore, whenever possible this book gives the registration number of a treaty.[224] But, if one has the reference to the volume of the UNTS in which the treaty is published, or an ILM reference, it may sometimes be preferable to look up the treaty on paper. Alternatively, a Google search will often produce the text and details about its present status.

The UN Secretary-General is also the depositary of over 530 multilateral treaties. The publication, *Multilateral Treaties Deposited with the Secretary-General* (in this book referred to as *UN Multilateral Treaties*), is an authoritative guide to the status of those treaties, containing as it does information on signatures, ratifications, accessions, successions, declarations, reservations and

[224] The number (e.g. No. 37770) quoted in this book refers to the registration number under which the treaty was registered in the UN Treaty Series (UNTS); the other figures are the paper volume where the text is to be found and, usually, the relevant page. Using the registration number is perhaps the easiest way to access the text of the treaty on-line, although it may not be that fast; be prepared to wait. Go to http://treaties.un.org >UNTS >Advanced Search. Under 'Search Objects', select 'Treaty'; then (if appropriate) click on either 'Show Only Subsequent' or 'Show Only Original'; then, under 'Attributes', select 'Registration Number'; type the registration number in the first box (not forgetting to delete 'DD/MM/YYYY') and then click on the second box which puts in the same number a second time; then click on 'Add'; wait a few seconds until the number appears lower down; then scroll down and click on 'Search'; wait a bit; then when the name of the treaty appears, click on its name and wait until the next box appears; scroll down to 'Vol in Pdf'. The latter does take some time to appear (other information about the treaty is also to be found in the box). When you have finished searching the document, *do not forget to click on 'Clear' before you search again*. Once you are used to it, the on-line process is simpler than it sounds, and usually quicker that going to the library to look up the text of the treaty on paper. If, like the famous Dayton Agreement, the treaty has not been registered with the United Nations, you might try Google. Although this is the longest footnote in this book, it may be the most useful.

objections. It is published in English and French. Correct as of 31 December each year, it is normally published on paper in March or April of the following year. It is also published electronically and updated daily. Access to the whole UN Treaty Collection website is now free.

Publication by States

Whether, or when, a treaty is published by a State is dependent on its constitution, legislation and practice. Publication may be in an official gazette or journal, or in an official treaty series. In the United Kingdom, all treaties which the United Kingdom has concluded, and which are subject to ratification or a similar two-step procedure,[225] are published as Command Papers in the Country, European Communities or Miscellaneous Series. The United Kingdom is party to over 13,000 treaties. These are mostly bilateral, but there are many multilateral as well. Since 1892, every treaty has been published in the *United Kingdom Treaty Series* (UKTS), once it has entered into force for the United Kingdom. The UKTS is not published in volumes, each treaty being published separately. Since 1974, only the English text of *multilateral* treaties has been published. Earlier British treaties dating back centuries can be found in *British and Foreign State Papers* (BSP). In contrast to some (chiefly monist) States, neither laying a treaty before Parliament, nor its publication in the UKTS has legal effect: neither procedure makes the treaty part of the law of any part of the United Kingdom.[226] Further information can be obtained by consulting www.fco.gov.uk/treaty/ or by emailing *treaty.fco@gtnet.gov.uk*.

Sources of treaty texts

International Legal Materials (ILM), published since 1962 by the American Society of International Law (ASIL) six times a year, is an invaluable source of texts of many recently concluded treaties, as well as judgments on international law and other relevant material. It is often the easiest way to find a treaty whose entry into force is considerably delayed.

The website of the Lauterpacht Research Centre for International Law at Cambridge, England (www.lcil.cam.ac.uk/) has many useful links. The website of the American Society of International Law (www.asil.org) is useful as is its electronic publications (www.asil.org/electronic-publications.cfm). The Australasian Legal Information Institute (www.austlii.org/) can also be useful.

For the text of treaties concluded between 1648 (Peace of Westphalia) and 1919, the best source is the 231-volume *Consolidated Treaty Series* (CTS), although not all the early treaties have been translated into English or French. For those concluded between 1919 and 1946, one should consult the

[225] See p. 76 above on the Ponsonby Rule. [226] Ibid.

205-volume *League of Nations Treaty Series* (LNTS, see the UNTC website). For US treaties, there is the *Treaties and other International Acts Series* (TIAS) issued in single pamphlets, and the *United States Treaties and other International Agreements* (UST) published in annual volumes since 1950. The now over 135 volumes of the *International Law Reports* (ILR), with its excellent indexes, are an important source for the decisions of courts and tribunals, international and national, on, *inter alia*, treaty questions.

Treaty indexes

Apart from the UN treaty publications, there are certain independent treaty indexes, although most are not kept up to date. For the main multilateral treaties since 1856, there is Bowman and Harris, *Multilateral Treaties, Index and Status* and its cumulative supplements (1984–, London, Butterworths), although it is now probably out of print. The annual index to *Treaties and other International Acts Series* (TIAS) can also be a useful source.

For United Kingdom bilateral and multilateral treaties, there is Parry and Shepherd's four-volume *Index of British Treaties 1101 to 1988* (1970 and 1991, London, HMSO). The *United Kingdom Treaty Series* has annual indexes and quarterly *Supplementary Lists of Ratifications, Accessions, Withdrawals etc*, that are not limited to acts by the United Kingdom.

Further reading on treaties

For succession to treaties, see pp. 364–71 below; and for hints on the drafting of treaties and on final clauses, see Aust MTLP, pp. 420–52.

6

Diplomatic privileges and immunities

Never has there been such a big embassy from here… I have six pages, four dwarfs, about twenty liveried servants, who will all be splendidly dressed, five trumpeters, musicians, a pastor, surgeons, physicians and a company of well-equipped soldiers.[1]

Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd edn, Oxford, 2008 ('Denza')

Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 1053–131 ('Oppenheim')

Introduction

There are now 186 States parties to the Vienna Convention on Diplomatic Relations 1961 (in this chapter, 'the Convention').[2] Even for the handful of non-parties, the Convention now represents an authoritative statement of the law, and as such is relied on heavily by the International Court of Justice.[3] Nevertheless, the manner in which the Convention is interpreted and applied can, to some degree, vary from State to State. All members of diplomatic missions and their local legal advisers therefore need to familiarise themselves with the practice and procedures of the receiving State on the matter, which will often publish guidance.

(In this chapter, references to specific articles are to those of the Convention, unless otherwise indicated.)

Since diplomacy is the means by which a State conducts relations with other States, the Convention plays a crucial role by regulating the establishment of *permanent* bilateral diplomatic missions to represent the interests of the State and the protection of its nationals, and the privileges and immunities accorded to those missions and their staff to give them the necessary freedom and

[1] Franz Lefort, writing as nominal head of the 1697–8 Russian embassy (diplomatic mission) to Western Europe in which Peter the Great travelled incognito, quoted in L. Hughes, *Russia in the Age of Peter the Great*, New Haven, 1998, p. 23.

[2] See 500 UNTS 95 (No. 7310); UKTS (1965) 19. For the ILC Commentary on the draft articles of the Convention, and the Convention, see A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, vol. I., pp. 163 et seq.

[3] *Case Concerning US Diplomatic and Consular Staff in Tehran (US* v. *Iran)*, *ICJ Reports* (1980), p. 3, paras. 45–55; 61 ILR 502.

security to carry out their work. Other missions and entities, and persons connected with them, also enjoy certain privileges and immunities. These are described at p. 141 (special missions), p. 142 (consular posts) and p. 181 (international organisations), below.

The establishment of diplomatic relations and permanent diplomatic missions

The establishment of diplomatic relations and permanent diplomatic missions requires the consent of both States (Article 2). They must be sovereign States and must recognise each other as such.[4] Recognition is usually soon followed by the establishment of diplomatic relations, and sometimes the establishment of such relations constitutes the act of recognition.

The two States are known by the self-explanatory terms *sending State* and *receiving State*. The term *diplomatic mission* is generic. Most are called embassies, but some have titles such as Libyan People's Bureau. As between the over fifty Commonwealth States, for historical reasons (which are not that easy to explain), their diplomatic missions are called high commissions, and their ambassadors are known as high commissioners.

Even when diplomatic relations have been achieved, permanent diplomatic missions do not have to be set up, or at least not in both States. If the two States do not have much in the way of mutual interests, neither may feel the need to have permanent missions, particularly if both States are small with limited resources. Alternatively, only one of the States may set up a permanent mission, provided the other State is content to conduct diplomatic relations mostly via that mission. This is not uncommon for newly independent States. Diplomatic relations can also be conducted by accrediting to the receiving State the head of the sending State's permanent diplomatic mission to a *third* State, or assigning members of his diplomatic staff to represent the sending State. He or they will then visit the receiving State as necessary (Article 5). This practice has been used even more in recent years because of the large increase in the number of States and lack of money. Relations can also be conducted by ad hoc diplomacy, by special missions[5] or in contacts between permanent missions to international organisations, in particular between permanent missions to the United Nations.

The functions of a diplomatic mission

The main functions of a diplomatic mission are described in Article 3(1): representing the sending State, protecting its interests and those of its nationals, negotiating with the receiving State, reporting what goes on in the receiving State and promoting friendly relations, which includes providing the local population with information about the sending State. The list is not exhaustive,

[4] For States and recognition, see pp. 15 et seq. above. [5] See p. 141 below.

and the customary functions include also cooperation with the receiving State in trade promotion, and financial, economic, scientific, defence and cultural matters and, increasingly, tackling crime (in particular drug trafficking and terrorism) – in fact, anything which the two States wish to do together through the means of their respective diplomatic missions.

These days, performing consular functions is an important role for most diplomatic missions, as expressly recognised both by Article 3(2) of the Convention and by Article 2(2) of the Vienna Convention on Consular Relations 1963 (the 'Vienna Consular Convention'),[6] which provides that the establishment of diplomatic relations implies consent to the establishment of consular relations. When a member of a diplomatic mission performs a consular function, he does so in accordance with the Vienna Consular Convention, but retains all his *diplomatic* privileges and immunities. This is important since consular and diplomatic functions overlap to some extent, particularly in the protection of one's nationals, and consular privileges and immunities are significantly less than diplomatic. Therefore, when a member of a diplomatic mission performs consular functions, he should generally deal with the local authorities, police, judicial, etc., rather than with central government (Article 70 (3) of the Vienna Consular Convention). And, to avoid misunderstandings as to the nature of his duties, it is desirable that he should be given a consular appointment *in addition* to his diplomatic post (e.g. First Secretary and Consul), and both appointments should be notified to the receiving State. So, even when he is exercising consular tasks, he will retain all his diplomatic immunities and privileges. That is most important.

There are, of course, grey areas. Some missions may get involved in *commercial activities*. Even when they can be regarded as proper functions of the mission (e.g. buying large quantities of foodstuffs for the sending State), the transactions themselves may not enjoy State immunity.[7] Trading activities, such as selling airline tickets or charging fees for language lessons, are generally not regarded as diplomatic functions. The promotion of tourism, in itself, is not outside those functions if done within the mission as part of its role of providing information about the sending State. But, a separate *tourist office*, even if it does not trade, does not perform a diplomatic function and is therefore not part of the premises of the mission (see below).[8] It is not unusual for a mission to establish a *school* for the children of the members of the mission. Its premises may properly be regarded as part of the mission, and the teachers as members of the administrative and technical staff. However, problems can arise if the school also admits children of nationals of the sending State who are not members of the mission, children of members of other missions or children of nationals of

[6] 596 UNTS 261 (No. 8638); UKTS (1973) 14; TIAS 6820. [7] See pp. 145 et seq. below.

[8] See *Diplomatic Immunities and Privileges: Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to 'The Abuse of Diplomatic Immunities and Privileges'*, published by the British Government in 1985, Cmnd 9497, para. 39. For extracts, see (1985) BYIL 437–53.

the receiving State. Much will depend on the attitude of the receiving State. The more the school becomes a commercial operation, the more the receiving State is likely to question its diplomatic status. However, the receiving State may agree to treat the school as part of the mission: see Article 47(2)(b).[9]

Problems can arise if a public body (such as a cultural organisation like the British Council) is also active in a State where there is a diplomatic mission of the same sending State. Even though the head of the body and some of its staff may also be accorded diplomatic status (e.g. cultural counsellor, etc.), often the body's office(s) will be separate from the diplomatic mission. Subject to any agreement between the sending and receiving States about the legal status of the body, there may be doubt as to the legal status of its premises and staff. These can lead to problems for both States. The British Council encountered problems in Russia in 2007, which have still not been resolved.

The members of the mission

The members of a diplomatic mission are the head of mission, the diplomatic staff, the administrative and technical staff ('A&T staff') and the service staff, none of which have to be members of the diplomatic service although usually most of the diplomatic and the A&T staff are. The head of mission and the diplomatic staff are defined in Article 1(e) as 'diplomatic agents', and enjoy the highest scale of privileges and immunities; the other members of the mission have lower scales.

The *head* of mission has to be expressly accepted by the receiving State before he can take up his post. This is done by obtaining the *agrément* (approval) of the receiving State. No form is prescribed, although something in writing is usual and desirable. No reasons have to be given for refusing *agrément* although if they are given they should relate to the person rather than his government. The receiving State can also require its prior approval (but not *agrément*) of military, naval or air attachés (Article 7).

The sending State may 'freely appoint' the other members of the mission. There is no requirement for prior or subsequent approval by the receiving State. Nor can it require that locally engaged staff be chosen from a list provided by it; nor require that the receiving State employ someone it does not want.[10]

The foreign ministry of the receiving State should be notified, in advance where possible, of all appointments and of the arrivals and departures of members of the mission. The engagement and discharge of local staff should also be notified. Notifications should clearly indicate whether the person is a diplomatic agent, a member of the A&T staff or service staff by describing the post (e.g. first secretary, communications officer, driver). Members of the family and private servants should also be notified. In doing so, a sending State must naturally act in good faith and not abuse the scheme of the Convention by notifying, say, an

[9] See p. 140 below. [10] See Denza, pp. 73–93.

embassy accountant as a diplomatic agent, since he does not perform duties of a diplomatic nature. In case of abuse, the receiving State could take action under Article 9 to have the member of staff removed (see below). In case of persistent abuse, it could limit the number of mission staff in accordance with Article 11 (see below). In most cases, the foreign ministry will raise the matter informally with the mission. If the mission cannot provide an acceptable explanation, it will either have to withdraw the notification or risk the receiving State using its powers to force withdrawal of the person(s).

Failure to notify a person entitled to privileges and immunities (and consequent omission from the local diplomatic list) will not affect the person's entitlement, which takes effect automatically on arrival in the receiving State to take up post (unless he is already there, in which case entitlement only begins once the appointment has been notified (Article 39(1))). Nevertheless, since the freedom of a sending State to appoint the members of its mission requires the receiving State to exempt the arriving members from immigration restrictions, failure to notify in advance could result in considerable delay and other inconvenience.

But, there is no presumption of diplomatic immunity: it must be established in each case, and a diplomatic passport is *not* conclusive evidence of diplomatic status.[11] Whether a person is a member of a mission is essentially a matter of fact. Any problem can usually be resolved by discussions with the receiving State. When the issue is raised in connection with legal proceedings, the courts of the receiving State will often look to its foreign ministry for guidance. Failure to notify a person, or a significant delay in doing so, may make it more difficult to convince a court or the foreign ministry that the person is really a member of the mission. In practice, such difficulties are more likely to arise when the person who has not been notified has been locally engaged, or is involved in an activity which is not obviously a function of a diplomatic mission,[12] or claims to be a member of the family of a member of the mission.[13]

Members of the *diplomatic* staff should be nationals of the sending State, although they can, exceptionally, be nationals of the receiving State if the latter agrees (Article 8). The receiving State can apply the same rule to nationals of third States who are not nationals of the sending State. The rule does not apply to the rest of the staff of the mission, many of whom are likely to be local nationals, for reasons of convenience and cost.

Persona non grata

Article 9 confers on the receiving State the unqualified power to require the removal of any member of the mission. For a diplomatic agent the receiving State notifies the sending State that he is *persona non grata*, and for all other cases that he is 'not acceptable'. The notification can be done at any time, even before the person's arrival in the receiving State. The sending State is then obliged either to

[11] See p. 129 below. [12] See p. 109 above. [13] See p. 134 below.

recall the person or to terminate his functions with the mission. If it refuses or fails to remove him within a reasonable time, the receiving State can refuse to recognise him as a member of the mission so that he will no longer enjoy any privileges or immunities. These powers are essential, and are no more than a reflection of the fact that diplomatic and A&T staff enjoy complete immunity from the criminal jurisdiction of the receiving State and inviolability for their person and residence. Under Article 39(2), the person concerned is entitled to have a 'reasonable' time in which to leave, retaining his privileges and immunities until then. Unless the circumstances are quite exceptional, forty-eight hours is the minimum reasonable period, seven to fourteen days being normal.

However, specific use of the Article 9 procedure is rare, and done more for political purposes. In practice, it is usually enough for the receiving State to request the recall of the person within a specified number of days, and this is normally done without trouble. When a serious offence has been committed, the sending State may be given the choice of waiving the person's immunity or withdrawing him. Today, persistent flouting of parking regulations is a good reason for requiring withdrawal.

But no reasons for demanding recall have to be given by the receiving State. There may be no conclusive proof of unacceptable conduct, or there may be a difference between the two States as to its true nature or purpose. In practice, reasons are often given, although sometimes wrapped up in diplomatic obfuscation ('activities incompatible with his status' (i.e. spying)). Whether the receiving State makes the reasons public depends largely on whether the conduct was purely personal, such as drunken driving, or had been authorised or condoned by the sending State, such as subversion, terrorism or spying.

Size and composition of the mission staff

In the absence of a specific agreement with the sending State, the receiving State can require that the number of staff of the mission 'be kept within limits considered by [the receiving State] to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission' (Article 11). Similarly, the receiving State can also refuse to accept officials of a particular category, such as defence attachés, provided this applies to all diplomatic missions in the receiving State.

Articles 13–20 deal with vital protocol matters such as credentials, precedence and flags, and so need not detain us.[14]

The premises of the mission

The 'premises of the mission' are defined in Article 1(i) to include all the buildings and land, irrespective of ownership (they may well be leased), used

[14] See Denza, pp. 106–27.

for the purposes of the mission, including the residence of the head of mission, which today is usually physically separate from the chancery (the offices of the mission). The Convention does not require missions to be at the seat of government, although they usually are. Some receiving States (e.g. Switzerland) require them to be there. In order to control the location of missions, some States have legislation governing the use of property for the premises of a diplomatic mission. The Diplomatic and Consular Premises Act 1987 requires the consent of the British Government before property can acquire the status of premises of a diplomatic mission. A certificate issued under the Act is conclusive evidence of whether land is, or was, at any particular time the premises of a mission. The sending State may establish offices forming part of the mission in another part of the receiving State (including an overseas territory), but only with the prior express consent of the receiving State (Article 12).

Facilitating the acquisition of premises for the mission

The receiving State must either 'facilitate the acquisition, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way' (Article 21). It must also assist 'where necessary' in obtaining suitable accommodation for the members of the mission. Although the receiving State must therefore provide administrative assistance, it does not have to go as far as actually providing premises. Nor does it have to change its laws, which may prohibit aliens from owning land (e.g. Denmark) or restrict the choice of areas in which missions may be located. Sometimes States will conclude a treaty to provide for the reciprocal provision of land for new mission premises and regulate their construction.[15]

Help with facilities for the mission

There is not much substance to the obligation in Article 25 that the receiving State shall accord 'full facilities' for the performance of the functions of the mission. Assistance in obtaining telephone lines, or permits for alterations or extensions to the premises, are examples of the kind of assistance that can be expected. But it is only 'assistance'. Since Article 41 requires all persons enjoying privileges and immunities to respect local laws and regulations, Article 25 cannot be invoked to avoid normal planning controls and licensing requirements. There is certainly no obligation on the receiving State to ensure the provision of public utility services (electricity, gas, telephone, etc.) if the mission does not pay its bills. Article 25 is usually invoked to bolster a request or complaint based on a more specific provision of the Convention.[16]

[15] See the Russia–UK Agreements of 1996, 1997 UNTS 142 (No. 33636); UKTS (1997) 1 and 2.
[16] See Denza, pp. 202–4.

Also, requests for assistance must be reasonable. It is doubtful if the receiving State is required to provide a certain number of exclusive free parking places in the road outside the mission or residence. Given the traffic problems in cities today, to insist on such a privilege could be unreasonable. The provision of parking spaces is a courtesy, not an obligation.[17] Nevertheless, even in cities with a serious traffic problem, a small number can usually be found for each mission; and these days there may be security reasons for the senior staff of some missions to be able to park near to the entrance of the mission and those guarding it. No doubt the provision of parking spaces is also influenced by considerations of reciprocity; the receiving State may have a problem in arranging for the allocation of spaces, but will want to ensure that it has sufficient for its own mission in the sending State.

Inviolability of the premises of the mission

It is sometimes said that a diplomatic mission is 'foreign soil'. This may be correct culturally, but not legally. The land on which the mission premises stand remains part of the territory of the receiving State, and buying or leasing the land has of course to be done under local law.[18] But Article 22(1) states the fundamental principle that the premises of the mission are *inviolable*: agents of the receiving State may not enter without the consent of the head of mission. However, if a mission is located in part of a commercial office building (quite common these days), those parts which it shares with non-diplomatic occupiers will not enjoy inviolability. The essence of inviolability is freedom from interference, coupled with a special duty to protect (see below). Inviolability is an *absolute* rule, since any exception to it could be abused by a receiving State.[19] In contrast to consular premises,[20] the prohibition on entry applies even in an emergency. If an ambassador would rather his embassy burn down than call in the local fire service, all the receiving State can do is to try to persuade him to let in the firemen.

Diplomatic missions with chanceries and residences in historic buildings in prime locations can now be an obstacle to the building of highways and shopping malls. But ambassadors need not worry. The mission cannot be required to move. Even if negotiations with the receiving State do not resolve the matter, inviolability means that the mission cannot be made to move or to give up part of its land, even if suitable alternatives are offered free.

Inviolability has various other consequences.

Police action

There have been examples of police entering diplomatic missions without permission in pursuance of their normal duties, in particular pursuing

[17] See p. 11 above on comity [18] See *Radwan v. Radwan* [1972] 3 All ER 1026; 55 ILR 579.
[19] See the examples in Denza, pp. 139 et seq. [20] See p. 143 below.

suspected criminals. But, even if the police were unaware of the status of the premises (unlikely in most cases), the intrusion would amount to a breach of its inviolability. There is, however, a possibility that in very exceptional circumstances police may enter the premises without consent if some of its occupants, whether diplomats or terrorists, clearly pose a real and immediate danger to human life.[21] But, in most cases, the receiving State has only the remedies of *persona non grata* or severing diplomatic relations.

Service of legal process

By legal process is meant writs, summonses and suchlike, which can usually be served either in person or by post. Personal service on the premises of the mission and the residences of members of the mission would be a breach of their inviolability, and is therefore ineffective. If service by post is attempted in ignorance of the prohibition, it does not amount to a breach of the Convention, but it is equally ineffective. In theory, the sending State's consent could be given to effect service on the premises, but this in unlikely. In practice, if a mission wishes to accept service it can, if local law allows, authorise its local lawyers to accept service, if necessary reserving its position on immunity from jurisdiction.

For the purposes of Article 22, it does not matter whether the process is addressed to a member of the mission, the mission itself or the sending State, the attempt to serve will be ineffective. The distinction is, however, important for the legal proceedings. It is important to know if one should bring a claim against a member of the mission *or* against the sending State. A mistake could have serious implications.[22]

Immunity from jurisdiction

Article 22(3) makes the premises of the mission, and all property on it, immune from search, requisition, attachment or execution. Now that a State is less able successfully to assert State immunity, the protection given by this provision is a valuable safeguard. What is unclear is the extent to which local courts can exercise jurisdiction in relation to the premises of the mission without breaching the Convention.[23] Much will depend on whether the law of State immunity of the receiving State allows claims concerning the property of foreign States; and, if it does, to what extent such claim can be made with respect to the premises of a mission. In principle, the holding of land by a State for the purposes of a diplomatic mission is an act *jure imperii* (performed in a governmental or public, rather than commercial or private, capacity) and should be protected by State immunity. Under section 16(1)(b) of the (UK) State Immunity Act 1978, a

[21] For a discussion of this dilemma in the case of the Libyan Mission siege in London in 1984 and the possibility of justifying entry on the basis of self-defence, see Denza, pp. 148–50.

[22] See p. 127 below. [23] See Denza, pp. 153–6.

State is accorded immunity from legal actions concerning '*title* to or its *possession* of property used for the purposes of a diplomatic mission' (which wording reflects the immunity from civil jurisdiction for a 'real action' accorded to a diplomatic agent by Article 31(1)(a) of the Convention). Since these terms seem to be directed more to questions of ownership and the right to occupy, it may be that proceedings for more mundane, but nevertheless important, matters such as arrears of rent or breach of covenant *are* permissible. But even if successful, judgment against the State would not disrupt the working of the mission since the judgment could not be enforced by execution against the premises of the mission or property on them.[24]

Bank account of the mission

This leaves the question of whether a judgment against a sending State can be executed against the bank account of its diplomatic mission. The point is not answered by the Convention, since immunity under Article 22(3) does not extend to property outside the premises of the mission, other than vehicles (see below). However, it is now established from a series of judgments in various countries that the bank account of a diplomatic mission enjoys immunity; to inquire into whether some of the funds represent the proceeds of commercial activity, or were to be used for such activity, would be to interfere in the affairs of the mission.[25]

Protection from intrusion or damage

The inviolability of the mission premises is reinforced by the special duty placed on the receiving State to take 'all appropriate steps' to protect the premises against any intrusion or damage (Article 22(2)). If the mission is particularly vulnerable, its protection against intrusion may require a twenty-four-hour police or military guard. It also requires the receiving State to expel intruders if the head of mission so requests. But his consent has not always been sought before action was taken by the receiving State, most conspicuously in the case of the unilateral action by the Peruvian Government to lift the siege of the Japanese ambassador's residence in Lima in 1996. This was a breach of the inviolability of the residence, and disregarded the primary responsibility of the ambassador and his government for the well-being of all persons in the residence.

Although the duty under Article 22(2) is limited to 'all appropriate steps', when damage has been caused to mission premises, whether from outside or by intruders, in practice the receiving State pays compensation even if it has not admitted any fault or it would not be easy to prove fault. In return, receiving States expect, and sometimes make it a condition of payment, that sending States accord reciprocal treatment. It has been long-standing UK practice to make an *ex gratia* payment for such damage, although there could be special

[24] See p. 115 above. [25] Denza, pp. 156–60 and 202–4. See also p. 158, n. 48, below.

circumstances when this might not be justified, for example a terrorist attack. Given the nature of such an attack, and the near impossibility of preventing it, unless the receiving State had been alerted to the impending attack and had done nothing, it may not be reasonable to expect it to pay compensation. The United Kingdom now advises missions to insure themselves against damage, including from terrorist attacks.

Disturbance of the peace of the mission and impairment of its dignity

Article 22(2) also places a duty on the receiving State to prevent any disturbance of the peace of the mission or the impairment of its dignity. This duty is fraught with difficulty, particularly for a receiving State which is at an advanced stage of democracy where the freedoms of speech and assembly are jealously guarded. Balancing them with the duty under the Convention is not always easy, but there is no requirement to insulate a mission from the free and peaceful expression of views. Some States have quite specific and detailed laws or regulations on what demonstrators may or may not do. Others, including the United Kingdom, deal with demonstrations on a case-by-case basis, leaving it largely to the police to decide what is appropriate in the particular circumstances. Happily, in London the police have a wealth of experience on which to draw. The police must ensure that the work of the mission is not disrupted, that staff are not put in fear, and that both staff and visitors can come and go freely. This will often mean that the demonstrators are kept on the opposite side of the street from the embassy. (A similar policy should also be followed if a demonstration is held outside the foreign ministry, given that members of missions need to have unimpeded physical access to it.) Very noisy demonstrations are frequent today with the use of powerful loudhailers. Allowing them too near to a mission is difficult to reconcile with the duty under Article 22(2).

Asylum

The Convention does not deal with the question of whether, and in what circumstances, a diplomatic mission may grant so-called diplomatic asylum. All that needs to be said here is that, even if it is wrongly granted, the receiving State must, of course, respect the inviolability of the mission premises. (Diplomatic asylum is dealt with at page 170 below.)

When inviolability of mission premises begins and ends

Although Article 39 has detailed rules on when the privileges and immunities of members of a mission begin and end, the Convention does not do the same for the premises of the mission. Their mere acquisition will, in itself, not make them 'premises of the mission'. But once the premises are ready to be occupied, they probably then become premises of the mission and will continue so even if

later they have to be vacated for refurbishment. They will cease to have their special status once they cease to be used for the purposes of the mission, which is essentially a question of fact, and which in practice is often a matter of negotiation with the receiving State. The receiving State can always agree to treat the site on which new buildings for the mission are being constructed as premises of the mission.[26]

Some States have legislation or administrative rules on the matter. The UK Diplomatic and Consular Premises Act 1987[27] requires express consent before property can be regarded as premises of the mission. Consent can be withdrawn in certain circumstances, especially if the premises have been abandoned.

Exemption of mission premises from taxation

It is a basic principle that one State does not tax another, since this would amount to taking property of the latter State and, anyway, it would be almost impossible to enforce. Accordingly, the sending State and the head of mission are exempt from all dues and taxes, national, regional or municipal, in respect of the premises of the mission, whether owned or leased, other than such as represent payment for 'specific services rendered' (Article 23). Thus if the sending State owns the mission premises, it is liable to pay only that portion of local taxes which represents payment for such services, that is to say general services which are financed from taxes and which are clearly beneficial to all missions, such as street maintenance, lighting and cleansing, and fire services (the so-called beneficial portion). Services which missions are less likely to benefit from are public education and libraries, and welfare services. Although missions do benefit from the services of the police, since under Article 22 the receiving State has a duty to provide protection, the mission is not liable to pay for such services. The beneficial portion is not based on the amount of services actually used each year, since given their nature that would be impossible to calculate, but on the amount spent on the beneficial services relative to that spent on the other services. How this is applied in practice will vary from State to State.

The exemption does not, however, apply to dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of mission (Article 23(2)). Thus, if a lease provides that property taxes paid by the landlord are added to, or included in, the rent, the sending State cannot claim exemption. But the exemption will apply if under the lease the mission is otherwise liable to pay the taxes direct to the authorities.

Does a mission (or its members) have to pay what is usually call a *congestion charge*, as it applies in Central London? There, some diplomatic missions pay it for their official vehicles and members of missions when they use their car in the congestion zone. Some do not pay. The practice varies in the capitals of other

[26] See the Russia–UK Agreement of 1996, 1997 UNTS 142 (No. 33636); UKTS (1997) 1 and 2.
[27] For the note about it circulated to all diplomatic missions, see (1987) BYIL 1987 541.

States such as Oslo and Singapore. Although the International Court of Justice would have jurisdiction to decide whether the United States should pay it in London, since the outcome is uncertain, and would almost certainly affect other immunities for taxation, the United Kingdom has so far declined to take the matter to the Court.[28]

Inviolability of mission archives

The 'archives and documents' (hereto referred to as documents) of the mission are inviolable at all times wherever they may be (Article 24). The term documents has to be given a wide definition to include at least all items included in the definition of 'consular archives' in Article 1(1)(k) of the Vienna Convention on Consular Relations 1963.[29] Today, it would also include documents held by electronic means, such as those stored on computer hard and floppy disks, CD-ROMs, memory sticks and whatever other new information-storage methods are invented. The inviolability is extensive. It does not depend on the documents, even when they are outside the mission, being in the custody of a member of the mission or being readily identifiable as mission documents (no mission stamp is required). Inviolability lasts indefinitely. Closure of the mission, severance of diplomatic relations or armed conflict make no difference (see Article 45). The receiving State has an obligation to protect the inviolability of the documents in all circumstances and to return them immediately if they have been lost or stolen. If the documents are disclosed (other than by the sending State) during legal proceedings, it is the duty of the court to respect their inviolability and to ensure they are returned. This would be so even if the sending State is the defendant and State immunity does not apply to the proceedings. If, however, a member of a mission had, as part of his functions, communicated a document to a third party, then it loses inviolability.

Means of transport

As with property *inside* a mission's premises, wherever they are in the receiving State its means of transport they have immunity from search, requisition, attachment or execution (Article 22(3)). This does not amount to inviolability, but stopping and searching a motor vehicle by the police is prohibited, as is wheel clamping, which is a breach of immunity from criminal jurisdiction. But the vehicle may be towed away if it is causing a serious obstruction, the driver cannot be traced and it cannot just be moved out of the way. No charges for towing or holding the car can be imposed, inconvenience being the only penalty. These points apply equally to the personal vehicle of a member of a mission who enjoys immunity from criminal jurisdiction.

[28] See Denza, pp. 369–73, who argues that, in London, missions do *not* have to pay the charge.
[29] 596 UNTS 261 (No. 8638); UKTS (1973) 14; TIAS 6820.

Freedom of movement

Subject to its laws and regulations concerning special zones entry into which is prohibited or regulated for reasons of national security, the receiving State must ensure to all members of the mission freedom of movement and travel in its territory (Article 26). Such freedom is essential to enable the members of the mission to report properly on conditions in the receiving State and to protect nationals of the sending State. Any special zones should therefore not be so extensive as to render freedom of movement and travel illusory.

Freedom of communication

Article 27(1) States the fundamental principle that the receiving State must permit and protect 'free communication' by a diplomatic mission for all official purposes. 'Free' does not mean without payment, but rather unrestricted communication between the mission and the sending State and its other missions, its nationals wherever they are, missions of third States and international organisations. The means by which this can be done is, however, circumscribed by the rest of the provision. Thus the right for the mission to use 'all appropriate means' is limited to communications with its government and its other missions and consulates. For this purpose, the appropriate means include the use of diplomatic couriers and messages in code or cipher. But, in communicating directly with third parties, including their own nationals, missions may not use such means. Wireless transmitters can, and of course do, transmit messages in code and cipher, but they should *not* be used for transmissions to third parties. Moreover, the installation and use of a transmitter (but not of telephone lines by which coded faxes and emails can be sent) requires the consent of the receiving State, but once this has been given the use of the transmitter is not subject to inspection or other intrusive regulation. However, both sending and receiving States have obligations to the International Telecommunications Union (ITU) to ensure that transmitters do not cause harmful interference with other transmissions. Where the receiving State has laws and regulations regarding compliance with ITU requirements, the mission should therefore comply with them (see Article 41(1) and (3)).

Inviolability of official correspondence

Article 27(1) confers inviolability on 'all correspondence relating to the mission and its functions'. Without the consent of the sending State, it cannot be used in evidence in the local courts or be opened by the receiving State. Unfortunately, this apparently simple formula is unclear as to its scope. All correspondence sent by the mission is covered, but it is not clear if correspondence to the mission from its own government or its other missions is also covered. This has less practical importance today when sensitive messages are either sent by electronic means in code or cipher, or by diplomatic bag.

The diplomatic bag

The diplomatic bag used to be the best means of ensuring secure communications between a sending State and its diplomatic missions. Even after secure wireless or telephonic transmissions became widely used for diplomatic communications, the diplomatic bag was still much used for sending lengthy classified documents and sensitive items of equipment. Today, the ability to send even voluminous texts by secure fax or email has not made the diplomatic bag redundant, but it is certainly used less frequently. Nevertheless, problems remain in applying the rules laid down in the Convention. At root is a dilemma: how to balance the interests of the sending State in a secure means of communication, against the concern of the receiving State that the inviolability of the bag should not be abused. The problem is complicated by the simple fact that every State is both a sending State and a receiving State.

What is a diplomatic bag?

Most diplomatic bags are still mailbags made of stout woven fabric, although no doubt human rights norms now prevent them being sewn by prisoners. But the bag does not have to be a sack or pouch. Because it can be used for heavy and bulky items, such as communications equipment and computers – even building materials – the bag can even be a freight container carried on a lorry, although the vehicle itself would not usually be accepted as a bag.

To have the status of a diplomatic bag, 'the packages constituting the diplomatic bag must bear visible external marks of their character' (Article 27 (4)). Although it is for each sending State to inquire into the precise requirements of the receiving State as to the marking of diplomatic bags, international practice normally requires (1) the bag to be sealed with a wax, metal (commonly lead) or plastic official seal of the sending State or its diplomatic mission, and (2) a label (tied or stuck to it) addressed to the mission or the foreign ministry of the sending State and bearing an official stamp.

The diplomatic bag must be clearly distinguished from packages which, although destined for, or sent from, a mission, do not carry the necessary marks of a diplomatic bag. Such packages come within Article 36(1)(a).[30]

What may the diplomatic bag contain?

Article 27(4) requires the bag to contain 'only diplomatic documents or articles intended for official use'. This is reinforced by Article 41(1) and (2), which places a duty on the members of the mission to respect the laws and regulations of the receiving State and not to allow the mission to be used 'in any manner incompatible with the functions of the mission'. Thus the use of the bag to send

[30] See p. 133 below.

narcotic drugs, weapons and explosives is a clear abuse of the Convention and local law, although some receiving States do permit the use of arms for personal defence. Nevertheless, provided the bag bears the correct marks evidencing that it is a diplomatic bag, the fact that it contains prohibited items will *not* affect its status.

Prohibition on opening or detaining the diplomatic bag

Article 27(3) prohibits the bag from being 'opened or detained'. Although not expressed in terms of inviolability, that is its effect. Except in the exceptional cases described below, a receiving State must *never* open a bag or impede its passage. Even if it has grounds for suspecting that inviolability is being abused, the receiving State has no right to open it or to require it to be returned to the sending State or the mission. (Requiring it to be sent back is the formula in Article 35(3) of the Vienna Consular Convention and was one of several suggested formulas in the 1980s to replace Article 27(3), but no agreement could be reached.)[31] There are, however, occasions when a receiving State claims the right to detain, refuse admittance to, or even open, an incoming bag that it claims to be suspect. The reaction of the sending State will depend on the circumstances, but as a last resort the sending State may in practice have no option but to return the bag to its foreign ministry. Before doing so, it should of course firmly remind the receiving State that if it persists in its illegal demand it risks reciprocal action (see Article 47(2)(a)).[32]

There are cases, fortunately extremely rare, where the circumstances are so exceptional that the receiving State may feel compelled, in the genuine interests of protecting human life or its national security, to insist on a bag being opened against the objections of the sending State. Such cases will occur only when there are very strong grounds for believing that the bag contains a human being, a corpse or explosives.[33]

Scanning the diplomatic bag

In 1961, scanning by X-rays or by using ultrasound or radioactivity detectors was either not technically possible or widely practised. Today, the safety of aircraft is of paramount importance and a variety of means are used to detect explosives, weapons and drugs. Regrettably, such items are sometimes carried in diplomatic bags. But no airline is obliged to carry any person (including even an ambassador) or any item which it considers illegal or a safety risk. It may therefore require as a condition of carriage that a diplomatic bag be submitted

[31] See Denza, pp. 244–8.

[32] And see p. 140 below. See also Denza, pp. 229–31, on reservations made by certain Arab States to Art. 27 in which they claim the right to reject a suspect bag if the sending State does not agree to it being opened.

[33] For examples, see Denza, pp. 242–3.

to scanning by the airline or airport security authorities. If the scanning indicates a suspicious item, the airline can refuse to take the bag. But, can the receiving State scan a bag *on arrival* in its territory; and if it finds the inviolability of the bag is being abused, what can it do? Depending on the circumstances, the mission may be willing to open the bag in the presence of officials of the sending and receiving States, although it is under no obligation to do so. The practice and views of States on the matter differ, but one may tentatively summarise the position as follows. Scanning is permissible provided it is not so intrusive in nature, or in the way it is carried out, that *details* of the contents could be revealed. Use of a sniffer dog to detect drugs is therefore acceptable, as is a radioactivity detector. On the other hand, certain X-ray and other equipment is capable of 'reading' the contents of documents and electrical equipment. This would be equivalent to opening the bag and inspecting its contents. But, even if the scanning is proper and reveals the presence of items such as guns, the receiving State is not entitled either to open the bag or to delay it. Instead, it should of course inform the mission and seek its comments. If the mission insists on the bag being released forthwith, it should be. If, however, the receiving State insists on the bag being returned to the sending State, despite the fact that this would be a breach of the Convention, since the sending State will itself already be in breach, it will not be in a strong position to protest.

If the bag is in transit via a third State, that State must accord it the same inviolability and protection as the receiving State (Article 40(3)).

The protection given by international law to the diplomatic bag applies whether or not it is accompanied by a diplomatic courier (for reasons of cost most bags today are unaccompanied), but for practical purposes a bag is naturally more secure if accompanied.

Diplomatic couriers

The messengers specially entrusted with the delivery of the diplomatic bag are accorded functional immunity – only so much as is necessary for the protection of the bag. Article 27(5)–(7) provides for three categories:

The full-time diplomatic courier Because of the expense, this is a dying race. He holds a diplomatic courier's passport indicating his status, and carries a document indicating the number of packages constituting the diplomatic bag, which must bear the visible external marks required by Article 27(4). In view of his function, the receiving State must protect him. He therefore enjoys personal inviolability (see below) and cannot be arrested or detained even when he has delivered the bag and returns without another one. His personal baggage, however, enjoys no special status and can be inspected or even confiscated. If the courier transits a third State, that State must accord him the same inviolability and protection as the receiving State (Article 40(3)).

The ad hoc courier Also for reasons of cost, these are increasingly used. The ad hoc (or 'casual') courier has the same status as a full-time courier, except that

his immunities, as a courier, cease once he has delivered the bag. So, such couriers are often members of a diplomatic mission who are sent to a neighbouring State to collect a bag delivered there by a full-time courier.

The captain of a commercial aircraft A bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorised airport in the receiving State. Although he must be provided with a document indicating the number of packages constituting the diplomatic bag, he is *not* a diplomatic courier. Nevertheless, if the aircraft has to transit a third State, that State must accord the bag the same inviolability and protection as the receiving State (Article 40 (3)). Since the captain is not a courier, a member of the diplomatic mission has the right to collect the bag 'directly and freely' from him. A diplomatic bag can also be entrusted to the captain of a State aircraft, including a military aircraft.[34]

Personal inviolability

Since Ancient Greece it has been a fundamental principle that a diplomatic agent is inviolable: he is not liable to any form of arrest or detention, and the receiving State must treat him with due respect and take all appropriate steps to prevent any attack on his person, freedom or dignity (Article 29).

No arrest or detention

Although the prohibition on arrest or detention is self-explanatory, there are certain exceptional circumstances when a diplomat can be detained temporarily, either in the interests of protecting others or in his own interest. There have been (a few) cases where a diplomat waving a gun about in the street has been disarmed by police. Similarly, if a diplomat is found by police to be obviously drunk in charge of a motor vehicle, he can be stopped and held by police until his mission or family collect him. Nor does inviolability mean that a diplomat can ignore procedures established to ensure general safety. Thus, if he refuses to submit to screening by airport metal detectors or X-ray machines, or to a search of his person or baggage, the airline is not under any legal obligation to carry him. He can travel by sea.

Safeguarding from attack

The duty to 'take all appropriate steps' to prevent any attack on the diplomat's person, freedom or dignity rests on the receiving State, even if the sending State also takes steps to protect its diplomats (in which case it must conform to local laws, in particular those on the possession and use of firearms).[35] What is 'appropriate' will depend on the circumstances. There is no need for a permanent guard on the residence of an ambassador unless there is reason to believe

[34] See p. 157 below on the immunity of State aircraft. [35] See p. 138 below on Art. 41.

that he may be at risk. The decision on what is reasonable must be left to the receiving State, although it should consult closely with the mission. Similarly, if a diplomat is taken hostage (other than in a mission or residence of a member of the mission),[36] what to do, and when, is a matter for the *receiving* State; it is not under any obligation to do what the sending State asks of it, such as giving in to kidnappers' demands.[37] If, however, the receiving State is clearly unable or unwilling to do what is necessary to obtain the release of the hostages, and their lives are in serious danger, the sending State may, in exercise of its inherent right of self-defence, use reasonable force to free them.[38]

Inviolability of the private residence

We have seen that the residence of the head of mission is treated as part of the premises of the mission and thus enjoys inviolability (Articles 1(i) and 22). The private residence of a diplomatic agent enjoys the same inviolability (Article 30 (1)). For this purpose, the residence may be temporary, such as a hotel room occupied on arrival at post. The inviolability is not lost when the residence is temporarily left unoccupied during a holiday or when repairs are being carried out. A second (e.g. vacation) home will be accorded inviolability only while a member of a mission or his family physically occupies it, including when he or they are temporarily away from it walking, bathing, etc.

Inviolability of private papers, correspondence and property

Although official papers in the possession of the diplomatic agent already enjoy inviolability,[39] Article 30(2) confers inviolability also on his *private* papers and correspondence. Thus, even if he is sued in respect of a private professional or commercial activity for which he has no immunity from jurisdiction,[40] he cannot be compelled by the local courts to produce such private papers and correspondence, although his head of mission could direct him to comply.

All property in the possession of a diplomatic agent, even if ownership is disputed, is inviolable (Article 30(2)). 'Property' includes his bank account and motor car. There are three exceptions: (1) enforcement of a judgment when, in accordance with Article 31(1)(a)–(c), he has no immunity (see below); (2) inspection of his personal baggage (Article 36(2)(b));[41] and (3) since it can have no greater inviolability than those of the mission, his motor car can also be towed away if it causes an obstruction.[42]

[36] See p. 117 above on the Lima hostages. [37] See Denza, pp. 258–63.
[38] See further p. 209, para. (1), below. On the rescue of Israeli nationals at Entebbe airport, see Oppenheim, para. 131, n. 11.
[39] See p. 120 above on Art. 24. [40] See p. 128 below on Art. 31(1)(c).
[41] See p. 133 below. [42] See p. 120 above.

The difference between diplomatic immunity and State immunity

Diplomatic immunity and State (or sovereign) immunity (see the next chapter) are often confused. State immunity is the immunity of a State, and its officials and agents, from the jurisdiction of another State. Diplomatic immunity is accorded to the members of a diplomatic mission, and in the case of diplomatic agents amounts to almost total immunity from jurisdiction. State immunity is not governed by a treaty of universal application (although the United Nations has now adopted a Convention on the Jurisdictional Immunities of States and their Property 2004),[43] and so the extent of the immunity varies from State to State. Keeping a clear distinction between State immunity and diplomatic immunity is therefore vital. Unfortunately, the difference is not always well understood by courts, private lawyers or even foreign ministries. Confusing the two can lead to trouble.

Take a simple case: an ambassador contracts with a local decorator for the repainting of the embassy. The ambassador disputes the bill, but the decorator will not reduce it. How is this typical dispute to be resolved? Because the ambassador would in any event have diplomatic immunity, one might think that all the decorator can do is to urge his foreign ministry to put pressure on the ambassador or his government to pay or to negotiate a settlement. But, in this case the ambassador would have signed the contract as part of his official functions, and therefore *on behalf of his State*. It is the sending State that is the party to the contract, not the ambassador. In fact, the embassy – merely a number of diplomats representing their State – has no legal personality and cannot therefore be sued.[44] So, can the decorator sue the State? Whether a State can be sued in a foreign court will depend on whether under the law of the receiving State a foreign State can claim immunity in the particular circumstances and, if so, whether that immunity is then waived.[45]

When considering legal proceedings in a matter in which a diplomat has been directly involved, it is crucial to analyse the situation or transaction to see if he was acting on behalf of his State or personally. Issuing legal proceedings against a diplomat when they should be against his State is pointless and will only cause delay and expense. To help to avoid confusion, when a member of a diplomatic mission signs a contract, lease or suchlike as part of his official functions, he should do so expressly on behalf of his State, and only the *State* should be named as the party.

Diplomatic immunity

A diplomatic agent is wholly immune from the *criminal* jurisdiction of the receiving State (Article 31(1)). This immunity is necessarily linked to the inviolability of his person.

[43] See pp. 145–6 below. [44] See a 1956 judgment of the Supreme Court of Croatia in 23 ILR 431.
[45] See pp. 150 et seq. below.

The position regarding *civil and administrative* jurisdiction is slightly different. That jurisdiction includes, in effect, all jurisdiction which is not criminal, although what is classified as criminal will vary from country to country. Parking and other minor traffic offences are often not regarded as criminal offences. The immunity covers all civil and administrative matters, which touch the diplomatic agent, including divorce and child custody. Article 31(1) provides, however, for some exceptions. The legal problems concerning diplomatic immunity are largely about how to deal with the consequences of immunity when it is not waived or the application of these exceptions.[46]

Exception (a): private immovable property in the territory of the receiving State

There is no immunity in respect of civil proceedings concerning title to or possession of land and buildings on the land. It seems that this applies also to the principal private residence of a diplomatic agent. However, even if a court were to order the diplomatic agent to leave, the inviolability of his residence (unless waived) would prevent the order being enforced (Article 30). The practice of States varies as to whether proceedings for recovery of rent or other such obligations also come within the exception.

Exception (b): private involvement in succession proceedings

There is no immunity if the diplomatic agent is involved as a private person, and not on behalf of the sending State, in civil proceedings relating to the estate of a deceased person.

Exception (c): private professional or commercial activity

There is no immunity in respect of civil proceedings relating to any professional or commercial activity carried on by the diplomatic agent outside his official functions. If a diplomat writing a book in his spare time defames someone, he will have no immunity from an action for defamation. The activity must generally be continuous, not an isolated act unless it is of some magnitude, like the speculative purchase of land. Investments in shares and suchlike are also likely to fall within the exception. Although Article 42 prohibits a diplomatic agent from practising 'for *personal* profit' any professional or commercial activity, this does not forbid all paid activities. The exception in Article 31(1)(c) is for the benefit of persons doing business with him if he were to embark on profitable work, whether in breach of the prohibition or with the consent of the receiving State. The exception is more likely to be relevant to a diplomatic spouse who works.[47]

[46] For a full account of the problems, see Denza, pp. 289–308. [47] See p. 134 below.

Proof of diplomatic immunity

Whatever the basis for immunity under the Convention, it is for the person claiming it to establish that he is entitled to it. Immunity can never be presumed. In an attempt to smooth their passage through foreign customs and immigration, some States issue diplomatic passports to government ministers, members of the legislature and sometimes even persons with no public office. But the possession of a diplomatic passport or diplomatic visa is, in itself, never proof of immunity. Proof requires evidence that (a) the person holds a position in a diplomatic mission which confers immunity *and* (b) that the immunity covers him in the particular circumstances of the case.[48] How these matters are established depends on the law and practice of each State. Obviously, the foreign ministry of the receiving State can help, but it has to be careful not to pre-empt the local courts. Even the apparently simple act by the foreign ministry of confirming that Mr Smith has been notified as a diplomatic agent serving in the Embassy of Ruritania does not prove that the person claiming immunity *is* Mr Smith – that also has to be proved. And, even if he is, as we have already seen – and will see again when we discuss other members of a diplomatic mission – whether his immunity applies in the particular circumstances of the case is a question of law. Some States (e.g. the United States) will sometimes certify to their courts points of fact and law; other States (e.g. the United Kingdom) will certify only matters of fact.[49] A foreign ministry may nevertheless indicate, albeit informally, whether it considers a person a member of a diplomatic mission. In doing so, it is important for the ministry to be even-handed. In responding to any factual enquiries about diplomatic status, the ministry must always remember that a successful claim of immunity could severely affect the rights of others. It must therefore not only consider the matter with great care, but all information provided to one party should be sent also to the other party or parties concerned.

Immunity from giving evidence

A diplomatic agent is not obliged to give evidence as a witness (Article 31(2)). The sending State may, however, agree to waive his immunity solely to enable him to do so. Whether it will be possible to attach conditions as to the manner in which he gives evidence will depend on the law and practice of the receiving State.

[48] This equally applies to persons claiming immunity as a member of a special mission (p. 141 below), a consular officer (p. 143 below), a Head or former Head of State (p. 161 below) or a person connected with an international organisation (pp. 181–2 below).

[49] Section 4 of the Diplomatic Privileges Act 1964 provides that a certificate by or on behalf of the Foreign and Commonwealth Secretary is conclusive evidence as to the *facts* in it. The question of immunity is for the court alone.

What immunity is not

For so long as a person has immunity, it protects him in the receiving State against legal proceedings in respect of all current and past matters, including private matters. In respect of acts performed in exercise of his functions as a member of the mission, the immunity continues indefinitely (Article 39(2)). But the law of the receiving State still applies to the immune person as it does to other persons (Article 41(1)); it is just that it cannot be enforced against him while the immunity lasts and is not waived. Immunity from jurisdiction is therefore not the same as being 'above the law'. The insurer of a person enjoying immunity should therefore always settle a claim against the insured person for the full and proper amount even if immunity has not been waived. Most receiving States now require members of foreign missions to hold third-party motor vehicle insurance.

Nor does immunity from the jurisdiction of the receiving State exempt a person from the jurisdiction of his own State (Article 31(4)). In the case of a serious criminal offence, the sending State may be willing to waive immunity (as is increasingly done) or to recall the person and prosecute or discipline him at home. In practice, much can be achieved by discussions between the mission and the foreign ministry of the receiving State; and if the case is serious and the mission uncooperative, the foreign ministry always has the power to require the person's recall.[50]

Immunity from execution

Even if immunity from jurisdiction has been waived, a judgment cannot be enforced by execution against the person, private residence or private property of the immune person (Articles 31(3), 29 and 30). This is subject only to the three exceptions in Article 31(1), in which cases his property can be seized provided there is no infringement of the inviolability of the person or his residence. Reliance on immunity and inviolability in order to evade legal obligations is a serious matter and may lead to the receiving State requiring the person to leave.[51]

Waiver of immunity

The purpose of diplomatic immunity is to ensure the efficient performance of the functions of a diplomatic mission; it is not for personal benefit. *Immunity cannot therefore be validly waived by the person enjoying it*. It can be waived only by or on behalf of the sending State (Article 32(1)). The law of the *receiving* State must determine whether immunity has been waived, and particular care must be taken with criminal proceedings, since an accused diplomat might

[50] See p. 111 above. [51] Ibid.

challenge the waiver. Waiver by the head of mission will normally be regarded as valid, unless it purports to be of his own immunity; and most governments require a head of mission to seek authority before waiving the immunity of any of his staff.

Waiver of diplomatic immunity must be express; it cannot be implied (Article 32(2)). Thus, if a person enjoying immunity takes part in civil or criminal proceedings as a defendant, but without an express waiver, the proceedings will be void. Informal or voluntary cooperation with proceedings does not amount to waiver. Whether waiver can be given in advance of the events giving rise to legal proceedings is not clear. However, since State immunity can be waived in advance,[52] an advance waiver for the purpose of at least *civil* proceedings (e.g. disputes under a lease) may be possible. It is most unlikely that advance waiver for criminal proceedings is possible, since, unlike some civil transactions, one cannot usually predict the circumstances that may give rise to criminal proceedings. Once validly waived in respect of particular proceedings, the immunity is lost for those proceedings, but not otherwise.

On the other hand, if a person enjoying immunity *initiates* civil proceedings, he cannot invoke his immunity in respect of any counter-claim directly connected with his claim (Article 32(3)). But, if he began the proceedings not knowing of his immunity, he will be entitled to have the proceedings dismissed.[53]

In civil proceedings, *waiver of immunity from execution* of the judgment requires a separate waiver (Article 32(4)). It is probable that this does not apply to criminal proceedings because the penalty is inseparable from the finding of guilt, and the practice of States seems to support this.[54]

Social security exemption

Since a diplomatic agent will continue to be subject to the social security legislation of the sending State, he is exempt from the social security obligations of the receiving State (Article 33(1)). A private servant who is in his sole employ is also exempt if he is not a national of or 'permanently resident'[55] in the receiving State and is covered for social security by the sending State or a third State (paragraph 2). But, if that exemption does not apply, the diplomatic agent must carry out the employer's obligations under local social security legislation (paragraph 3). Although the Convention does not provide specifically that a mission must comply with local social security legislation in respect of those of its staff who are *not* exempt (mostly locally engaged), sending States increasingly take the view that – as good employers – they should ensure that local social security contributions for non-exempt staff are paid by the mission. Even when a member of a mission is exempt, he can take part in the local social

[52] See p. 150 below. [53] Denza, pp. 342–3.
[54] But see ibid., pp. 343–5. [55] See p. 136 below.

security scheme if this is permitted by local law (paragraph 4). Nothing in Article 33 affects the provisions of social security agreements past or future (paragraph 5).

Exemption from taxation

Although he remains subject to taxation by his sending State, a diplomatic agent is exempt in the receiving State from 'all dues and taxes, personal or real, national, regional or municipal' (Article 34). This exemption is very broad and includes direct and indirect taxation.[56] But, there are important *exceptions* to the general exemption:

(1) '[I]ndirect taxes of a kind which are normally incorporated in the price of goods and services.' The main indirect taxes are value added taxes and sales taxes. The exception is interpreted in two ways. Some States, particularly the United Kingdom, do not grant general exemption for value added tax even when the amount is identifiable at the point of sale. Many States take the contrary view and either provide tax exemption cards or have refund procedures. Other States, including the United Kingdom, allow (though as a concession) certain refunds on high-value goods.
(2) '[D]ues and taxes on private immovable property situated in the territory of the receiving State, *unless* he holds it on behalf of the sending State for the purpose of the mission.' Although the intention as to the scope of this exception is not clear,[57] it would appear from State practice since 1961 that most receiving States now exempt the residence of a diplomatic agent from local property taxes, although sometimes on the basis of reciprocity (see Article 47(2)(b)). Accommodation used for purely private purposes, such as a weekend cottage, is not exempt.
(3) '[E]state, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39.' See the discussion of Article 39.[58]
(4) '[D]ues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State.' A diplomat cannot enjoy exemption from taxation on local investments. There are, of course, other ways in which expatriates can lawfully arrange their finances so as to minimise tax.
(5) '[C]harges levied for specific services rendered.' See the discussion of Article 23.[59]
(6) '[R]egistration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.' The fees, dues and duties referred to all relate only to 'immovable property', i.e.

[56] See pp. 119–20 above about the congestion charge. [57] Denza, pp. 363–9.
[58] At pp. 136–7 below. [59] See p. 119 above.

land and buildings. The proviso about Article 23, which exempts the premises of the mission from all taxes, except those which represent payment for specific services rendered, means that, for example, if the fee payable for registration of the transfer of legal title to the residence of a diplomatic agent is quite out of proportion to the cost of that service, and therefore amounts to a tax, there is exemption from at least the excess amount.

In calculating the tax due on non-exempt income, any income that is exempt must be disregarded.

Exemption from personal services

Article 35 exempts a diplomatic agent from all personal services, from any kind of public service (such as sitting on a jury), and military obligations, including those connected with requisitioning, contributions and billeting of soldiers.

Exemption from customs duties and inspection

These exemptions are of considerable practical importance and can cause problems due to the natural desire of a receiving State to prevent abuse of such valuable privileges and the natural human weaknesses of diplomats.

Exemption from customs duties

Article 36(1) requires the receiving State to permit the import, free from all customs duties, taxes and related charges, other than service charges, of 'articles for the official use of the mission' and 'articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment', this latter privilege continuing throughout his posting. It is for the head of mission and the sending State to determine, in good faith, what is covered by these formulas; these days they include even construction materials needed for the premises of the mission. However, the receiving State is not under an obligation to allow the entry of goods the import of which is subject to a general prohibition (see Article 41). It may, of course, make exceptions on a concessionary basis. Similarly, since the Convention contains no privileges regarding exports, any prohibition on exporting certain articles, such as antiquities, applies equally to the mission and its staff.

These important import privileges are qualified by the right given to the receiving State to control the exercise of the privileges by means of its laws and regulations in order to prevent abuse. They can prescribe procedural formalities, restrictions on quantities, the period within which duty-free entry of goods will be allowed on first installation (for those staff entitled to that privilege),[60]

[60] See p. 135 below (A&T staff).

and regulations on subsequent disposal of goods imported duty-free (a motor vehicle can usually be sold locally only to a buyer entitled to the same import privileges).

Exemption from inspection

Article 36(2) generally exempts the *personal baggage* of a diplomatic agent from search, but permits the receiving State to inspect it (including unaccompanied baggage) if there are 'serious grounds' for presuming that it contains articles not covered by the exemptions in Article 36(1), or articles the import or export of which is prohibited by its law or controlled by its quarantine regulations. The inspection must be conducted in the presence of the diplomat or his representative. These conditions do not apply to security searches required by airports or airlines.[61] A package which does not constitute personal baggage is subject to normal inspection, unless it constitutes a diplomatic bag.[62]

Members of the family of a diplomatic agent

The immunities and privileges in Articles 29–36 are also enjoyed by 'the members of the family of a diplomatic agent forming part of his household', unless they are nationals of the receiving State (Article 37(1)). The quoted formula certainly covers the spouse and any minor children, but practice varies from State to State as to which other persons come within it. A student child who has reached majority but lives with the diplomat is usually included, as also is a student who lives with him during the vacations. Increasingly, non-married partners are being accepted; and sometimes even same-sex partners. A widowed parent who lives as part of the diplomat's household may be accepted. Some States will not recognise more than one wife of a polygamous marriage. Difficult cases will be the subject of consultations, but, if these do not result in agreement, in practice the final decision lies with the receiving State.

Working spouses

Increasingly these days, diplomatic spouses of either sex want to work during a posting. Some States make difficulties and refuse work permits, often citing as the reason the immunity of the spouse. Yet the prohibition in Article 42 on a member of a diplomatic mission practising a profession or commercial activity for personal profit does not apply to spouses. And anyway immunity should not be an obstacle. Under Article 31(1)(c) the spouse will have no immunity from civil or administrative jurisdiction in relation to work *not* undertaken for a diplomatic mission. The work will be subject to tax (Article 34(d)), and the person will have to satisfy any professional requirements. Thus a spouse who works as, for example, a doctor, teacher or computer programmer will have to

[61] See p. 125 above. [62] See p. 122 above.

pay tax and can be sued in respect of the work. Yet some receiving States make it a condition of granting a work permit to a diplomatic spouse that his or her *general* immunity from jurisdiction be waived in advance. This is wrong. Since the spouse will have no civil or administrative immunity in respect of the work, there is no reason for a general waiver. Nevertheless, many States have found it necessary or prudent to conclude bilateral reciprocal arrangements authorising their respective diplomatic spouses to work subject to certain conditions and procedures.[63]

Administrative and technical staff

Article 37(2) provides that a member of the administrative and technical (A&T) staff of the mission (e.g. registry, secretarial, communications and security staff), and members of his family forming part of his household, also enjoy the privileges and immunities in Articles 29–36, subject to certain qualifications. Nevertheless, *full immunity from criminal jurisdiction* and *inviolability of person, residence and property* is the same as that of a diplomatic agent.

- The exemption from *civil and administrative jurisdiction* in Article 31(1) is limited to acts performed *in the course of the officer's duties*. Thus, in addition to his official acts, he will be immune in respect of acts incidental to his duties, such as driving to and from an official appointment.
- The customs privileges in Article 36(1) are limited to goods imported on *first* arrival in the receiving State, although a period of three to twelve months after arrival is usually allowed.

Service staff

Service staff are the members of the staff of the mission in its domestic service (Article 1(g)). They are therefore those employed by the sending State, not by members of the mission. They include drivers, kitchen staff, porters and gardeners. They enjoy immunity only in respect of 'acts performed in the course of their duties'. Evidence of the head of mission that a particular act was done in the course of the person's duties will be persuasive, but not conclusive. It is ultimately for the courts to decide. Service staff are also exempt from taxes on their salaries and from social security contributions (Article 37(3)).

Private servants

A private servant is a person in the domestic service of a member of the mission, not one employed by the sending State (Article 1(h)). He enjoys exemption only

[63] Turkey–UK Agreement on Diplomatic Dependants' Employment 2000, 2139 UNTS (No. 37295); UKTS (2000) 98. And see Denza, pp. 397–400.

from taxes on his salary, and from social security contributions, provided he is covered by a social security scheme in another State (Article 33(2)). But the receiving State must exercise its jurisdiction over the servant 'in such a manner as not to interfere unduly with the performance of the functions of the mission'. This obligation can be discharged by the exercise of administrative discretion.

Nationals and permanent residents of the receiving State

Unless the receiving State grants additional privileges and immunities, a *diplomatic agent* who is a national of, or is permanently resident in, the receiving State enjoys only immunity from criminal and civil jurisdiction, and inviolability, in respect of 'official acts performed in the exercise of his functions' (Article 38(1)). This immunity is narrower than that of a member of the A&T staff, and amounts, in effect, to State immunity. All *other* members of the staff, and private servants, who are nationals or permanent residents of the receiving State enjoy privileges and immunities only to the extent allowed by the receiving State, although it must exercise its jurisdiction over them 'in such a manner as not to interfere unduly with the performance of the functions of the mission' (Article 38(2)).

A constant problem is in applying the concept of 'permanently resident'. Certain factors may well point to an intention to reside permanently in the receiving State: having been recruited locally; marriage to a permanent resident of the receiving State; other substantial personal links forged with the receiving State; and that there is little likelihood of being posted abroad again. But each case has to be dealt with on its own facts. Determining whether or not a particular person is a permanent resident may have to be discussed by the receiving and sending States, and, if necessary, decided by a court.[64]

Although under Article 37(1) members of the family of a diplomatic agent do not enjoy privileges and immunities if they are local nationals, they do not lose them if they are permanent residents, although such cases used to be rare. In contrast, members of the families of A&T staff who are local nationals or permanent residents have no privileges or immunities (Article 37(2)).

Commencement of privileges and immunities

Privileges and immunities are enjoyed from the moment the entitled person enters the receiving State to take up his post or, if already there, when his appointment has been notified to the foreign ministry (Article 39(1)). As indicated earlier,[65] there is no absolute obligation on the sending State to give prior notification of arrival, only 'where possible' (Article 10(2)). Difficult problems can arise when diplomatic status is claimed long after the person has arrived, and often for the purpose of asserting immunity from prosecution

[64] See generally Denza, pp. 418–25. [65] See pp. 111–12 above.

for a serious criminal charge. Since diplomatic status cannot be assumed, it has to be established, if necessary to the satisfaction of a court.[66] Therefore, a late notification, especially if it is received after criminal charges against the person have been announced or are imminent, may well be seen as not having been made in good faith. If the foreign ministry, or a court, is not satisfied that the status has been established, they can disregard the notification.

Termination of privileges and immunities

When the functions of an entitled person have come to an end (i.e. he has ceased to be a member of staff of the mission), his privileges and immunities 'normally' cease on his *final* departure from the receiving State (Article 39(1) and (2)). He is allowed a 'reasonable period' in which to leave, during which the privileges and immunities continue, even in the case of an armed conflict. What is a reasonable period will depend on the circumstances, but a month is normal. If the person is dismissed from the diplomatic service *en poste*, he will be entitled to a reasonable period in which to leave. If he is dismissed because of serious criminal charges made against him in the receiving State, the sending State should at the same time waive his immunity. However, even once he has finally left (for whatever reason), his immunity with respect to acts performed 'in exercise of his functions as a member of the mission' will continue. Other acts (private acts) will no longer enjoy immunity.

If a member of a mission dies, the members of his family continue to enjoy their privileges and immunities until the expiry of a reasonable period in which to leave the country (Article 39(3)). But, if a member of the family loses entitlement to privileges and immunities (as a spouse will do as a result of separation or divorce), the entitlement probably ceases with immediate effect.[67]

Third States

Diplomats in transit

When a diplomatic agent is in a third State, he enjoys no privileges and immunities, with two exceptions. We have already dealt with one, the ad hoc diplomatic courier.[68] The other is when a diplomatic agent passes through, or is in, a third State, provided he has any necessary visa for it, 'while proceeding to take up or return to his post, or when returning to his own country'. The third State must accord him inviolability and 'such immunities as may be required to ensure his transit or return' (Article 40(1)). The immunities do not extend to exemption from search of personal baggage or from confiscation of prohibited items. (One must also remember that possession of a diplomatic passport is not proof that the person is a diplomatic agent.)[69] Any members of the family of the

[66] See p. 129 above. [67] Denza, pp. 438–9. [68] See p. 124 above. [69] See p. 129 above.

diplomatic agent who enjoy privileges or immunities and who accompany him, or are travelling separately to join him or to return to their country, must be treated in the same way. In similar circumstances, the third State must 'not hinder' the passage of members of the A&T or service staff, and members of their families (Article 40(2)).

Communications in transit

Third States are also required to accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State; and to accord diplomatic couriers (provided they have any necessary visas) and diplomatic bags in transit, the same inviolability and protection as the receiving State is bound to accord (Article 40(3)).

Duties of the mission to the receiving State

Several duties of the mission are set out in Article 41. First, and most importantly, all persons enjoying privileges and immunities have a duty to respect the laws and regulations of the receiving State. Immunity from local law does not mean that one is above the law; it is still applicable to a diplomat (otherwise there would be no point in waiving immunity), even if he cannot be forced to appear before the courts. Enjoyment of immunity therefore carries with it a duty not to abuse it by ignoring the law. If he does, his privileges and immunities will not be affected, although in a serious case his immunity may be waived by the sending State, or he may be required to leave.

Second, members of a mission must not interfere in the internal affairs of the receiving State. The scope of this duty is not always well understood. It does not mean that a diplomat cannot, if instructed by his government, express in public views about the domestic policy of the receiving State, even though his government must be careful not to interfere in those affairs. But a diplomat must not express his personal views on such matters even if he or she feels strongly on the matter.

Third, all official business with the receiving State must be conducted with or through the foreign ministry of the receiving State, or such other ministry as may be agreed. But, these days, in practice much business – and not always of a technical nature – is conducted directly with other ministries without any prior agreement with, or even with the knowledge of, the foreign ministry. However, if the foreign ministry insists on business on all, or specific, subjects being conducted only with it, the mission must comply. Today, many treaties are negotiated by a mission directly with the other ministries without reference by the mission or those ministries to either foreign ministry. This is a thoroughly bad practice. Treaty-making is not as simple as it may seem: see the previous chapter. Any expertise lies with foreign ministries, who should always be kept informed of progress, and whose approval should always be obtained before

any text is finalised. Failure to do so can lead to political problems. Similarly, if a matter concerns a dispute, both foreign ministries need to be made aware of it at an early stage.

Lastly, the premises of the mission must not be used in any manner incompatible with the functions of the mission, such as for commercial purposes. The granting of diplomatic asylum by the mission is also incompatible with its functions, unless permitted by customary international law or by a treaty to which both the sending State and the receiving State are parties.[70]

End of the functions of a diplomatic agent

The functions of a diplomatic agent come to an end when the sending State so informs the receiving State, or when the latter informs the sending State under Article 9(2) that it refuses to recognise him as a member of the mission (see Article 43). But there are other circumstances: death, breach of diplomatic relations, disappearance of the sending State (e.g. the German Democratic Republic) or unconstitutional change of its Head of State, occasioning the need for fresh credentials for its heads of missions. The replacement of the government of the sending State by constitutional means does not affect the functions of its diplomatic agents. And, even if the government is overthrown unconstitutionally, the receiving State will usually continue to regard its diplomatic agents as still functioning pending recognition of the new government. Difficulties can arise when there is an internal conflict in the *sending* State, and there is a disagreement among the members of the mission as to which party to support. These types of problem can be resolved only in the light of the particular circumstances.[71]

Facilities for departure

If diplomatic relations deteriorate or are broken off, or if an armed conflict breaks out with the receiving State, it must nevertheless grant facilities to enable persons enjoying privileges and immunities, and members of their families, to leave 'at the earliest possible moment'. This includes members of families who are local nationals, but not staff who are local nationals (which would include dual nationals). If the mission needs it, the receiving State must place at its disposal the necessary means of transport for its members and their property (Article 44).

Breach of diplomatic relations and the protection of the interests of the sending State

Diplomatic relations are broken off from time to time, although even an armed conflict between two States does not always result in the severance of all

[70] See p. 170 below. [71] See further Denza, pp. 476–80.

contacts. Discreet contacts are often continued in a third State (sometimes with the help of its government) or between permanent missions to the United Nations or other international organisations. The receiving State is under an obligation, even in the case of an armed conflict, to respect the premises of the mission, its property and its archives (Article 45(a)). The sending State is entitled to entrust custody of the premises of the mission, its property and its archives to a third State acceptable to the receiving State (Article 45(b)). Similarly, the sending State may also entrust the protection of its interests and those of its nationals to a third State ('protecting power') acceptable to the receiving State (Article 45(c)).

Once the mission has been closed down, its premises lose inviolability, unless they house an 'interests section'. There is a growing trend for the interests of the sending State and its nationals to continue to be looked after by a number of its own staff, who for this purpose become members of staff of the mission of the protecting power. In many cases, the interests section is housed in the premises previously occupied by the sending State's mission. So it is, to some degree, business as usual, except that the staff of the interests section must obey the orders of the head of mission of the protecting power, and even if the interests section is in its old premises it must fly the flag of the protecting power. To arrive at this situation requires agreed arrangements between the protecting power and the State whose interests it will be protecting. There will also have to be arrangements between the protecting power (acting as surrogate) and the receiving State, since the latter can reserve the right to consent to the appointment to the diplomatic staff of a mission of nationals of a third State who are not also nationals of the sending State (Article 8(3)), and the receiving State will normally want to make reciprocal arrangements for an interests section in the sending State.[72] The protecting power (and the receiving State) may insist that the interests section limits itself to reporting and consular matters.

Non-discrimination and reciprocity

Although Article 47 states that the receiving State must not discriminate between States, it recognises that the receiving State is entitled to depart from this rule: (a) if the sending State applies the Convention *restrictively*, in which case the receiving State can reciprocate; and (b) where by custom or agreement States treat each other *more favourably* than required by the Convention. Thus, if a receiving State unnecessarily restricts the free movement of members of a mission, the sending State can do likewise. Also, two States may accord on a reciprocal basis greater privileges and immunities to the staff of their respective missions. During the Cold War, some States reached mutually beneficial reciprocal agreements under which junior staff were also accorded full immunity and inviolability. Some of these agreements could still be in effect.

[72] Ibid., pp. 492–6.

Special missions

A special mission is 'a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or performing in relation to it a specific task'. This definition of special mission is taken from Article 1(a) of the Convention on Special Missions 1969.[73] Since the beginnings of diplomacy, such ad hoc missions have been an essential part of diplomatic relations, and pre-date embassies as we know them today. Although the permanent diplomatic mission is still a cornerstone of diplomatic relations, special missions are an essential complement. The vast majority are made up of diplomats and civil servants, but some are led by ministers, and some by foreign ministers, prime ministers or even Heads of State (see the quotation on the start of this chapter). Many special missions are sent to negotiate a bilateral or multilateral treaty or to discuss problems related to the implementation or amendment of a treaty.

The definition of special mission does not cover the situation in which two or more States send temporary missions to meet in a *third State*, with or without its knowledge. When this is done at Head-of-State level, customary international law may accord members of a special mission sufficient immunity, but when it is done at official level there is doubt even today as to what immunity they enjoy.

Since the rules of customary international law on special missions were not at all clear, the International Law Commission drafted the Special Missions Convention. It drew copiously on the 1961 Convention, and so gave special missions privileges and immunities almost identical to those of permanent diplomatic missions. Yet, because members of special missions generally live in hotels, stay for only a few days or weeks and rarely bring their families, they do not have to cope with all the problems of permanent missions; nor do they cause the same problems for the host State as do permanent missions. Therefore, conferring on special missions the same scale of privileges and immunities is not easy to justify. This may be why the 1969 Convention did not enter into force until 1985, when it had received the necessary twenty-two ratifications (and even now it has only thirty-eight parties) and this only because in the 1990s nine former republics of the Soviet Union and Yugoslavia ratified it in a bout of post-independence enthusiasm. No large West European State is a party.

A few of the many States which are not parties to the 1969 Convention have legislation on special missions; the others relying on customary international law as determined by their courts.[74] It is almost certain that, provided a State has consented to it coming, a special mission will have immunity from civil and criminal jurisdiction in respect of official acts, but what else it may enjoy seems to depend mostly on domestic law, if any. This may not be satisfactory given the

[73] 1410 UNTS 231 (No. 23431); ILM (1970) 127. [74] See Oppenheim, pp. 1125–6.

increasing number of special missions. But the author has been on numerous special missions, sometimes to rather risky places, and has never felt the need for special legal protection. Indeed, assuming that they are aware of the lack of a clearly defined status of a special mission, that uncertainty may exert a good influence on its members.

(As to representatives of States to international organisations, see pp. 181–3 below.)

Consular relations

L. Lee, *Consular Law and Practice*, 3rd edn, Oxford, 2008
Oppenheim, *Oppenheim*, pp. 1132–55

The office of consul goes back a long way, and until 1963 was regulated by customary international law and bilateral consular conventions (i.e. treaties). The latter are not affected by the Vienna Convention on Consular Relations 1963 (the Convention),[75] and can be supplemented, extended or amplified (Article 73). The Convention followed the pattern of the 1961 Diplomatic Convention, although the substance drew heavily on largely established practice as reflected in consular conventions. The Convention entered into force in 1967 and now has 172 parties. The International Court of Justice sees the Convention as an authoritative statement of international law.[76] The provisions of the Convention broadly follow those of the Diplomatic Convention, so only the most important provisions and differences will be mentioned below.

The establishment of diplomatic relations implies consent also to consular relations. Today, most embassies also carry out consular functions in accordance with the Convention, although the staff retain their diplomatic status.[77] But there is still sometimes a need for States to establish 'consular posts' (*not* missions) separate from their diplomatic missions. The establishment of each post requires the consent of the receiving State, including its location and the district (sometimes just a port) that it will cover (Articles 2–4).[78] A consul may not act outside his district.

The functions of a consular post are set out in detail in Article 5 and include protection of, and assistance to, nationals of the sending State; developing commercial, economic, cultural and scientific relations and reporting on developments in those areas; providing information about conditions in the receiving State; issuing passports and visas; performing notarial and similar acts;

[75] 596 UNTS 261 (No. 8638); UKTS (1973) 14. For the ILC Commentary on the draft articles of the Convention, and the Convention itself, see A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, vol. I., pp. 225 et seq.

[76] *Case Concerning US Diplomatic and Consular Staff in Tehran (USA* v. *Iran), ICJ Reports* (1980), p. 3, paras. 45–55; 61 ILR 502.

[77] See pp. 109–11 above.

[78] China–UK Exchange of Notes 1999, 2139 UNTS 256 (No. 37305); UKTS (2000) 93.

transmitting legal documents; and supervising and assisting ships and aircraft registered in the sending State.

A consul has freedom of communication with, and access to, a national of the sending State who has been detained by the local authorities, which, if the person so requests, must inform the consul of that fact, and the detained person informed 'without delay' of his rights (Article 36).[79] The consul can help to arrange for him to have a local lawyer, giving legal advice *not* being a consular function. A consul has the right to visit any of his nationals who have been imprisoned.

Consular posts are headed by a consul-general, consul, vice-consul or consular agent, usually the first or the second named. The appointment must first be approved by the receiving State by means of an *exequatur*, although the consul may be allowed to exercise his functions on a provisional basis (Articles 8–14). Normally, consuls are subordinate to the head of his State's local diplomatic mission.

The premises of a consular post are inviolable, and the authorities of the receiving State need the consent of the head of post to enter them, although, unlike a diplomatic mission, this is assumed 'in case of fire or other disaster requiring prompt protective action' (Article 31).[80] The consular bag is inviolable but, unlike the diplomatic bag,[81] if the receiving State has 'serious reason' to believe that it contains something other than official correspondence, documents or articles intended exclusively for official use, it may request that the bag be opened in the presence of an authorised representative of the sending State. If the request is refused, the bag must be returned to its place of origin (Article 35(3)).[82]

If criminal proceedings are instituted against the head of post and any other consular officer (not 'consular employees', who are support staff), they must appear before the competent judicial authorities, but may not be arrested or detained pending trial, except in the case of a 'grave crime' and pursuant to a judicial order (Article 41). But consular officers and consular employees are immune from both the criminal and the civil jurisdiction of the receiving State 'in respect of acts performed in the exercise of consular functions'.[83] The only *exceptions* to this are *civil* actions on a contract concluded by a consular officer or employee who did not expressly or impliedly contract as agent of the sending State, and actions by a third party for damage arising from an accident caused by a vehicle, vessel or aircraft (Article 43). In addition, all members of a consular post can be called by a court to give evidence. If a consular officer should decline, he cannot be forced or penalised, but other members of the post cannot decline to be a witness (except on matters to do with their official functions) or to produce official correspondence or documents (Article 44). All these protections can be waived (Article 45).

[79] See *LaGrand (Germany* v. *USA), ICJ Reports* (2001), p. 9, para. 128; 118 ILR 37.
[80] Cf. diplomatic missions. [81] See pp. 122 et seq. above.
[82] See Denza, pp. 244–8. [83] See Oppenheim, pp. 1144–6 for examples.

Honorary consuls can perform the same duties as career consular officers, but are usually local businessmen (and often local or third-State nationals), and unpaid. The Convention *generally* applies to them, as it does to career consular officers (see Articles 58–68). The most important exceptions are that neither his premises nor his person is inviolable and he must appear before the court if criminal proceedings are instituted against him (Article 63), although he is immune from criminal jurisdiction in respect of official acts even if he is a local national or permanent resident (Articles 58(2) and 1(1)).

7

State immunity

L'état c'est moi.[1]

Fox, *The Law of State Immunity*, 2nd edn, Oxford, 2008 ('Fox')
Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 341–76 ('Oppenheim')
Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 697–777 ('Shaw')

Introduction

State immunity is also known as sovereign immunity, reflecting its origins in the sanctity of kingship. State immunity may be pleaded by a State when a person wishes to make it a party to legal proceedings in the court of another State, usually as the defendant. If successful, the plea prevents the court from exercising jurisdiction over the State. The dispute can then be disposed of only by the courts of the foreign State itself, by an international court or tribunal, or by diplomatic means. Originally, State immunity was absolute, and remained so into modern times even though States were then carrying out many commercial transactions abroad. It was not until the second half of the twentieth century that a restrictive approach – essentially removing immunity for commercial matters – came to be generally accepted.

State immunity is a doctrine of customary international law. But unlike the law of State responsibility, which has been developed almost entirely by international courts and tribunals, State immunity is much more the product of judgments of domestic courts. Their approaches to State immunity reflect differences between their legal, political and economic systems. But, in recent decades, there has been more convergence in domestic legislation and judgments, so that it is now easier to describe the law of State immunity.[2] This is now helped by the UN General Assembly's adoption on 2 December 2004 of the UN Convention on the Jurisdictional Immunities of States and Their Property

[1] Louis XIV, 13 April 1655.
[2] For a perceptive introduction to the basic problems, see Higgins, pp. 78–86.

(in this chapter, the 'UN Convention').[3] So far, six States have ratified it, and it will enter into force after thirty ratifications. The (integral) annex to the UN Convention contains 'Understandings' with respect to certain of its provisions. The UN Convention does not apply to questions of immunity involving States or their property arising in proceedings instituted before its entry into force, except insofar as the UN Convention reflects customary international law.[4] But, even before then, the UN Convention may well influence domestic courts which will by their judgments still develop the law. Therefore, the best advice one can give to anyone with a claim against a foreign State, or indeed the foreign State itself, is to instruct lawyers who really are expert in the local law on State immunity. But first, we must distinguish State immunity from other related subjects.

The relationship of State immunity to other legal doctrines

Diplomatic immunity distinguished

When an embassy is involved in a transaction, there is often confusion between diplomatic immunity and State immunity, although legal proceedings should almost always be against the sending State, not the embassy or any member of it (see p. 127 above for a practical example). As with diplomatic immunity, State immunity does not mean that local law is not applicable to a foreign State, only that it cannot be enforced by legal proceedings unless the immunity is waived. But, given that the purpose of diplomatic immunity is the protection of diplomats, it is, apart from certain exceptions, absolute. Because the customary international law on diplomatic immunity was so well developed, it was possible to codify it in 1961 in the Vienna Convention on Diplomatic Relations. That law is as firm and accepted today as it was in 1961. That cannot be said of the law of State immunity, which has undergone considerable changes in the last fifty or so years, and is no longer so absolute.

Non-justiciability

In contrast to State immunity, the doctrine of non-justiciability applies when a foreign court *does* have jurisdiction, for example in proceedings between private parties, but declines to exercise it, either at the request of the defendant or on its own initiative. Under the doctrine, a domestic court may decide not to exercise jurisdiction if the object of the dispute relates to inter-State matters for which the court considers there to be no judicial or objective standards by which to judge the issue. Non-justiciability can also describe a rule of private

[3] A/RES/59/38; ILM (2005) 801; or Fox, App. 2. The text was based on a draft by the ILC: see A. Watts, *The International Law Commission 1949–1995*, Oxford, 1999, vol. III, pp. 1999–2103. See also, articles on the Convention in (2006) ICLQ 395–445; and by D. Stewart in (2005) AJIL 194–211.

[4] See pp. 6–8 above on the effect of such treaties on customary international law.

international law,[5] under which a court applies the law of the foreign State and recognises the validity of its legislation and acts done according to that law.[6] This can be criticised as an example of judicial timidity, since the legality under international law of many acts of foreign States can be judged by domestic courts. For example, the English courts have refused to recognise Nazi laws discriminating against Jews[7] and, more recently, Iraqi legislation (under Saddam Hussein) that violated basic principles of the UN Charter.[8] But there are other cases where the underlying issue is better decided by an international court or tribunal in proceedings to which the State is a party, such as a maritime boundary dispute.[9] International law provides an objective standard by which the validity of acts can be assessed, and so any adverse effect on foreign relations which the judgment might have should be less likely.

Act of State

Non-justiciability must be distinguished from a substantive defence known as act of State.[10] In English law, this normally refers to a defence to an action for a tort committed abroad whereby, in response to a claim by an alien, the defendant may plead that he acted under the orders, or with the approval, of the British Government. The term is also used to describe a doctrine developed by the US courts. It is not a rule of international law; rather it is more to do with the respective constitutional roles of the US judiciary and executive. Under this doctrine, US courts exercise restraint in not questioning the validity of the taking of property abroad by a foreign State, even if it may have been done in breach of international law, unless there is a treaty with the foreign State governing the matter.[11] The approach is similar to that of non-justiciability.

Human rights

In 2002, the European Court of Human Rights ruled that in the present state of international law State immunity is *not* incompatible with human rights.[12] On 23 December 2008, Germany began proceedings against Italy in the International Court of Justice contending that Italian courts (in particular in the 2004 judgment of the Corte di Cassazione in *Ferrini*)[13] had disregarded

[5] See p. 1 above. [6] *Luther* v. *Sagor* [1921] 3 KB 532; 1 AD 49.
[7] *Oppenheimer* v. *Cattermole* [1976] AC 249; 72 ILR 446.
[8] *Kuwait Airways* v. *Iraqi Airways* [2002] 2 AC 883; [2002] 2 WLR 1353; [2002] 3 All ER 209; 125 ILR 602. For a detailed examination of the case and of the English law on non-justiciability, see Fox, pp. 36–9 and 112 et seq.
[9] See *Buttes Gas and Oil Company* v. *Hammer* [1982] AC 888; [1981] All ER 616; 64 ILR 331.
[10] See Oppenheim, p. 368, n. 15. [11] *Sabbatino*, 35 ILR 1. See Shaw, pp. 191–2.
[12] *Al-Adsani* v. *UK*, ECHR App. 35763/97; 123 ILR 24.
[13] 128 ILR 658. See also, C. Focarelli, 'Denying Foreign State Immunity for the Commission of International Crimes: the Ferrini Decision' (ICLQ (2005) 951–8).

Germany's immunity for jurisdiction for acts committed by its armed forces during the Second World War.[14]

Sources of the law on State immunity

It may be some time before the UN Convention enters into force. It is not clear to what extent parts of it reflect customary international law or represent progressive development. Nevertheless, the UN Convention, being the only universal treaty on the subject, represents a good basis from which to examine what the customary international law is or, at least, may be. The UN Convention will therefore be the focus of the following pages, even though it is in parts rather lacking in clarity and certainty, and the law of State immunity will inevitably continue to vary from State to State.

The UN Convention will be discussed along with another, although much older, treaty on the subject, the European Convention on State Immunity 1972 (the 'European Convention'),[15] since Article 26 of the UN Convention provides that nothing in it shall affect rights and obligations under existing treaties on State immunity. Although the European Convention is much concerned with reciprocal enforcement of judgments by the parties to it (there are only eight of them), it may have been influential in the formulation of legislation by States. Two leading pieces of influential legislation will be examined: the State Immunity Act 1978 (in this chapter, the 'UK Act'),[16] which largely follows the European Convention, and the Foreign Sovereign Immunities Act 1976 (in this chapter, the 'US Act'), as amended.[17] (It is the policy of the US Government not to assert more immunity abroad than a foreign State would enjoy under the Act in the United States.) The courts of States that do not have legislation on State immunity have to rely on customary international law as deduced by examining the practice (mainly legislation and judgments) of other States.[18] They will now also have the UN Convention to consider.

Only a short and very general overview can be given. Advice on an actual situation will always require a close and detailed examination of the facts and the applicable law of the State of the forum (court).

[14] See *Jones* v. *Saudi Arabia* 2006 UKHL 26, para. 22; 129 ILR 629; ILM (2006) 1108. Jurisdictional Immunities of the State (*Germany* v. *Italy*) 2009 (www.icj-cij.org). See also, *Waite* v. *Kennedy*, App. 26083/94; (1999) 30 EHRR; 118 ILR 121, paras. 72–4; and *Beer and Regan* v. *Germany*, App. 28934/95.

[15] 1495 UNTS 182 (No. 25699); ILM (1972) 470; UKTS (1979) 74.

[16] ILM (1978) 1123. The legislation of Australia, Canada, Malawi, Pakistan, Singapore and South Africa has been modelled on the Act, and the UN Convention has borrowed several of its provisions. The Act does not apply to visiting forces (s. 16(2)) to which only the common law applies: see *Holland* v. *Lampen-Wolfe* [2000] 1 WLR 1573; [2000] 3 All ER 833; 119 ILR 367, and pp. 159–60 below.

[17] As to the US Act, as amended, see Fox, p. 317 et seq.

[18] As to Members of the Council of Europe, see *State Practice regarding State Immunities*, CoE, 2006.

Which entities enjoy immunity?

What is a State has already been discussed.[19] Article 2(1)(b) of the UN Convention defines a State to include:

(i) '[I]ts various organs of government.' That is to say, all branches or emanations of government through which the government acts, including agencies and diplomatic missions. Proceedings against a government are effectively against the State. The legislature and judicial organs are also part of the State, although they are unlikely to have proceedings brought against them as such in a foreign court.

(ii) '[C]onstituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of the sovereign authority, and are acting in that capacity.' Entitlement depends on the constitution of the State.[20]

(iii) '[A]gencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in exercise of sovereign authority of the State.' This depends on the constitution and laws of the State. The reference to 'other entities' would not normally include a corporation established by the State which has an independent legal personality, even if its purpose is non-commercial. The BBC and the British Council were both created, and are largely financed, by the State but are not part of it. Their assets are therefore not those of the United Kingdom. Most States have similar, so-called public corporations or parastatals.[21] But they, and even a purely commercial entity, like a bank, could have immunity in respect of, say, the processing of requests for exemption from foreign exchange control restrictions or to do with economic sanctions. On the other hand, a state-trading organisation, even if it is part of the State, would not enjoy immunity in respect of its commercial activities (see below). (See also Article 27 of the European Convention; section 14 of the UK Act; and section 1603(a) and (b) of the US Act.)

(iv) '[R]epresentatives of the State acting in that capacity.' This covers all natural persons authorised to represent a State, in its various manifestations, in respect of acts done by them on behalf of the State, and includes the Head of State acting in his official capacity.[22] If a public official is sued for something that he did in his official capacity (even if it were contrary to international law), this would amount to suing the State, and so he could

[19] See p. 15 above. See p. 379 below on the attribution of conduct to a State. A State may in certain cases be responsible for acts of private persons who themselves may not enjoy State immunity in respect of the acts.

[20] See *R. (Alamlieyeseigha)* v. *CPS* [2005] EWHC 2704 (Admin.) about a certificate of the Foreign Secretary under s. 21 of the (UK) State Immunity Act that a Nigerian provincial governor did not conduct international relations.

[21] See also p. 379 below. [22] See also p. 161 below.

plead State immunity.[23] Diplomats also have personal immunity from suit, and Article 3 of the UN Convention provides that the Convention is without prejudice to the privileges and immunities enjoyed under international law by diplomatic missions, consular posts and other diplomatic missions and delegations, and persons connected with them. Furthermore, customary international law regulates certain special areas (such as foreign forces).[24] Being *lex specialis*, it is not affected by the UN Convention, the fifth preambular paragraph of which affirms that the rules of customary international law continues to govern matters not regulated by the Convention.

Exceptions to immunity

The approach taken both in treaties and legislation is that acts or omissions by a State are immune unless they fall within an exception (Article 5 of the UN Convention; Article 15 of the European Convention; section 1 of the UK Act; and section 1602 of the US Act). However, some of the exceptions have exceptions (and in the UN Convention there are even some exceptions to those exceptions). None of this makes understanding the subject any easier.

Consent

A State can always waive its immunity by consenting to proceedings, and do so in advance. But a contractual clause that the law of another State will govern a contract does not amount to consent to the jurisdiction of that State's courts. But a State cannot claim immunity if it initiates or intervenes in proceedings, unless this is done in ignorance of the facts entitling it to immunity, and immunity is then claimed as soon as possible. It is not consent if the State intervenes merely to claim immunity, or for the sole purpose of asserting a right in the property at issue, provided the State would have been entitled to immunity if the proceedings had been brought against it. A State instigating or intervening in proceedings does not usually have immunity in respect of a counter-claim.

Article 17 of the UN Convention provides that a State that enters into a written agreement with a foreign national to submit to arbitration disputes concerning a commercial transaction (which includes investment matters: see the relevant Understanding), cannot invoke immunity before a foreign court in proceedings relating to that agreement, the arbitration procedure or the award, unless the

[23] *Propend* v. *Sing*, 11 ILR 611; and *Holland* v. *Lampen Wolfe* [2000] 1 WLR 1573; [2000] 3 All ER 833; 119 ILR 367. In *Jones* v. *Saudi Arabia* [2005] UKHL 26; 129 ILR 629; ILM (2006) 1108 the English House of Lords held unanimously that the officials of the defendant State who allegedly tortured Mr Jones were immune: see esp. Bingham, para. 12. See also p. 161 below on criminal prosecutions.

[24] See pp. 159–60 below.

agreement provides otherwise. The US Act provides for waiver by implication, but breach of international law would not amount to an implied waiver.[25]

Many contracts with States provide that disputes will be submitted to arbitration, and this may amount to implied consent to the courts of the State where the arbitration would be held exercising supervisory powers over the arbitration. Under the UK Act, when a State has agreed in writing (although not with another State) to submit a dispute to arbitration, it is, subject to any contrary provision in the arbitration agreement, not immune from proceedings in the UK courts that relate to the arbitration.

(See Articles 7, 8, 9 and 17 of the UN Convention; Articles 1, 2 and 3 of the European Convention; section 2 of the UK Act; and section 1605(a)(1) of the US Act.)

A separate, express waiver of immunity from execution of the judgment is necessary (see p. 157 below on enforcement).

Commercial transactions

At the heart of the modern restrictive approach is the principle that a State is not immune in respect of its commercial transactions (Article 10 of the UN Convention; Articles 4 and 7 of the European Convention; section 3 of the UK Act; and section 1605(a)(2) of the US Act). The problem – for which no completely satisfactory solution has yet been found – is how to define 'commercial'.[26] Since we are here concerned with the activities of a State, a distinction has to be drawn between those transactions which anyone can do (*acta jure gestionis*) and those which only a State can do (*acta jure imperii*). One can distinguish between these two types of transaction according to either the *nature* of the transaction or its *purpose*. The purchase by a State of uniforms for its army is obviously commercial in nature, but is done for a public purpose since only States have (real) armies. The main problem with the purpose test is that all acts by a State are necessarily for some public purpose. Thus, in 1963, the Bundesverfassungsgericht (the German Federal Constitutional Court), in the leading case of the *Empire of Iran*,[27] preferred to look at the nature rather than the purpose of the transaction.

Article 2(1)(c) of the UN Convention defines a 'commercial transaction' as:

(i) any commercial contract or transaction for the sale of goods or the supply of services;
(ii) any contract for a loan or other transaction of a financial nature, including an obligation of guarantee or of indemnity in respect of any such loan or transaction;

[25] See *Yemen* v. *Aziz* [2005] EWCA Civ 745; [2005] AER (D) 188.
[26] See the comprehensive comparative survey in Fox, pp. 502–47.
[27] 45 ILR 57, at pp. 80–1.

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons. (Dealt with in Article 11: see below.)

But, the UN Convention then avoids choosing between the nature and purpose tests by adding in paragraph 2:

> In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1(c), reference should be made *primarily* to the *nature* of the contract or transaction, but its *purpose* should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the *practice of the State of the forum*, that purpose is relevant to determining the non-commercial character of the contract or transaction.[28] [emphasis added]

Thus, a court should first consider the nature of the contract or transaction. If it is clearly *non*-commercial (e.g. a prohibition on food imports due to a health scare), there should be no need to go further. But if it appears to be commercial, then it is open to the defendant State to argue that its purpose is non-commercial. The purpose test would normally have to be carried out by applying the practice of the forum State, and so this takes one back to the jurisprudence of its courts. It has proved impossible for courts to avoid completely inquiring into the purpose of a State's transaction in order to evaluate its nature; they just have to look at the whole context.

Although the commercial exception is already applied by most legal systems, both common law and civil, how this is done varies. The UK and US formulas, as construed and applied by their courts, are not necessarily better or worse than, or even that different from, the one in the UN Convention, which is inevitably a compromise between the different approaches taken by States.

Section 3(3) of the UK Act defines 'commercial transaction' as any contract for the supply of goods and services, any financial loan or indemnity and:

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages *otherwise than in exercise of sovereign authority*. [emphasis added]

Subparagraph (c) covers not only contracts but all other activities that are not essentially of a public character. The English courts have interpreted the italicised words as requiring an examination of the *nature* of such transactions

[28] The formula was originally inserted to help, in particular, developing countries making bulk contracts for food or medicine for humanitarian purposes. It is almost the same as in the 1991 draft of the International Law Commission: see its own commentary in Watts, *The International Law Commission 1949–1995*, Oxford, 1999, vol. III, pp. 2017–21. In paragraph 3, the statement that '[t]he provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State', means that the definitions are for the purpose of State immunity only and do not affect similar terms in treaties or domestic law on other subjects.

or activities, not their purpose: has the State acted in exercise of its sovereign authority (in public law) or like a private person (in private law)?[29] But even this approach may well involve some inquiry into purpose.

Section 1603(d) of the US Act provides that the commercial character of an activity:

> shall be determined by reference to the nature of the course of conduct or particular transaction or act, *rather than by reference to its purpose*. [emphasis added]

The italicised words have been relied upon by US courts 'only so far as is absolutely necessary to define the nature of the act',[30] an approach not unlike that of the UK courts. Thus, if a State does something that a private person can do (e.g. issues bonds), it is not immune even when it is done for a public purpose. If it is something that only a State can do (e.g. regulate a bond market), it is immune. The US Act's commercial exception also requires that in respect of the activity there is a jurisdictional link with the United States (section 1605 (a)(2)).

The European Convention is much concerned with the reciprocal enforcement of judgments against State parties. But, although Article 4 is formulated differently to the equivalent provisions in the UK and US Acts, or the UN Convention, the end result may be similar: if an activity is one which only a State can do, it may well have immunity.

Contracts of employment

Under Article 11 of the UN Convention, unless the States concerned agree otherwise, a foreign State has *no* immunity from proceedings relating to a contract of employment for work to be performed for it in the forum State. This exception to immunity has itself exceptions that provide for *immunity in the following cases* (to which there are even some exceptions):

(a) The work is 'in the exercise of governmental authority'. It would have to be of a non-commercial nature, and so would include acts of a regulatory nature, such as verifying that certain products are suitable for import into the employer State.
(b) The employee is a diplomatic agent or other person enjoying diplomatic immunity or a consular officer. These are almost always nationals of the employer State and can usually instigate employment proceedings in that State.
(c) Recruitment, renewal or reinstatement issues.

[29] See Lord Wilberforce in *I Congreso del Partido* [1983] AC 244, at 269; 64 ILR 307, at 320. For the facts and a discussion of the case, see Shaw, pp. 708–13.
[30] *Argentina* v. *Weltover*, 504 US 607 (1992); 100 ILR 509.

(d) Dismissal or termination issues if the Head of State, head of government or foreign minister of the employer State has determined that the proceedings 'would interfere with the security interests' of the State. The Understanding on this provision says that this refers primarily to national security and the security of diplomatic missions and consular posts.
(e) The employee is a national of the employer State when the proceeding is instituted, *unless* he has permanent residence[31] in the forum State. Despite the poor drafting of this last exception, the intention would seem to be that there would be no immunity unless one of the (main) exceptions in (a) to (d) or in (f) applies.
(f) The employer State and the employee have otherwise agreed in writing, *unless*, by reason of the subject matter of the proceedings, there are public policy reasons conferring exclusive jurisdiction on the courts of the forum State.

The provisions, with their exceptions to exceptions, mainly reflect the varied State practice, making them complex and rather lacking in coherence.

Article 5 of the European Convention accords no immunity where the employment is performed in the forum State, unless (a) the employee is a national of the employing State, (b) when the contract was signed he was neither a national of the forum State nor habitually resident there or (c) the parties to the contract agreed in writing otherwise, unless under the law of the forum State its courts have exclusive jurisdiction by reason of the subject matter. Sections 4 and 16(1)(a) of the UK Act generally follow the European Convention.[32] The US Act has no specific provision for State employment contracts.

Disputes about employment by a diplomatic mission or consular post of a locally engaged person are a particular and constant problem.[33]

Torts (delicts)

Under Article 12 of the UN Convention, there is *no immunity* in respect of proceedings for pecuniary compensation for death or personal injury, or damage or loss of tangible property, caused by an act or omission attributable to the foreign State, provided the act occurred in the territory of the forum State *and* the author of it was there at the time. This follows Article 11 of the European Convention and the general trend of State practice. Under the UN Convention, the European Convention and the UK and US Acts, the tort exception applies even when the act was ostensibly performed in exercise of sovereign authority. The exception does not include non-tangible loss, such as economic loss or damage to reputation. Nor does it include loss that is not

[31] See p. 136 above on permanent residence.
[32] However, that Convention has only eight parties, including Belgium and Switzerland, whose courts have not always followed the Convention on employment matters.
[33] See (2005) ICLQ 705–8.

actionable under the law of the State where the act was committed, which would include acts of foreign armed forces during an armed conflict or any other non-insurable risks.[34] In other words, Article 12 cannot put the claimant in a better position than he would be in if no issue of State immunity arose.

Section 5 of the UK Act goes slightly further in not requiring the author to be in the United Kingdom when the act was committed. Thus, proceedings against Libya for compensation for the sabotage of the Pan Am aircraft over Lockerbie in 1988 could be brought in Scotland even though the perpetrator of the crime was not in the United Kingdom at the time. In *Al-Adsani*, a person claimed to have been tortured *abroad* by local officials. It was held by both the House of Lords and the European Court of Human Rights[35] that he was not able to sue in the United Kingdom on the basis that he had received medical treatment in the United Kingdom for his injuries.

Section 1605(5) of the US Act is similar to the UK Act, but includes also non-tangible loss (except for defamation and similar matters and loss or damage caused by the exercise of a 'discretionary function'). But, if the act is criminal (say, murder), there would be no immunity since there can be no discretion for a State to commit such an act.[36]

Ownership, possession and use of property

Article 13 of the UN Convention provides no immunity from proceedings relating to a foreign State's right or interest in, or possession or use of, or any obligation arising out of: (a) immovable property (land) in the forum State; (b) a right or interest in movable or immovable property arising by way of succession, gift or *bona vacantia*; or (c) a right or interest in the administration of property, such as trust property, a bankrupt's estate or a company in liquidation. Articles 9 and 10 of the European Convention and section 6 of the UK Act provide for similar exceptions to immunity. Section 16(1)(b) of the UK Act accords immunity specifically from proceedings concerning a State's title to or possession of property (not just land) used for the purposes of a diplomatic mission.[37] Although there might seem to be no need to accord such immunity, since diplomatic premises are inviolable and immune from execution,[38] there would be little point in allowing proceedings unless the sending State had consented, and this is reflected in the general saving provisions of Articles 3 and 21(1) (a) of the UN Convention[39] and Article 32 of the European Convention.

[34] See the ILC Commentary to the final draft of Art. 12, in Watts, *The International Law Commission 1949–1995*, Oxford, 1999, vol. III, pp. 2068–71, and A/C.6/59/SR13.

[35] [1996] 1 LLR 104; 107 ILR 536; and App. 35763/93; 123 ILR 24. [36] *Liu* v. *China*, 101 ILR 519.

[37] See also p. 114 above. [38] See pp. 115–18 above.

[39] Art. 21(1)(a) makes clear that a bank account of a diplomatic mission cannot be seized: see further p. 117 above.

Intellectual and industrial property rights

A foreign State will not be immune from proceedings relating to intellectual or industrial property rights (patents, copyright, trademarks, etc.), including infringements of the rights of third persons, that are protected in the forum State (Article 14 of the UN Convention; Article 9 of the European Convention; section 7 of the UK Act).

Ships

Article 32 of the UN Convention on the Law of the Sea 1982[40] confirms the immunity of 'warships and other government ships operated for non-commercial purposes'. The law on shipping is immensely complicated, due partly to differences between common law concepts of Admiralty proceedings and actions *in rem*, and civil law procedures. Article 16 of the UN Convention therefore describes the immunity in general terms: although States can agree otherwise, if a court has jurisdiction in proceedings relating to the operation of a ship owned or operated by a foreign State, the ship will have no immunity unless it was, when the cause of action arose, used for 'government non-commercial purposes'.[41] In addition to warships and naval auxiliaries, coastguard, police and customs vessels and other vessels owned or operated by a foreign State will be immune, provided that, at the time, they were on *only* government non-commercial service. There is no immunity from proceedings relating to the carriage of cargo unless it was carried on an immune ship or is owned by the foreign State and used or intended to be used exclusively for government non-commercial purposes. A certificate, signed by a diplomatic representative or other competent authority of the foreign State, that a ship or cargo is of a governmental and non-commercial character, is evidence of that, but is not conclusive. (See also section 10 of the UK Act and section 1605(b) of the US Act.) The European Convention does not apply to proceedings regarding ships owned or operated by States or to the carriage of cargo by such vessels or to the carriage of cargo owned by a State (Article 30). Instead, the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State Owned Vessels 1926 and its 1934 Protocol apply.[42]

[40] 1833 UNTS 3 (No. 31363); ILM (1982) 1261; UKTS (1999) 81.

[41] The text of Art. 16, apart from the omission of the former para. 3, is close to the ILC final draft articles. The ILC Commentary on the final draft articles in A. Watts, *The International Law Commission 1949–1995*, Oxford, 1999, vol. III, pp. 2079–86, or at www.un.org/law/ilc/) is therefore especially useful.

[42] 176 LNTS 199; UKTS (1980) 15.

Aircraft and space objects

Article 3(3) of the UN Convention provides that the Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by it.[43]

Registration of a foreign judgment

Many States have treaties or laws that, on a reciprocal basis, enable the judgment of a foreign court to be registered in their courts and enforced by them as if it were one of their own. But, if the foreign judgment is given against a foreign State by its *own* courts, registration requires the prior consent of the foreign State, which is rather unlikely to be given.[44]

Criminal jurisdiction

A State cannot be charged with a criminal offence (but see below on Heads of State), and none of the above, nor the UN Convention, applies to criminal proceedings.[45]

Enforcement

Even when there is no immunity, that does not mean that the claimant will be able to enforce a judgment against the property of the defendant State. Consent by a State to the exercise of jurisdiction does not imply consent to measures of constraint (enforcement). Therefore before embarking on any proceedings, a claimant's lawyers will have to assess whether any judgment could be enforced effectively, both in terms of the law of the forum State and whether at the end of the process there is likely to be enough property available on which the judgment could be executed.

Pre-judgment measures of constraint

Such measures as attachment and arrest (not of persons) before judgment can only be taken if the defendant State has expressly consented to them. This can be done by express provisions in an arbitration agreement, or in a written contract, or by allocating or earmarking property for the satisfaction of the claim (Article 18 of the UN Convention).

[43] As to which, see, respectively, pp. 320 and 339–40 below.
[44] *AIC* v. *Nigeria* [2003] EWHC 1357 (QB).
[45] The resolution adopting the Convention (A/RES/59/38) agrees with the general understanding of the negotiators that the Convention does not cover criminal proceedings.

Execution of the judgment

No judgment can be executed by attachment, arrest or execution without the consent of the defendant State or by allocating or earmarking property for the satisfaction of the claim.[46] But Article 19(c) of the UN Convention has an exception to this strict rule. Execution can be effected where it has been established:

> that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Article 21 of the UN Convention provides that, without consent, the following property shall be considered as specifically in use or intended for use by the State for government *non-commercial* purposes: (a) the property of diplomatic missions, etc.;[47] (b) property of a military character; (c) the property of a central bank or other monetary authority;[48] (d) property forming part of the cultural heritage or State archives; or (e) property which is part of an exhibition of scientific, cultural or historical interest and not for sale. The above provisions of the UN Convention represent probably the nearest to generally accepted State practice in this difficult area. But, one must always carefully explore the law of the forum State: see, for example, sections 10 and 13 of the UK Act and sections 1609–1611 of the US Act.

Procedure

Service of process

Some attempts to serve process on a foreign State have been unsuccessful due to mistakes by claimants' lawyers (who sometimes wrongly treat the matter as involving only service out of the jurisdiction) or uncertainty as to the procedure in the *forum* State. Article 22 of the UN Convention provides that service of the writ or other document instituting the proceedings (with a translation if necessary) *shall* be effected by its transmission *through diplomatic channels* to the foreign ministry of the *defendant* State. Service is deemed to have been effected once *that* foreign ministry has received it. It is not clear if the foreign ministry of the *forum* State has a legal duty to transmit the documents, but a refusal (perhaps for foreign relations reasons) or other failure to transmit them would seem to be a matter for the law of the forum State. Service can also be effected by any other means agreed by the two States or which is acceptable to

[46] As to waiver of immunity from execution of an arbitral award, see Fox, pp. 495–501.
[47] See p. 117 above on the bank accounts of diplomatic missions.
[48] See *AIC* v. *Nigeria* [2003] EWHC 1357 (QB), paras. 53 and 58.

the defendant State, provided it is not precluded by the law of the State of the forum. Once a State has entered an appearance on the merits of the case (not merely to contest jurisdiction), it is precluded from claiming that service had not been validly effected. (See also Article 16 of the European Convention; section 12 of the UK Act; and section 1608 of the US Act.) Service cannot be validly effected by delivering the documents to a diplomatic mission of the defendant State.[49]

Judgment in default

Article 23 of the UN Convention generally follows established practice. A judgment in default of appearance cannot be rendered against a foreign State unless the court finds that (a) the State has been correctly served, (b) at least four months have elapsed from the date of service and (c) the court is not precluded from exercising jurisdiction, that is, it is satisfied there is no immunity. A copy of any default judgment (with a translation if necessary) must be transmitted to the foreign State by one of the means for service of process on it, and at least four months from its receipt by the foreign State are allowed for an application to have the judgment set aside. (See also Article 16(7) of the European Convention; section 12(4) and (5) of the UK Act; and section 1608 (e) of the US Act.)

Visiting forces

Activities of the armed forces of a State, including the procurement of goods, are governed by customary international law. Property of a military character is immune from execution. But when, in peacetime, its armed forces are physically present in another State with its consent, there is generally a real practical need to provide in some detail as to how civil and criminal jurisdiction over those forces is to be exercised. This can be done by a status-of-forces agreement (SOFA) or *ad hoc*.[50] A SOFA has the effect of modifying the rules on State immunity as between the parties. Perhaps the best-known multilateral SOFA is the NATO SOFA 1951,[51] which has served as a model for other multilateral and bilateral SOFAs.[52]

Civil claims

Under Article VIII of the NATO SOFA, claims by the parties against each other for loss or damage to State property are dealt with by mutual waivers or

[49] See p. 116 above; and Denza, *Diplomatic Law*, 3rd edn, Oxford, 2008, pp. 151–3.
[50] If only a very small number of persons are being sent for a short time, it may be sufficient to notify them as members of the A&T staff of the diplomatic mission (see p. 135 above).
[51] 199 UNTS 67 (No. 2678); UKTS (1955) 3. See Lazareff, *Status of Military Forces under Current International Law*, Leiden, 1971.
[52] See Oppenheim, pp. 1162–4.

arbitration. Claims by *third parties* are dealt with differently. *Tort* claims concerning *official* acts are dealt with by the host State in the same way as claims against its own armed forces, with the sending State paying a proportion of any compensation. Tort claims in respect of *non-official* acts are either settled *ex gratia* by the host State or are dealt with by the local courts in the normal way.[53] Immunity can be claimed only against the enforcement of a judgment in respect of an official act. Not surprisingly, disputes can arise as to whether a tortious act was, in the words of the NATO SOFA, 'done in the performance of official duty', and provision is made for these to be resolved by an arbitrator. *Contractual* claims are within the jurisdiction of the courts of the host State, and therefore immunity may be pleaded.

Section 16(2) of the UK Act provides that the Act does not apply to proceedings relating to anything done by foreign armed forces in the United Kingdom which are the subject of the Visiting Forces Act 1952. That Act implements the NATO SOFA and has been applied also to non-NATO visiting forces. Thus, in deciding whether an act is official or unofficial, the UK courts have to the apply the common law restrictive doctrine of State immunity to decide whether the act was public or private in nature, and for this purpose they look at the whole context. In *Holland* v. *Lampen-Wolfe*, it was decided that alleged defamatory remarks about a US national employed by the US forces as a civilian teacher on a US military base in the United Kingdom, and made by her civilian superior (also a US national), were acts done within the sovereign authority of the United States and therefore immune.[54] But, in *Gerber* v. *Gerber*, the use of baby foods on a foreign military base in breach of a registered trademark was held not to have been done in exercise of sovereign authority.[55]

Criminal jurisdiction

SOFAs make provision for the criminal jurisdiction of the sending and host States over members of the visiting force. As with civil proceedings, the details will vary from agreement to agreement, but they follow generally the NATO SOFA. Under that treaty, the sending State has exclusive jurisdiction over offences under its military law, provided they are not also offences under the law of the host State. The host State has exclusive jurisdiction over offences under its law, provided they are not offences under the law of the sending State. Where an act is an offence under the law of both States, so that each has jurisdiction (concurrent jurisdiction), the sending State has primary jurisdiction

[53] For details of British procedures, contact the Directorate of Business Resilience (*sic*), Common Law Claims & Policy, Zone A, 7th Floor, St George's Court, 2–12 Bloomsbury Way, London WC1A 2SH.

[54] [2000] 1 WLR 1573; [2000] All ER 833; 119 ILR 367. See also *Littrell* v. *USA (No. 2)* [1995] 1 WLR 82; [1994] 4 All ER 203; 100 ILR 438, in which medical treatment of a US airman at a US military hospital by US personnel was held to be an immune matter.

[55] [2002] EWHC 428 (Ch).

over those offences that are solely against its property or security, or against another member of the force, or done in performance of official duties. In all other cases, the host State has primary jurisdiction. Jurisdiction can of course be waived by either State.

Heads of State, heads of government, foreign ministers and other senior officials

This subject had not been considered in depth until some twenty years ago,[56] but since then it has received prominence due to attempts to pursue some current or former foreign leaders for serious international crimes.

Civil proceedings

The official acts of a Head of State are rightly treated as those of the State. But an act done by him in his private capacity (*ratione personae*) is subject to the customary international law applicable to a Head of State (Article 3(2) of the UN Convention). States have taken different approaches. Some European courts have held that there is no immunity for private acts. In contrast, section 20 of the UK Act accords a Head of State, and members of his family forming part of his household, the same inviolability and immunities as the head of a diplomatic mission, which covers all official and almost all private matters.[57]

A Head of State cannot be arrested or served with legal process. But, once he leaves office, he can be sued in respect of private matters arising during his time in office. Whether a head of government, foreign minister or other senior official has the same immunity is not clear. But now that many monarchs and presidents have little real power, it being exercised instead by their heads of government, there is a trend to accord heads of government and foreign ministers the same degree of immunity. But, at least under English law, a Head of State has no right to anonymity in civil proceedings to which he is not a party.[58]

Criminal proceedings

In 2002, in the *Arrest Warrant* case, the International Court of Justice held that the issue of a warrant for the arrest of a foreign minister for war crimes and crimes against humanity, and its circulation to other States, were coercive measures that violated his inviolability and absolute immunity from criminal jurisdiction under customary international law for all acts, public or private, committed while in office or before.[59] This decision necessarily applies also to

[56] A. Watts, 'The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers' (1994-III) 247 *Hague Recueil* 40. See now, Fox, p. 165 et seq.
[57] See pp. 111 and 127 et seq. above. [58] See *Aziz* v. *Aziz* [2007] EWCA Civ 712.
[59] *Arrest Warrant* (*Congo* v. *Belgium*), *ICJ Reports* (2002), p. 3; ILM (2002) 536; 128 ILR 1 and 60.

Heads of State and heads of government, and may apply to other senior officials such as defence ministers.[60] But, once such a person has left office, can he be arrested and prosecuted for a crime committed while in office? He would have no continuing immunity for private crimes, but the *Arrest Warrant* judgment suggests that he would have continuing immunity for crimes committed in his *public* capacity.[61] So, could a Head of State order the commission of acts of torture yet remain immune from prosecution for it abroad, even after he has left office? In its judgment in *Pinochet (No. 3)*, the House of Lords (the UK's highest court – now replaced by the UK Supreme Court) held that the former Chilean President had no immunity from extradition to Spain to face charges of torture committed while he was in office.[62] Under the Torture Convention, a Head of State can be liable for the crime,[63] and it would be inconsistent with the obligations under that Convention (to which Chile, Spain and the United Kingdom are parties) if a *former* Head of State could retain his immunity for such crimes and Chile could refuse to extradite or prosecute offenders. By ratifying the Torture Convention, by implication Chile had waived any continuing immunity. But the differing reasoning of the judges makes it difficult to say with any certainty the exact basis on which the court came to its decision, and whether the precedent has wider implications. Although the judgment may be followed for the crimes listed in the Statute of the International Criminal Court (genocide, war crimes and crimes against humanity), it seems unlikely that it extends to terrorist offences or to simple murder. The international law on this matter is still evolving. The UN Convention does not apply to criminal proceedings.[64]

(As to the position of such persons in relation to international criminal tribunals, see pp. 254 et seq. below.)

[60] See the case of the Israeli Defence Minister, Mofaz: see 128 ILR 709 and (2004) ICLQ 771.

[61] And has been so applied by the Belgian, Dutch, German and Spanish supreme courts, at least when there was no jurisdictional connection with the forum State: L. Reydams, *Universal Jurisdiction*, Oxford, 2004, pp. 141 and 165. But see the joint separate opinion in the *Arrest Warrant* case (see n. 59 above) of Judges Higgins, Kooijmans and Buergenthal, paras. 19–65; and (2002) ICLQ 959.

[62] *Pinochet (No. 3)* [2000] 1 AC 147; [1999] 2 WLR 825; [1999] 2 All ER 97; 119 ILR 135. See also (1999) ICLQ 687.

[63] 1465 UNTS 85 (No. 24841); ILM (1984) 1027; UKTS (1991) 107; BGG 229.

[64] See A RES/59/38 or ILM (2005) 801, para. 2.

8

Nationality, aliens and refugees

But in spite of all temptations/To belong to other nations/He remains an Englishman.[1]

Nationality

Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 851–96 ('Oppenheim')

Introduction

Possession by a natural person (an individual) or a legal person (such as a corporation) of the nationality of a State provides them with a link to that State for the purposes of international law. The most important aspect of this link is the right of the State in international law to protect its nationals as against other States. The law of each State primarily determines who are its nationals. In certain, and usually exceptional, cases, international law will not recognise a person as a national of a State even if the State regards him as its national. Although the nationality (provided it has been lawfully obtained) may be valid in the State of nationality, it may not be recognised for the purposes of international law. So the State of the (new) nationality may not be entitled to make an international claim on his behalf unless it can establish that at the relevant time he had a 'genuine connection' with it.[2]

Dual nationality

A dual national is a person who has the nationality of two (and sometimes more) States. It can be acquired in various ways, deliberately or accidentally. A

[1] W.S. Gilbert, *HMS Pinafore*, a comic opera, Act I.

[2] See *Nottebohm*, *ICJ Reports (Second Phase)* (1955), p. 4, at pp. 22–6; 22 ILR 349; *Admadou Sadio Diallo (Guinea* v. *Congo)*, *ICJ Reports* 2007, p. 1; ILM (2007) 712; and p. Okowa, 'Sadio Diallo: *Guinea* v. *Congo* Preliminary Objections', (2008), ICLQ 219–44. The effectiveness in international law of the conferring by Iceland in 2005 of its nationality on the chess grand master, the late Bobby Fischer, may have been problematic.

child is sometimes born a dual national. The law of one or both States may require the person, usually when he reaches the age of majority (usually 18 or 21), to choose which nationality to keep, and allows perhaps a year in which to choose or lose nationality. And, if a person later acquires a second nationality, whether he retains the nationality of his first State will depend on the law of that State, which may provide for automatic withdrawal of his nationality or require him, within a certain period, to choose. When a dual national is in one of his States of nationality, he cannot usually seek the protection of the other, although the latter may make representations. However, there is a trend, at least among Western States, to claim the right to protect a dual national when detained in the State of his other nationality if his connection with that State is tenuous (e.g. his only connection may be a parent born there). In a third State, a dual national can be protected by either State.[3] In 2006, the International Law Commission submitted to the UN General Assembly draft articles on Diplomatic Protection. In 2007, the General Assembly invited the comments of States on the ILC's suggestion that the draft articles might be embodied in a convention; and that the Assembly would again revisit the matter in 2010, discussing it in more detail in a working group of the Sixth Committee.[4]

Citizenship

The term 'citizenship' usually denotes entitlement, under the law of a State, to full civil and political rights. Citizenship and nationality normally coincide.

In the law of a State, which still has the remnants of a colonial empire, 'citizenship' may be limited to person with close connections with ('belongs to') the metropolitan territory, those belonging to its overseas territories having a separate status. Thus, the British Nationality Act 1981, as amended, distinguishes between three main categories: (a) British citizens – those belonging to the metropolitan territory of the United Kingdom, to the Channel Islands or to the Isle of Man,[5] and now also to all remaining British overseas territories; (b) British Overseas Territories Citizens – persons who belonged to a former overseas territory, but who did not acquire the citizenship of that country on independence; and (c) British Nationals (Overseas) (former belongers of Hong Kong).[6] Nevertheless, in international law, all those in the various categories are nationals of the United Kingdom, even though only British citizens are free of UK immigration control.

Under the 1981 UK Act, there is also the category of 'Commonwealth citizen' enjoyed in the United Kingdom and its overseas territories by all citizens of Commonwealth States, although, in itself, it does not confer the right freely to enter the United Kingdom. However, in recognition of the ties between the

[3] See p. 406 below on dual nationality and claims.
[4] See http://untreaty.un.org/ilc/guide/9_8.htm. [5] See pp. 29–30 above.
[6] See www.ips.gov.uk/passport/index.asp.

United Kingdom and its former territories, Commonwealth citizens are entitled to stand for election to the British Parliament, to vote in British elections and to sit on British juries. Usually, this is not reciprocated by Commonwealth States. For historical reasons, citizens of the Republic of Ireland (which is not in the Commonwealth) have the same entitlements.

The right to leave and return to one's State of nationality

Under Article 12(2) of the International Covenant on Civil and Political Rights 1966,[7] a person is entitled to leave any State, including his own. With the virtual end of communist regimes, the right to leave is now general in domestic law, and has led to a substantial increase in so-called economic migrants.[8] But, in some cases, financial and other obstacles (e.g. refusal of a passport, restrictions on the States which can be visited or loss of nationality on leaving) may make the right problematic. The right may of course be subject to restrictions to prevent persons accused of crimes from fleeing, and for health and other reasons of public interest.

Article 12(4) guarantees the unrestricted right of a person to return to his own country.[9]

Passports[10]

Even a (genuine) passport raises no more than a presumption that the holder is a national of the State of issue, although the presumption is not so easily rebutted. National law governs the issue of passports, and an unjustified refusal of a passport can amount to a severe restriction on the ability to leave or return to one's State of citizenship, and is a possible breach of the State's international obligations.[11]

Statelessness

If a person loses his citizenship, but does not acquire a new one, he becomes stateless. Although the State in which he is living will treat him as an alien (see below), it does not have to recognise the right of any other State to protect him. The stateless person will be covered by such human rights obligations as are binding on his State of residence, but enforcing those rights may not be easy, although if there is a breach of a human rights treaty any other party to it will have the right to complain. In an attempt to reduce statelessness, the United Nations adopted the Convention relating to the Status of Stateless Persons

[7] 999 UNTS 171 (No. 14688); ILM (1967) 368; UKTS (1977) 6; BGG 182.
[8] See p. 172 below. [9] But note the UK position, p. 226 below.
[10] D. Turack, *The Passport in International Law*, Lexington, MA, 1972; J. Torpey, *The Invention of the Passport*, Cambridge, 1999.
[11] See Oppenheim, p. 866, n. 7.

1954.[12] This gives less favourable treatment than the Refugees Convention (see below), and has only sixty-three parties. The Convention on the Reduction of Statelessness 1961 has a meagre thirty-five parties.[13] However, many stateless persons will have a claim to refugee status.

Legal persons

The buildings and employees of a legal person (such as a corporation) are its physical embodiment, but for legal purposes they are not the corporation. A company is the most common form of corporation, and is created by law. Given this fundamental distinction from natural persons, determining the nationality of a company is not as easy, although it is particularly important for the purpose of the protection under international law of the company's assets and activities abroad and the bringing of international claims. The basic principle is that a company has the nationality of the State in which it was incorporated or in which it has its registered office or head office. In *Barcelona Traction (Second Phase)*, the International Court of Justice decided that a company incorporated in Canada, and with its head office there, had Canadian nationality even though 88 per cent of the shareholders were Belgian nationals.[14] These days, for tax purposes many companies are incorporated in one State (where the registered office is), but have their headquarters in another State. An international tribunal may therefore look behind the legal veil (façade) of incorporation to determine in which State the control and ownership of the company really lies. The State with which the company has a close, substantial and effective connection may then be treated as the State of nationality. *Foreign branches* of a company will usually have the same nationality as the company, but if the company incorporates *subsidiary companies* under the law of another State, they will probably have the nationality of that State. A multinational company can pose further problems, since it may be incorporated in one State, have its headquarters in another, and do most of its business in other States.[15] But, it all depends on the precise facts and circumstances, including the reason nationality is an issue.

A treaty, especially a bilateral treaty, will often define which companies are to be regarded as covered by it. This is particularly important for bilateral investment treaties (BITs), which provide for compensation in the event of expropriation.[16] The grant of the right to operate scheduled air services is usually

[12] 360 UNTS 117 (No. 1518); UKTS (1960) 41.

[13] 989 UNTS 175 (No. 14458). See A. Aust, 'Limping Treaties, Lessons from Multilateral Treaty-making' (2003) NILR 243, at 262–3.

[14] *ICJ Reports* (1970), p. 3, paras. 32–101; 46 ILR 178.

[15] See Oppenheim, p. 863, n. 15, on the complexities of multinational company nationality. See also Art. 9 of the ILC draft articles on diplomatic protection: see n. **4** above.

[16] See pp. 348–9 below.

restricted to airline companies that are substantially owned and effectively controlled by the parties to an air services agreement or their nationals.[17]

The jurisdiction of the Iran – US Claims Tribunal[18] is limited to claims by companies which are incorporated under either Iranian or US law, provided that 50 per cent or more of the stock is held by Iranian or US nationals. Nationality is presumed if the claimant can establish prima facie that there is such a 50 per cent holding and the respondent produces no evidence to the contrary. But the rule should not be seen as reflecting any general principle, being limited to the particular circumstances.[19]

Ships and aircraft

A ship has the nationality of the State whose flag it is entitled to fly irrespective of the nationality of the person(s), or company, which owns it. The flag can be readily changed.[20] The flag State is important for the purpose of jurisdiction over the ship, especially on the high seas.[21] An aircraft has the nationality of the State in which it is registered,[22] but this can also be changed. In both cases, for the purpose of international claims nationality may have to be claimed in respect of the beneficial owner of the ship or aircraft.

Diplomatic protection

A State has the *right* to protect its nationals abroad, that is to say, to try to ensure that another State treats them in accordance with treaties binding on both States and the minimum standards for treatment of aliens laid down in customary international law. But there is *no legal duty* on a State to protect its nationals.[23] Not surprisingly, this is generally not understood. Whether a State decides to take action to protect one of its nationals (including legal persons) will depend on several factors: whether the national can establish the necessary facts that he has been treated wrongly by the foreign State; whether he can, and has taken, steps to correct the wrong; whether the case is meritorious; whether the State has the means to take effective action with the foreign State.[24] If a State makes a formal claim in respect of one of its nationals, natural or legal, the person must also satisfy the nationality-of-claims rule.[25] Between 1997 and 2006, the International Law Commission studied diplomatic protection, which covers several of the issues outlined in this chapter. It is not clear what will happen to its proposal.[26]

[17] See p. 322 below. [18] See p. 410 below for more about the Tribunal.
[19] See Collier and Lowe, *The Settlement of Disputes in International Law*, Oxford, 1999, pp. 80–1 and 194–5 for more details of how the rule operates.
[20] See further, p. 295 below. [21] See p. 290 below. [22] See further, p. 322 below.
[23] *Barcelona Traction (Second Phase), ICJ Reports* (1970), p. 3, at para. 78; 46 ILR 178.
[24] See *Abassi* [2002] EWCA Civ 1598; 126 ILR 685. [25] See p. 406 below.
[26] See n. 4 above.

Aliens

Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 896–948.

In relation to a State, an alien is any person who is not one of its nationals. An alien will not have the same rights and obligations as nationals, although some States confer on aliens certain rights otherwise enjoyed only by their nationals. The principal disadvantage of being an alien is that one has no entitlement to enter or stay in a foreign State, unless this is conferred by treaty. Entry and residence can be made subject to presentation of a passport or a national identity card, obtaining a visa and restrictions as to length of stay, place of residence and employment. A national of an EU State enjoys almost unrestricted freedom of entry into other EU States, although permanent residence can be subject to certain restrictions. For certain EU States, the Schengen Agreement 1990 has abolished most internal immigration controls for EU and third-State nationals.[27] In the case of tourists and short-stay visitors, many States have unilaterally waived the requirement of a visa or have concluded bilateral visa-abolition agreements.[28] For migrant workers and workers who frequently cross a frontier (*fronteliers*), there are many bilateral treaties waiving visa and passport requirements.[29]

An alien is subject to the law and jurisdiction of the foreign State. Certain of the laws of his own State will continue to apply to him, although, in practice, they may well not be enforceable while he is abroad; and the jurisdiction of his home State will extend to certain crimes and other acts committed by him while abroad.[30] Unless prevented by its treaty obligations, the foreign State is free to treat aliens less favourably than its own nationals, for example by prohibiting them from owning land (as in Denmark, even for other EU nationals) or doing certain work, especially in the professions. Aliens are usually not allowed to be government officials, to stand for parliament or to vote.[31] But, an alien who takes up residence will normally be subject to local taxation. If he still remains subject to the tax laws of his own State, a double taxation agreement between the two States may lessen the tax burden.[32]

The life of an alien is – or at least should be – better if the foreign State is a party to the International Covenant on Civil and Political Rights 1966.[33] This requires that all persons in the territory of a party, regardless of national origin, enjoy certain basic rights. Other human rights treaties will also apply to aliens.

[27] ILM (1991) 68, and see p. 445 below.
[28] For example, the Poland – UK Agreement 1992, 1703 UNTS 186 (No. 29464); UKTS (1992) 69.
[29] See Oppenheim, pp. 901–3.
[30] See pp. 43–4 above.
[31] But see pp. 164–5 above for a notable exception.
[32] See, for example, the Australia – UK Double Taxation Agreement 2003, 2258 UNTS (No. 40224); UKTS (2004) 5.
[33] 999 UNTS 171 (No. 14668); ILM (1967) 368; UKTS (1977) 6. See pp. 217–18 et seq. below.

Many bilateral treaties afford specific protection to aliens, such as treaties of commerce and friendship, and consular conventions.

Property of aliens[34]

An alien, whether an individual or a legal person, may be subject to special restrictions on the holding of property. But if an alien owns property lawfully, customary international law requires the State to protect property rights by allowing access to its courts on an equal footing to its nationals. But a State (by means of governmental or other public bodies) is not prevented from expropriating the property of aliens, so long as certain conditions are met. 'Expropriation' means the compulsory deprivation of property against the payment of compensation. 'Nationalisation' usually means *general* expropriation, typically of a whole industry. In contrast, 'confiscation' is the taking of particular property without compensation. 'Sequestration' is the taking possession of property temporarily, the legal title to which remains with the owner. (References below to 'expropriation' generally include also nationalisation, confiscation or sequestration.)

Expropriation can be done by various means. It is rarely effected by sending soldiers to occupy a factory and replacing all the managers with local officials. But, it can be done by much less obvious means, such as imposing penal rates of taxation on certain types of businesses to drive them out of business. One has to examine all the facts and circumstances to determine the *substantive* effect of the act that the alien owner claims has deprived him of his property.[35] An act that causes a significant diminution in the value of the property may well constitute expropriation.

The factors which must be considered in determining whether an expropriation is lawful in international law are: (a) whether it was done in accordance with proper legislation or arbitrarily; (b) whether it was done for a public purpose (an environmental concern may not be enough);[36] (c) whether aliens were discriminated against; and (d) whether appropriate compensation has been paid. Whether the compensation is appropriate depends on whether it is adequate and effective, and promptly paid. Whether these criteria are met will depend on the facts of each case. The calculation of the amount of compensation is usually complicated, but compensation for loss of property should reflect its market value immediately before the expropriation was formally announced or had become known. To be effective, the compensation must be paid in a form that is of value to the alien. If paid in money, it must be in a currency that can be transferred abroad and freely exchanged.

[34] See the extensive references to cases in Oppenheim, pp. 911–33.

[35] See *Sporrong and Lönnroth* (1982) 5 EHRR 35; 68 ILR 86, at pp. 104 et seq.; and *Starrett Housing Corp*. v. *Iran*, ILM (1984) 1090, at 1107–17; 85 ILR 349.

[36] *Santa Elena* v. *Costa Rica*, ILM (2000) 1317.

Such, or similar, criteria have been included in thousands of bilateral investment treaties (BITs), that are generally concluded between a developed and a developing State.[37] Disputes may also be submitted under other multilateral treaties such as the World Trade Organization Agreement,[38] the North American Free Trade Agreement (NAFTA)[39] or Protocol 1 to the European Convention on Human Rights 1950 (ECHR),[40] provided the States involved are parties to them. Expropriation claims may also fall within the jurisdiction of specially established tribunals, such as the Iran – US Claims Tribunal,[41] or, previously, the UN Compensation Commission established by the UN Security Council by Resolution 687 to compensate those who suffered loss as a result of Iraq's invasion of Kuwait.[42] (On dispute settlement generally, see Chapter 22.)

Asylum

A State can let an alien enter and remain in its territory even if his own State objects. This is more correctly called the grant of *asylum* (or *political asylum*), and is conferred by States in their discretion. Aliens have no 'right' of asylum,[43] it is merely the right of a State to grant or refuse it. The practice of asylum predates by centuries the Refugees Convention (see below). The concept is wider than refugee status in that it can be granted when the person has no fear of persecution. Persons fleeing from famine or floods and given shelter in a foreign State may often be misdescribed as 'refugees' because they seek refuge, but they are more accurately described as *displaced persons* who have been given asylum, often only for a temporary period. In the same way, persons genuinely seeking refuge from persecution are often confusingly referred to as *asylum-seekers*.

Diplomatic asylum

Diplomatic asylum must be clearly distinguished from asylum as just described. Diplomatic asylum is the giving of protection by a diplomatic mission to a person fleeing from the authorities of the host State (not just from a person or a crowd). The person fleeing can be a local national, a national of the sending State or a national of a third State. Except as between some Latin America States, this practice is not favoured since it amounts to the sending State abusing the inviolability of its diplomatic mission[44] by acting in a manner which conflicts with its duty to respect the local laws, and indeed the sovereignty, of the host State.[45] Nevertheless, from time to time persons will enter a mission and claim diplomatic asylum. It may be either physically difficult to eject them (although the mission can authorise the local police to do so) or

[37] See pp. 345 et seq. below. [38] See p. 353 below. [39] See p. 358 below.
[40] See p. 219 below. [41] See p. 410 below. [42] See www.uncc.ch/ and p. 411 below.
[43] The reference to 'asylum' in Art. 14 of the Universal Declaration of Human Rights 1948 (see pp. 217–18 below) is to the rights of refugees.
[44] See p. 115 above. [45] See p. 138 below.

politically awkward. The intruders may have good grounds for believing that they will be treated severely by the local authorities, and there will be the inevitable media attention. If there is a genuine humanitarian case, it will need all the diplomatic skills of the head of the mission, and his foreign minister, to balance their legal duty to the receiving State and their moral duty. That a person wants refuge in the sending State is not a valid reason for protecting him, although the sending State will be in a stronger position, politically and legally, if there are grounds for believing that, if ejected, he would be subjected to 'summary justice', or otherwise dealt with arbitrarily or treated inhumanly.[46]

Refugees

Hathaway, *The Rights of Refugees under International Law*, Cambridge, 2005 ('Hathaway')

Oppenheim, Oppenheim's *International Law*, 9th edn, London, 1992, pp. 890–6 ('Oppenheim')

Feller, Türk and **Nicholson** (eds.), *Refugee Protection in International Law*, Cambridge, 2003 ('Feller, Türk and Nicholson')

Weis, *The Refugee Convention 1951: The Travaux Préparatoires Analysed with a Commentary*, Cambridge, 1995

Office of the UN High Commissioner for Refugees (www.unhcr.org/)

Definition of refugee

The relevant treaty is the Convention relating to the Status of Refugees 1951, as amended by the 1967 Protocol extending the Convention to cover all refugees, past, present and future. The two instruments are referred to collectively as 'the Refugees Convention' (in this chapter, 'the Convention').[47] Article 1A(2) defines 'refugee' as a person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.[48]

[46] See generally Oppenheim, pp. 1082–6; *R. (B. Children)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2005] 2 WLR 618.

[47] 189 UNTS 137 (No. 2545) and 606 UNTS 267 (No. 8791); UKTS (1954) 39 and UKTS (1969) 15.

[48] Office of the UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992 (www.unhcr.org/publ/PUBL/3d58e13b4.pdf). See also Art. I of the OAU Convention on Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 60 (No. 14691), which expands on the Refugees Convention definition by covering persons who have fled from, in effect, generalised violence. That is relevant in the African context, although most conflicts in Africa are characterised by inter-ethnic violence and so in many such cases the Refugees Convention definition would also apply.

The definition applies also to a stateless person who is outside the country of his 'habitual residence' and is unable or, owing to such fear is unwilling, to return to it.

Some important misunderstandings are caused by misuse or misapplication of basic terms. Refugees must be clearly distinguished from other persons with whom they are constantly confused. Because of war or natural disaster, people have long sought safety in foreign countries, and the last quarter of the twentieth century saw a substantial rise in their numbers. It is therefore important to distinguish from refugees such *displaced persons* seeking *asylum* (see above), since persons seeking protection as refugees are frequently referred to (often disparagingly) as 'asylum-seekers'.[49] The same period also saw a large increase in *economic migrants* whose sole purpose in leaving their State is to seek a better life. Then there are *internally displaced persons* (IDPs) who have had to leave their homes for various reasons, but who are still in their own State. The Office of the UN High Commissioner for Refugees (UNHCR) has only a limited mandate for IDPs. It does not have a mandate for the other groups mentioned in this paragraph or for other 'persons of concern', such as former refugees who have been repatriated, stateless persons or persons who have been displaced by war or generalised violence where there is no element of persecution per se. So, this section does not deal with those categories.

Not all States are parties to the Convention (and the 1967 Protocol). But there are 144, and its basic principles, in particular the definition of a refugee and the prohibition on *refoulement*,[50] are now part of customary international law. Unlike asylum, refugee status is a legal *right*. Once the criteria have been satisfied, States have an obligation to treat the person as a refugee; there is no discretion. However, States have to use their domestic legislation and procedures in dealing with claims to refugee status. One has therefore to consider each refugee application, not only on its own particular facts, but also in the light of the law of the State concerned. Although there is some room for varying opinions in interpreting some aspects of the Convention, in applying their legislation States should be guided by the Convention, UNHCR Guidelines and Conclusions of the UNHCR Executive Committee. Here, one can only outline the most important provisions of the Convention.

The UNHCR was established in 1951 by General Assembly Resolution 428 (V), to which was annexed the UNHCR's Statute. The Statute gives it a mandate to protect refugees whether or not the State which they are in is a party to the Convention, provided the State is cooperative. Even if it is uncooperative, the UNHCR still has a mandate in respect of refugees within that State's territory, so that it can still make *démarches* to the authorities on their behalf and publicise their plight.

[49] The media have much to answer for; but are not helped when the Convention is incorporated into UK law by the Asylum [*sic*] and Immigration Appeals Act 1993.

[50] See p. 176 below.

Application for refugee status

The proposition that a refugee should make his claim in the first country at which he *arrives* is controversial and not supported by the Convention or other legal instruments. But the determination of refugee status should be made by the first State in whose territory the *claim* to refugee status is *made*.[51] Every State is obliged to admit refugee claimants, this duty of admission flowing from the principle of non-*refoulement* (see below), and is a key part of refugee law. The claim is often made at immigration control at an airport or seaport. Since the territory of a State includes its territorial sea, a claim can be made on or from a ship in the territorial sea, or by a lawyer on behalf of the claimant once the ship has entered the territorial sea. (The large signs at UK airports that suggest that the UK Border begins only after immigration has been passed, do not affect applications for refugee status, the applicant being already in the United Kingdom.) Thus, when a ship carrying persons seeking refuge has entered the territorial sea of a State, it should not be turned back. The practice of a State declaring a 'migration zone' within its territory (only within which a person can apply for refuge), but leaving outlying areas of its territory *outside* the zone in an attempt to avoid the Convention applying in the zone, is not compatible with Convention obligations. However, it may be compatible with its obligations if the State makes provision for applications to be properly processed outside the zone, either in its territory or in a third State, and, if they are successful, admits the refugees into the zone.

Once the claim has been made, the State should not require the claimant to leave while his application is pending. This might result in a breach of the prohibition on *refoulement*.[52]

A passport is *prima facie* proof of the nationality of the claimant, but is not conclusive.[53] It is not necessary for a person claiming refugee status to have lawfully entered the State where he makes the claim (Article 31(1)). One must therefore be very careful when one reads about 'illegal immigrants'. Used correctly, this term means only that the persons have entered another State without the necessary advance permission, such as a visa. Many economic migrants fall into this category. But the term 'illegal immigrant' is often used in a derogatory sense, and it may obscure (and be so intended by politicians) the fact that the person may be a genuine refugee even if, as a matter of domestic law, he has arrived in the State without permission, and so is there illegally only in that sense. Not surprisingly, most refugees are quite unable to obtain a visa or other permission before entering the State of refuge. Embassies and consulates may refuse a visa or be inaccessible, and the Convention does not require States to process refugee applications abroad, although there is a growing trend to do

[51] See the EU's so-called Dublin Agreement 1990, 2144 UNTS 492 (No. 37439); UKTS (1996) 72.
[52] See s. 6 of the (UK) Asylum and Immigration Appeals Act 1993.
[53] See pp. 129 and 165 above.

this. Because most airlines will not carry passengers who do not have a passport and any necessary visas, many genuine refugees smuggle themselves into the State of refuge, as do some persons who are only economic migrants.

Fear of persecution

An applicant's fear of persecution will be well founded (i.e. real) if he establishes to a reasonable degree that if he were to return to his State it is likely that he would be persecuted. Fear being largely subjective, the applicant's perception will be important, but it must still be reasonable. So there must be some basis in fact that he, or other persons in his State who are in a like position, have been or are likely to be persecuted. In addition to a detailed investigation of the background of the individual and his family, the State of refuge will have to assess the conditions in his own State in order to determine whether the fear is reasonable. But persecution of him or others does not have to be the reason he left his State, since circumstances can change for the worse subsequently.

The persecution must be for reasons of race, religion, nationality, membership of a particular social group or political opinion, although a rigid line cannot be drawn between these categories, since often they overlap. The Convention does not define persecution, although it must amount to some significant form of ill-treatment, usually involving human rights abuses. The ill-treatment does not have to be physical. Discrimination in matters such as education or healthcare, if particularly severe and cumulative, may amount to persecution, but the threshold is high. In itself, fear of punishment for a crime (including for desertion from the armed forces or draft-dodging) will not be enough. The person would have to show that, because of his political opinions etc., the real purpose of a prosecution would be to persecute him or that, for the same reason, he would not get a fair trial or the sentence might be excessive. Persecution for reasons of 'nationality' includes persecution of ethnic or linguistic groups. Being of a different political opinion to that of the government will, in itself, not be enough; the person would have to show that because of his opinions he has a real fear of persecution. This is more likely if he has actively expressed those opinions.

Persecution can also be done by a dominant minority, but States vary on whether fear of persecution by *private* persons is sufficient. This includes organisations as well as individuals who are not formally linked to the State, for example rebel armed forces and paramilitary groups. Some States regard private persecution as insufficient, and others only if the persecution is known to the authorities and they were unwilling or unable to provide protection.[54] The UNHCR Handbook makes clear that, depending on the circumstances, persecution by non-State agents can fall within the Convention. The

[54] See the judgment of the House of Lords in *R.* v. *Home Secretary, ex parte Adan* [2001] 2 AC 477; ILM (2001) 727; and Feller, Türk and Nicholson, p. 59.

majority of States also follow this route (including several Western European). There is also significant jurisprudence to this effect. The purpose of the Convention is to provide international protection where national protection of an individual's fundamental rights has failed. The identity of the persecutor is not therefore particularly relevant. Although the first State which the claimant enters should process his claim, a State that takes a narrow view and rejects the claim may, instead of returning him to his State (which could amount to a breach of the non-*refoulement* obligation) do nothing to prevent him entering another State that takes a more liberal approach.

Even where a State may grant diplomatic asylum in one of its diplomatic missions to a local national,[55] since they are *not* part of the territory of the sending state[56] the asylum-seeker cannot claim refugee status since he is still in his own State.

Exceptions to refugee status

Article 1, Sections C to F, of the Convention list four cases where a person coming within the definition of refugee is nevertheless excluded from the protection of the Convention: he no longer needs protection (Section C); he is receiving protection and assistance from UN organs or agencies other than the UNHCR, for example the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) (Section D); although not a national of his new State of residence, its authorities treat him as if he were one (Section E). Section F is rather different in that it lists, in the words of the UNHCR Handbook, 'persons not to be deserving of international protection'. A State is required *not* to treat a person as a refugee if there are 'serious reasons for considering'[57] that:

(a) he has committed a crime against peace (aggression), a war crime or a crime against humanity;[58]
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Category (c) might appear somewhat vague,[59] but it has been applied by domestic courts and is of increasing importance. To make it clear that persons involved in terrorism are not entitled to refugee status, in 1996 the UN General Assembly reaffirmed that terrorism, including knowingly financing, planning and inciting terrorist acts, is 'contrary to the purposes and principles of the

[55] See p. 170 above. [56] See p. 115 above.
[57] It is *not* necessary to prove that he has been convicted of a relevant criminal offence.
[58] For an explanation of these terms, see pp. 252–3 below.
[59] See the UNHCR's guidelines on Art. 1F on its website: www.unhcr.org/.

United Nations', and that before recognising refugee status, States should ensure that the person has not participated in terrorist acts.[60] Naturally, all potential Section F cases, including terrorist ones, require the most careful examination by national authorities, since difficult issues are often involved.

Non-*refoulement*[61]

A State is *not* obliged to give refuge to a person even if he has established his refugee status. But, in addition to not returning him to his own State, he must not be sent to a third State if his life or freedom would there be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (Article 33(1)). This is known as the principle of non-*refoulement*. It applies even before a claim to refugee status has been verified, provided there is a prima facie claim. The test is whether his life or freedom 'would' be threatened, and is thus an objective test, the refugee's perception not being so relevant. In the case of a political refugee, it may be necessary to determine whether the third State would be able to protect him from abduction or attack by agents of his own State.

A mass influx of refugees into a State can cause considerable problems, particularly as such movements tend to be into small or developing countries with limited resources. The 1967 UN General Assembly Declaration on Territorial Asylum[62] provides that in order to safeguard the local population such refugees may be refused entry or, if already in the State, returned even if they may be persecuted. But the Declaration is not legally binding and an attempt to convert it into a treaty was unsuccessful. Yet, the Convention was written with mass movements in mind (Second World War refugees) and its limited exceptions to the prohibition on *refoulement* do not include situations of mass influx.[63]

Protection for the State of refuge

The prohibition on *refoulement* does not apply when there are 'reasonable grounds' for regarding the refugee as a danger to the security of the State of refuge or, having been convicted of a 'particularly serious crime' constitutes a danger to the community of that State (Article 33(2)). Similarly, Article 32 permits the expulsion of a refugee on grounds of 'national security or public order'. Expulsion must be done with due process of law, and the refugee must be given a reasonable time in which to seek admission to another State. However, even when the State of refuge would be entitled to send the person to another

[60] Paras. 2 and 3 of the Declaration annexed to A/RES/51/210; ILM (1996) 1188.
[61] From the French '*refouler*', to return.
[62] See A/RES/2312(XXII).
[63] Conclusion No. 22 (1981) of the UNHCR Executive Committee. Hence, the need for improved burden sharing between States, one of UNHCR's current priorities: see www.unhcr.org/.

State, including his own, the State of refuge may be prevented from doing so by its obligations under other human rights treaties. Such obligations are also relevant in the case of those who are excluded from refugee status by virtue of Article 1, Section F (see above). The European Court of Human Rights has decided that Article 3 of the European Convention on Human Rights has extraterritorial effect.[64] This prevents a person, whatever his nationality, being sent to another State if he might there be subject to inhuman or degrading treatment.[65] Article 3 of the Torture Convention 1984[66] prohibits the return or extradition of a person to another State if there are substantial grounds for believing that he would be in danger of being subjected to torture.

Obligations of the State of refuge to the refugee

The Convention has two dozen articles on the treatment of refugees by the State of refuge. Generally, these require refugees to be treated no less favourably than other aliens who are there, and not to discriminate as between refugees on grounds of race, religion or country of origin. (The Convention counterbalances this with the obligation on refugees to abide by the laws of the host State.) Many of the provisions are now subsumed by other international human rights obligations. There is a (qualified) obligation to issue refugees with travel documents. Before the Convention, these were known as 'Nansen Passports'.[67]

[64] For an explanation of this term, see pp. 42–9 above.
[65] *Chahal* v. *UK* (1997) 23 EHRR 413; 108 ILR 385.
[66] 1465 UNTS 85 (No. 24841); ILM (1984) 1027; UKTS (1991) 107; BGG 229.
[67] Oppenheim, p. 892, n. 8; I. Kaprielian-Churchill, 'Rejecting "Misfits": Canada and the Nansen Passport' (1994) *International Migration Review* 281–300.

9

International organisations

I don't want to belong to any club that will accept me as a member.[1]

Klabbers, *An Introduction to International Institutional Law*, 2nd edn, Cambridge, 2009 ('Klabbers')
Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 1282–331 ('Shaw')

Introduction

International organisations grew out of the diplomatic conferences of the nineteenth century as States sought more effective ways to deal with problems caused by the rapid development of international society. The International Telegraphic (later Telecommunications) Union and the Universal Postal Union were founded in the 1860s. There are now countless international organisations, ranging from large ones with global responsibilities and virtually universal membership, such as the United Nations and the so-called UN specialised agencies, to regional or highly specialised organisations, such as the (large) European Union and the (small) International Whaling Commission. Although each organisation is different and must be studied separately, they share the following basic characteristics:

- Establishment by treaty (constituent instrument), although there are some exceptions. The Organization for (previously Conference on) Security and Co-operation in Europe (OSCE/CSCE), emerged following the Helsinki Final Act 1975, which was not a treaty.[2] Nor was the Commonwealth or its secretariat established by treaty.[3] The International Committee of the Red Cross (ICRC) is a Swiss corporation, and States are not members of it. However, it has a special place internationally (dare one say even *sui generis*?), being regarded with particular respect by governments and referred to in (and is sometimes a party to) treaties.[4]

[1] G. Marx, *Groucho and Me*, 1959, Ch. 26. [2] See p. 59 (Final act) above.
[3] See ILM (1965) 1108 and *Sumukan* v. *Commonwealth Secretariat* (CA) [2007] EWCA Civ 1148, Sedley LJ, para. 40.
[4] See further Shaw, pp. 244, n. 244 (yes, it *is* right), and 261–2.

- Membership limited exclusively or primarily to States. This is reflected in the alternative generic term 'intergovernmental organisation'. Only *States* can be members of the United Nations, but the European Union has been able to become a member of certain organisations, such as the FAO[5] and the Commission for the Conservation of Antarctic Marine Living Resources,[6] which admit to membership organisations on which their members have conferred exclusive competence for certain matters. Some organisations admit as members *non-State entities* on the basis that they are separate customs territories. Thus, although China is a member, China, Hong Kong (the Hong Kong Special Administrative Region – HKSAR)[7] and China, Macao (the Macao SAR), as well as Chinese Taipei (Taiwan), are also full members of the World Trade Organization (WTO). Both China and the HKSAR are members of the International Textiles and Clothing Bureau, the World Tourism Organization (WTO) and the World Meteorological Organization (WMO). Other organisations have a separate category of associate membership for the overseas territories of members. Many organisations allow non-member States and some non-State entities to be observers without the right to vote.
- International legal personality separate from its members (see below).
- Financed by the members.

International organisations usually have three main organs: an assembly, in which all the members are entitled to sit (usually with one vote each); an executive body (often with restricted membership); and a secretariat. These organs need to be carefully distinguished from the organisation itself and its members.[8]

Membership and representation

Many international organisations, such as the UN specialised agencies (which are *not* part of the United Nations: see page 189 below), are open for membership by any State. Others that are limited to particular regions (e.g. Europe) or interests (e.g. Antarctic science) restrict effective membership accordingly.[9] Issues of membership are quite different from questions of representation. Representation is concerned with which government is entitled to represent a State within an international organisation. A prime example is China. The Republic of China was an original Member of the United Nations. But in 1949 the Nationalist (Kuomintang) Government lost the civil war to the Communists

[5] See the FAO Constitution, Article II(3), at www.fao.org.
[6] See Article XXIX of the CCAMLR Convention, 402 UNTS 71 (No. 22301); ILM (1980) 837; UKTS (1982) 48; TIAS 10240; B & B Docs. 628.
[7] Section VI of Annex I to the Joint Declaration on the Question of Hong Kong, 1399 UNTS 33 (No. 23391); ILM (1984) 1366; UKTS (1985) 26.
[8] See pp. 183–4 below. [9] See pp. 329–30 below.

and retreated to the island of Formosa (Taiwan). The victors formed the Government of the People's Republic of China (the 'PRC Government'), which the United Kingdom and other States recognised in 1950 as the Government of China. But political opposition, led by the United States, to the PRC Government representing China in the United Nations persisted until 1971, when the General Assembly decided that the PRC Government should represent China.

Credentials

Credentials[10] must be distinguished from representation (see above).

Withdrawal[11]

The UN Charter and some other constituent treaties have no provision permitting a member State to withdraw, but the right to do so can probably be implied,[12] although in some cases (such as the European Union) there might be heavy financial consequences.

International legal personality

An international organisation is rather like a corporation in that it has legal personality separate from its members. This makes the organisation a subject of international law, with rights and duties under it.[13] Although established by States, perhaps the most important aspect of the separate international legal personality of an international organisation is that it can enter into treaties with other subjects of international law, whether other international organisations,[14] member States or non-member States. Its own constituent instrument may provide that it shall have international legal personality; otherwise, this may be inferred from its purpose, the powers given to it by its members and its practice.[15]

The constituent instrument will usually provide that in the territory of each member the organisation shall have the legal capacity it needs to carry out its functions, such as entering into contracts, buying and selling land and taking part in legal proceedings. This means, in effect, that each member must accord

[10] See p. 56 above, and R. Sabel, *Procedure at Diplomatic Conferences*, 2nd edn, Cambridge, 2006, p. 58 et seq.

[11] See Klabbers, pp. 109–14.

[12] See Aust MTLP, pp. 397–8, esp. n. 25. See p. 448 below about the express right in the Lisbon Treaty to withdraw from the European Union.

[13] On subjects, see p. 12 above.

[14] On treaties with international organisations, see p. 51 above.

[15] *Reparations for Injuries Suffered in the Service of the United Nations, ICJ Reports* (1949), p. 174; 16 ILR 318. Because they were not established by treaty, and their subsequent history, there must be serious doubt whether the Commonwealth or the OSCE have international legal personality: see Aust MTLP, pp. 398–9 and 411–14; Oppenheim, pp. 265–6; and Shaw, pp. 239–40 and 1239.

it the status of a corporation in its domestic law. Whether this requires legislation will depend on the constitutional law and practice of the member. In the United Kingdom, and possibly in some other States that follow the dualist approach to the status of treaties in domestic law,[16] the fact that the United Kingdom is a party to a treaty establishing an international organisation will, in itself, *not* accord the organisation legal personality in UK law. There will usually have to be legislation (either an Act of Parliament or an Order in Council under the International Organisations Act 1968) to accord it corporate status.[17] When legal personality has been conferred on an international organisation by the law of a member State, the law of a non-member State may treat the organisation as having legal personality in that State.[18]

Immunities and privileges

To ensure that ministers, diplomats and other officials attending meetings of an international organisation, whether at its headquarters or elsewhere, are free from interference in carrying out their duties, they enjoy certain immunities and privileges. Some are also accorded to the organisation itself and its staff. The guiding principle is that there must be a *functional* need for immunity, primarily to ensure independence of the participants and the organisation. And, certain fiscal privileges are accorded to representatives of members, and to the organisation and its staff. This is justified on the different basis that the host State (the State where the organisation has its headquarters or where it is holding a meeting) should not benefit from taxes and duties paid from the income of the organisation, its staff or representatives of members since the income comes from the States which are members of the organisation. The host State should anyway benefit in many ways, particularly economic, from having the organisation or conference in its territory.

The constituent instrument, or a protocol to it, will usually provide for the immunities and privileges. Such instruments tend to follow a pattern set initially by the General Convention on the Privileges and Immunities of the United Nations 1946[19] and the Convention on the Privileges and Immunities of the Specialized Agencies 1947, which has a separate annex for each agency.[20] More recent treaties have more detail, and exceptions from the immunity from jurisdiction.[21] They are normally supplemented by a treaty with the host State (headquarters agreement)[22] elaborating on the immunities and privileges and specifying the necessary procedures.

[16] See p. 75 above. [17] See generally Shaw, pp. 1296–1303; and pp. 76–7 above.
[18] *Arab Monetary Authority* v. *Hashim* [1991] 2 WLR 738; 85 ILR 1.
[19] 1 UNTS 15 (No. 4). [20] 33 UNTS 261 (No. 521).
[21] See the OPCW–UK Agreement on the Privileges and Immunities of the OPCW, 2207 UNTS (No. 39170); UKTS (2002) 31.
[22] See p. 332 below on the headquarters agreement between the Antarctic Treaty Secretariat and Argentina.

Although the provisions vary slightly depending on the organisation and how old the treaty is, they generally provide that the organisation, its staff and representatives of members will be immune (to varying degrees) from legal proceedings unless the organisation (or the member State concerned, as the case may be) waives immunity. Immunity is a matter for the domestic courts, but if the organisation has determined that a person has immunity and that the act in question attracts immunity, there is a presumption of immunity. Although that determination is not binding on the courts, it must be given the greatest weight and not be set aside except for the most compelling reasons.[23]

Some very senior staff of an organisation may be accorded full diplomatic immunity, but otherwise the staff (even when they have left it) and representatives of members will be immune only from legal proceedings for what they say, or do, in their work. In more recent treaties there is usually no immunity in respect of motor accidents. Experts on mission for an organisation, such as consultants, are accorded such privileges and immunities as are necessary for the independent exercise of their functions. These usually include immunity from personal arrest or detention; and immunity in respect of what they do in the course of performing their mission, including what they say and write.[24] The organisation will be exempt from income tax, but the staff will be subject to a (notional) internal tax.

It is now common for contracts with an organisation to provide for an advance waiver, so that any contractual disputes can be referred to arbitration. The immunity of the organisation may also be much less where it has a commercial purpose. The European Bank for Reconstruction and Development has virtually no immunity from legal proceedings, and its assets can be seized to pay a judgment debt once all appeals have been exhausted.[25]

A particular problem arises if a staff member of, or representative to, an international organisation is considered by the host State to be a threat to its security. The relationship between the host State and the organisation is different from that between it and a sending State. Constituent treaties emphasise the fundamental principle that the organisation must be able to function freely and independently. Although they require the chief officer to waive the immunity of a staff member or expert on mission in a proper case, there may be a dispute about this. Furthermore, the representatives of member States are accredited to the organisation, *not* to the host State. Although a few constituent treaties or headquarters agreements acknowledge the right of the host State to require the removal of a person who is considered by the host State to be a threat to its security, most

[23] See the *Immunity from Legal Process*, Advisory Opinion (*Cumaraswamy*), *ICJ Reports* (1999), p. 62, paras. 57–65; 121 ILR 405.

[24] See the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the UN*, Advisory Opinion (*Mazilu*), *ICJ Reports* (1989), p. 177; 85 ILR 322 and *Cumaraswamy* (n. 23 above), p. 62.

[25] See the 1990 Agreement establishing the EBRD, Arts. 46, 47 and 55 (www.ebrd.com/about/basics/index.htm).

do not. Nevertheless, even without such an express provision, some host States take the view that they can deport such persons or refuse them admittance.

The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character 1975[26] provides for the relations between States and intergovernmental international organisations of a universal character (those whose membership and responsibilities are on a worldwide scale), and to the representation of States at conferences convened by or under the auspices of such organisations. The Convention lays down a scale of immunities and privileges for permanent missions of States to such organisations, and for delegations to their conferences. The Convention follows closely the 1961 Diplomatic Convention and the 1969 Special Missions Convention (which had been modelled on the Diplomatic Convention).[27] For instance, Article 59(1) of the 1975 Convention provides that the 'private accommodation' of a member of the diplomatic staff of a delegation to a conference enjoys inviolability. This has always been understood to include a hotel room,[28] and is just one example of a scale of privileges and immunities that goes further than that in, for example, the Convention on the Privileges and Immunities of the United Nations[29] and similar treaties of other universal international and regional organisations. Most international organisations of a universal character have their headquarters, and hold most of their meetings, in Western States. The existing treaties on the privileges and immunities of the organisations and of persons connected with them (which treaties are preserved by Article 4(a) of the 1975 Convention) are regarded by those States as sufficient, and good models for future agreements. After nearly 40 years, the 1975 Convention has only 34 of the 35 ratifications needed to bring it into force. Apart from some former communist States of Eastern Europe, only one small Western European State has ratified the Convention, and no State that is host to a major international organisation has ratified it. Even when the Convention enters into force, a State that is not a party to the Convention will of course not be bound by it.

Liability

Since an international organisation has a legal personality separate from its members, in principle the members are not liable, in either international or domestic law, for its acts.[30] However, whether in certain circumstances the

[26] See A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, vol. I, pp. 449 et seq.; and A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 256–8.

[27] See p. 108 above.

[28] See para. (3) of the ILC Commentary on the final draft article in A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, vol. I, p. 528.

[29] See n. 19 above.

[30] See the International Tin Council case decided by the (UK) House of Lords: *Rayner* v. *Department of Trade and Industry* [1989] 3 All ER 523, at 529; 81 ILR 680.

members should be liable is currently being studied by the International Law Commission under the topic, 'Responsibility of International Organizations', but it may be some time before any conclusion is reached.[31]

Dispute settlement

A dispute between the members of an international organisation, or between the organisation and its members, about the interpretation or application of its constituent instrument can be settled in accordance with the relevant provisions (if any) of the instrument. Certain instruments, such as the treaties governing the World Trade Organization or the European Union, establish a more or less self-contained legal order within which the member States have to operate. The treaties therefore include elaborate procedures for settling disputes arising within that legal order.[32] Other international organisations have built-in dispute procedures. Articles 26–29 of the International Labour Organization Constitution provide for a commission of inquiry to hear complaints that a member State is not observing an ILO convention.[33] However, as with other disputes involving member States, it would be expected that the members would first consult fully in an attempt to settle the matter. Even if that is unsuccessful, it does not follow that the dispute settlement procedures of the organisation will be activated. There may be various reasons why members may not wish to formalise the dispute. There are many disputes within international organisations that remain unresolved, often because they are not so important (or at least not important to a sufficient number of members) that they have to be resolved.

The United Nations[34]

It may seem surprising, but the United Nations Charter has no built-in procedure specifically for settling legal disputes within the Organization, other than staff disputes. There are differences of view, some longstanding, about the interpretation or application of the Charter, but these are generally dealt with by negotiations, mostly informal and sometimes inconclusive. Some are on major issues (such as the effective exclusion of South Africa during the period of apartheid). Some are resolved, often by a compromise (such as over the question of the arrears of South Africa's contributions when it resumed its seat); others remain unresolved. Some things are better dealt with by a political 'fix'.

The International Court of Justice (ICJ) has given advisory opinions on various UN internal matters.[35] In the *Lockerbie* cases (now discontinued by agreement), the ICJ was asked to interpret the Charter in order to decide

[31] See also p. 191 below. [32] See p. 354 below (WTO) and pp. 438 et seq. below (EU).
[33] See www.ilo.org. [34] On which, see the following chapter.
[35] See p. 427 below and www.icj-cij.org.

fundamental questions regarding the respective powers of the Security Council and the ICJ.[36]

The (so-called) UN specialised agencies

Most disputes within the specialised agencies are settled by negotiation, but if there is a need to pursue a more formal procedure the dispute will be referred in most of the agencies to one of the main organs. If the main organ cannot settle it, the dispute may then be referred to arbitration, or to the ICJ for an advisory opinion.

Staff disputes

The constituent instruments of international organisations provide mechanisms by which disputes between the organisation and staff members can be settled.[37] This is essential since most international organisations have immunity from the jurisdiction of domestic courts. The UN has an Administrative Tribunal, and the ILO Administrative Tribunal decides cases referred to it by other UN specialised agencies.

[36] *Lockerbie* (*Libya* v. *UK*) (Provisional Measures), *ICJ Reports* (1992), p. 3; ILM (1992) 662; 94 ILR 478; and *Lockerbie* (*Libya* v. *UK*) (Preliminary Objections), *ICJ Reports* (1998), p. 9; ILM (1998) 587; 117 ILR 1 and 664.

[37] See C. Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, 2nd edn, Cambridge, 2005; Klabbers, pp. 243–7.

10

The United Nations, including the use of force

… measures commensurate with the specific circumstances as may be necessary …[1]

Goodrich, Hambro and **Simons**, *Charter of the United Nations*, 3rd edn, New York, 1969 ('Goodrich')

Bailey and **Daws**, *The Procedure of the United Nations Security Council*, 3rd edn, Oxford, 1998 ('Bailey and Daws')

Simma (ed.), *The Charter of the United Nations*, 2nd edn, Oxford, 2002 ('Simma') www.un.org/

Introduction

The United Nations was established by its Charter of 26 June 1945 entering into force on 24 October. Membership is open only to States. By 31 July 2009, there were 192 Members, virtually all States of the world.

Before discussing 'the UN', one should think what the term really means. Just like a company, the United Nations has legal personality.[2] But, like many companies, the United Nations is a complex body and any praise or criticism should be directed at that part of it that is responsible for a particular matter, and sometimes at a particular UN Member or Members. But, the UN body which may do much good may be one of the United Nations' own agencies, such as UNICEF. They should *not* to be confused with the so-called UN specialised agencies which are *not* part of the United Nations.[3] Or, it may well be the UN General Assembly or the UN Security Council. In the case of those two principal organs of the United Nations, one should also try to understand why they – or rather the States that are members of them – acted as they did, or, indeed, failed to act. All this will be explained in this chapter.

Membership

The fifty-one original Members did not have to satisfy the criteria for membership: see Article 3. They included India, which did not become independent

[1] It is 'UN-English'. See Security Council Res. 665 (1990), para. 1.

[2] On international legal personality, see p. 180 above.

[3] See page 189 below.

until 1947, and the Byelorussian Soviet Socialist Republic (now Belarus) and the Ukrainian Soviet Socialist Republic (now Ukraine), both of which were only republics of the Union of Soviet Socialist Republics and did not become independent until 1991.[4] The membership of these three was the result of a political deal at the San Francisco Conference in 1945.

New applicants for membership have to satisfy the criteria in Article 4: an applicant must be a State, be peace-loving,[5] accept the obligations in the Charter and, in the judgement of the Organization, be able and willing to carry out the obligations of membership. The first criterion is essentially legal and no longer causes problems, whereas the other three are more subjective and political.[6] The attributes of statehood have been discussed earlier.[7] Thus an overseas territory of a State, or a constituent part of a State (India successfully opposed the admission of the Indian state of Hyderabad), cannot be a Member. Today, admission raises a very strong presumption that the new Member is a State. Since most UN Members do not recognise as States entities such as Taiwan or the Turkish Republic of Northern Cyprus (TRNC),[8] they have not been accepted as either Members or observers. Nor can an international organisation be a Member, although it can be granted observer status. Palestine also has observer status.[9]

To be accepted as a Member, first the Security Council must recommend membership (and the veto applies),[10] and the General Assembly must then agree to admission by a two-thirds majority vote (Articles 4(2) and 18(2)). In the first five years of the United Nations, most applicants (Iceland, Indonesia, Israel, Burma, Pakistan, Sweden, Thailand and Yemen) were admitted without difficulty. But, following the start of the Korean war in 1950, the Cold War led to many problems. The (then dominant) Western group blocked the admission of the communist States of Eastern Europe, and the Soviet Union and its allies blocked the admission of pro-Western States. The logjam was released by a deal in 1955, which led to the admission of sixteen new Members. The two Germanys and the two Koreas posed particular problems. As the result of new political arrangements, the former two were admitted in 1973 and the latter two in 1991.[11] In the 1990s, it was also accepted that so-called micro-States (e.g. Andorra, Liechtenstein, Monaco, Nauru, San Marino and Tuvalu) could become Members. And Switzerland eventually joined in 2002. Today, there is the problem of the status of Kosovo (see p. 17 above).

[4] See p. 19 above on Russian republics.
[5] This prevented former enemy States (e.g. Hungary, Italy and Japan) from becoming Members until the mid-1950s. The so-called enemy States clauses are Art. 106 and 107 of the Charter.
[6] See the *Conditions of Admission to Membership in the UN (Article 4)*, Advisory Opinion, *ICJ Reports* (1948), p. 57; 15 ILR 333.
[7] See p. 15 above. [8] See pp. 18–19 above. [9] See pp. 26–8 above.
[10] See the *Conditions of Admission to Membership in the UN (Article 4)*, Advisory Opinion, *ICJ Reports* (1948), p. 57; 15 ILR 333.
[11] See pp. 362–3 below on the two Germanies.

Withdrawal, suspension and expulsion[12]

The Charter has no provision for a Member to withdraw, but the right to do so can be implied.[13] In January 1965, Indonesia formally announced that it had decided to withdraw, but in September 1966 said that it would resume its participation in UN activities. The other Members (who were clearly embarrassed) appeared not to have regarded the first announcement as amounting to withdrawal,[14] and so Indonesia was not required to reapply for membership.

A Member which has 'persistently violated the Principles' of the Charter can be expelled if the Security Council so recommends and the General Assembly agrees by a two-thirds majority (Articles 6 and 18). In practice, it is considered preferable for the Member to stay so that it can be more effectively subjected to criticism from the other Members. Also, expelling a Member would set an awkward precedent for some Members: who might be next? Thus, it is more likely that a Member would at most be suspended from the exercise of certain rights, such as voting. Under Article 5, the Security Council can recommend to the General Assembly that a Member against which enforcement action[15] has been taken should be suspended. This has never happened, although a similar effect was obtained by the (legally suspect) rejection of the credentials of South Africa's delegation to the General Assembly during the later years of the apartheid regime. Article 19 provides for a Member's right to vote in the General Assembly to be suspended if it is in arrears in paying its contributions by an amount equal to that due from it for the preceding two years. This happens occasionally, and, for reasons unrelated to ability to pay, the United States got close to losing its vote during the 1990s.

Regional groups

The fifty-one original members could be roughly divided up as: three African, two Asian, six Middle Eastern, seven Communist, twenty Latin American and thirteen Western States. The present 192 Members include some 130 developing countries. The membership is now divided into five (informal) groupings that are important for the purpose of coordinating policy and nominating candidates for election to UN organs and subsidiary bodies: African (53), Asian (including the Middle East) (55), Eastern European (21), Latin American and Caribbean (33) and Western European and others (WEOG) (30).[16]

[12] See J. Klabbers, *An Introduction to International Institutional Law*, 2nd edn, Cambridge, 2009, pp. 109–13.
[13] See Aust MTLP, pp. 397–8, esp. n. 25.
[14] See (1966) *UN Juridical YB* 222–3. It could be seen as a Nelson touch by the Members.
[15] Meaning a measure under Chapter VII, often sanctions: see esp. pp. 195 et seq. below.
[16] See the scholarly study by S. Talmon, 'Participation of UN Member States in the Work of the Organization', in Yee and Morin (eds.), *Multiculturalism and International Law*, Leiden and Boston 2009, pp. 239–75.

The UN's principal organs

Article 7 of the Charter provides that the Organisation has six 'principal organs': the General Assembly, the Security Council, the Economic and Social Council (ECOSOC), the Trusteeship Council (now defunct), the International Court of Justice and the Secretariat. ECOSOC no longer has the importance the Charter gives it.

Although the Secretariat is one of the principal organs of the United Nations, it is limited to what the General Assembly or the Security Council ask it to do, and the means they give it. In other words, it does not have the extensive initiating powers of the European Commission. The UN Secretary-General (UNSG) is *not*, as even some good newspapers like to call him, 'the UN Chief'. His main role is to head the UN Secretariat: see Article 97. During the Cold War, Dag Hammarskjöld felt able to exert moral authority. But, the UNSG is appointed by the General Assembly on the recommendation of the Security Council. Since the veto applies, in practice the successful candidate has to have the support of all the five permanent members. Since the premature death of Hammarskjöld in 1961, the permanent members have been careful to choose someone who they saw as not likely to criticise their actions. Mr Annan was felt to be such a person, as he had been in the Secretariat for many years. But, with two more years to go of his second term, he spoke publicly on a matter which was contentious (Iraq) and said the second war had been unlawful. So, the rather grey Mr Moon was chosen to succeed him.

The workings of the General Assembly and the Security Council will be discussed the most, with the emphasis on their contribution to international law and peace and security. The International Court of Justice is dealt with at pp. 412–29 below. Of the principal organs, only the Court and the Security Council have the power to make decisions that are legally binding. The General Assembly's power to take such decisions is limited to internal matters, such as elections to UN organs and bodies, and budgetary and staff issues.

But, first, we must deal with a common misconception about the so-called UN specialised agencies.

The UN specialised agencies

It is not generally known that the UN specialised agencies are *not* part of the United Nations; in fact, some, such as the international organisations now known as the Universal Postal Union and the International Telecommunications Union, were first established in the 1860s. The membership of each of the specialised agencies is not the same as the United Nations, and they have their own budgets and are financed separately from the United Nations. But they all have 'relationship agreements' with the United Nations, and are regarded as part of the 'UN family' and share similar work methods. On important political matters, such as recognition of statehood, they generally

follow the lead given by the United Nations. However, agencies such as UNEP, UNHCR and UNICEF are *not* UN specialised agencies, but bodies set up by the UN General Assembly, and therefore, unlike the so-called UN specialised agencies, they do *not* have international legal personality[17] separate from that of the United Nations. And, although the International Atomic Energy Agency (IAEA), founded in 1957 and with now 144 Members, has close and important links with the UN Security Council and the General Assembly, it is not even a UN specialised agency.

The General Assembly

The General Assembly consists of all Members of the United Nations, each having one vote. Decisions on 'important' questions (e.g. the budget and most elections) are taken by a two-thirds majority of those members present and voting (abstentions not being taken into account). All other matters, including whether a question is important, are decided by a simple majority of those voting. In practice, the Assembly can discuss any matter, although it should not discuss a matter of international peace and security while the Security Council is actively seized of it (Article 12). In general, it does not do this, although the International Court of Justice has recognised an increasing tendency for the General Assembly and the Security Council to deal in parallel with certain matters, and this is accepted practice and consistent with Article 12.[18] The General Assembly is essentially a debating chamber, and only in this sense can it be equated to a parliament. But, unlike the European Parliament, it has no powers to challenge an executive body, and does not play a role in making 'legislation' as such (but see below on international law-making). Except for decisions on internal issues, its resolutions are no more than *recommendations*, although over time the substance of certain resolutions may become accepted as reflecting customary international law.[19] In certain special cases, they can also have legal effect.[20]

Main Committees of the General Assembly

The General Assembly meets in plenary session for general debates, to discuss particular topics, and to adopt resolutions. Most of its work is done in six Main Committees, which prepare recommendations (draft resolutions) for the General Assembly. All UN Members are entitled to take part in the plenary sessions of the General Assembly and meetings of the Committees. The Committees are: First (Disarmament and International Security), Second

[17] On which, see p. 180 above.
[18] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, *ICJ Reports* (2004), p. 6, paras. 24–8; ILM (2004) 1009.
[19] See pp. 6 et seq. above.
[20] See *Namibia*, Advisory Opinion, *ICJ Reports* (1971), p. 6, paras. 87–116; 49 ILR 2.

(Economic and Financial), Third (Social, Humanitarian and Cultural), Fourth (Special Political and Decolonisation), Fifth (Administrative and Budgetary) and Sixth (Legal). Each Committee reports to the plenary, where their recommendations for resolutions are normally adopted without any change and with a minimum of (or no) debate.

The General Assembly has been instrumental in developing international law by (a) establishing the International Law Commission (ILC) (see below), (b) adopting multilateral treaties (usually called 'conventions') drafted mainly by the ILC or the Third or Sixth Committees and (c) convening diplomatic conferences to negotiate conventions, such as the UN Convention on the Law of the Sea 1982 and the Rome Statute of the International Criminal Court.

Sixth Committee[21]

Like others, the Sixth Committee meets during the annual autumn session of the General Assembly, and intersessionally in sub-committees and working groups. Although originally intended as an expert committee that the General Assembly could ask for legal advice or for scrutinising draft legal instruments produced by the other Main Committees, the Sixth Committee's chief role has been to elaborate conventions for adoption by the General Assembly, such as recent counter-terrorism conventions.[22] It also oversees the work of the ILC by debating its annual report, commenting on its drafts and proposals for new topics, and proposing to the General Assembly what form drafts for international instruments should take (convention (treaty), guidelines, model legislation, etc.), and whether the final drafting and negotiations should be done by a diplomatic conference or by the Committee itself.

International Law Commission (ILC)[23]

Established by General Assembly Resolution 174(11) of 1947, the ILC started work in earnest in 1949. Its (now) thirty-four members are elected by the General Assembly for five-year terms, and are mostly professors of international law with some current or former foreign ministry legal advisers. It meets for two, five-week sessions each summer in Geneva. For each new topic it decides to study, it appoints one of its members as a 'Special Rapporteur'. Each year, he will present the ILC with a report on his research, with proposals and draft articles for a possible convention (treaty) or other instrument, such as guidelines. Each year the ILC reports to the General Assembly (in practice, the Sixth Committee) on its work, with the draft articles and commentaries on them. The ILC has been successful with the adoption at diplomatic conferences

[21] See www.un.org/ga/sixth/. [22] See p. 268 ('Bombings' and 'Financing') below.

[23] See www.un.org/law/ilc. For a short introduction to the work of the ILC, a bibliography, and for most of the ILC draft conventions and their commentaries and the resulting final texts, see A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999 (3 vols.).

or by the General Assembly of conventions originally drafted by it (albeit as final draft articles) on, for example, the law of treaties and diplomatic relations, but less so on some other subjects.[24]

The Security Council

Membership

The Security Council has fifteen members,[25] five being permanent: China, France, Russia, the United Kingdom and the United States (the 'P5'). The ten non-permanent members serve for two years, five being elected each year by the General Assembly, and cannot serve consecutive terms. In practice, the composition of the non-permanent membership is informally distributed on regional lines, the ten seats being allocated as follows: Africa (three), Asia (two), Eastern European (one), Latin America and the Caribbean (two) and WEOG (two).[26] In practice, each regional group nominates a clean slate of candidates for election, although there are sometimes contested elections for WEOG seats. So that there is always an Arab State on the Council, things are so arranged that each year an Arab State is elected to fill, alternately, an Asian or an African seat (unless a North African State is elected). Each *month*, the presidency of the Council rotates in alphabetical order.

Working methods[27]

Most Council resolutions are adopted by unanimity or without any vote being taken. A glance at the verbatim records of Council meetings in at least the last twenty years shows that most meetings at which resolutions were adopted lasted only a few minutes, unless members made formal explanations of vote (EOVs). Unlike the early days of the United Nations, and for most of the Cold War, there is now very little discussion at Council meetings of draft resolutions or procedural matters. In fact, there is usually none. Even before the end of the Cold War members of the Council increasingly discussed Council business informally, often, as diplomats tend to do, in the corridors. But, sometime in the 1970s, a small room was constructed near to the Council Chamber in which the members of the Council could meet together informally, but with simultaneous interpretation into all six UN languages, and (albeit *very* limited) seating.

[24] See A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243–66.

[25] A Charter amendment in 1963, coming into force in 1965, increased the non-permanent members from six to ten. Otherwise, things largely remained the same. See pp. 204–5 below about the chances of further reform of the Council.

[26] See p. 188 above.

[27] See A. Aust, 'The Procedure and Practice of the Security Council Today', in R.-J. Dupuy (ed.), *The Development of the Role of the Security Council Workshop*, Hague Academy of International Law Publications, 1992, pp. 365–74; and M. Wood, 'Security Council Working Methods and Procedure: Recent Developments' (1996) ICLQ 150–61.

Apart from the Secretary-General, some of his officials and the interpreters, no one else is allowed in the room without the agreement of the members of the Council. States that are the object of the consultations are not allowed in, although sometimes a UN expert, such as a Special Representative of the Secretary-General, is invited to address the members.

At these informal 'consultations of the whole', the members discuss all matters which are, or may be, put on the Council's agenda; consider drafts of resolutions and presidential statements; discuss procedural questions; and, most importantly, assess whether a proposed resolution is likely to be adopted if put to the vote. Any 'decision' taken in these informal consultations has *no* legal status, and *no* official record of the discussions is kept. But it is only by these means – which are completely normal in diplomacy, or indeed in business and other fields – that the members of the Council can work really effectively. Being in daily and private contact, their deliberations are much more profitable than if they were conducted in public. Views can be expressed more freely than in the Council Chamber, where they usually have to be given in front of other UN members, the public and the world's media.

Lack of an official record of the informal consultations makes it difficult sometimes to interpret the terms of a resolution. A good recent example is the so-called first Resolution (1441 (2002)) that preceded the 2003 Iraq war, especially paragraphs 12 and 13. The only authoritative indication of the intention of members are any EOVs they make in the Council (not later to the media), although they are often deliberately worded with diplomatic obscurity.[28]

In addition to these and other informal contacts, there are constant private consultations between the members of certain groups on the Council. These are principally the P3 (France, the United Kingdom and the United States); the P5 (the P3 plus China and Russia);[29] the five to seven members (usually) belonging to the Non-Aligned Movement (NAM); and the rest, the so-called non-non-aligned members (NNA). Other groups are formed ad hoc. Within a group, the members can naturally speak even more freely than in the consultations of the whole. The P5 in particular can better assess whether there might be a veto if a draft resolution were to be put to the vote. When a draft resolution is threatened with a veto, it is either not pursued or is redrafted, the threat being referred to as the 'virtual veto'.

However, informal consultations should not be confused with *private* (or closed) meetings of the Council. These are meetings of the Council which are held in the Security Council Chamber, but at which the public and the media are not admitted. There is no provision in the Rules of Procedure of the

[28] See S/PV.4644 on the adoption of UNSC Res. 1441 (2002).

[29] See F. Delon, 'Le rôle joué par les membres permanents dans l'action du conseil de securité', as in R.-J. Dupuy (ed.), *The Development of the Role of the Security Council Workshop*, Hague Academy of International Law Publications, 1992, pp. 349–64. See Bailey and Daws, pp. 137–41.

Council for States which are not members of the Council to attend a closed meeting, and to allow them to do so (unless the matter is of direct concern to them) is unusual. Afterwards, the UN Secretary-General issues a short, bland communiqué. He will also hold one copy of the verbatim record of the meeting which can be inspected by those who attended the meeting, or with special permission. This merely says little more than that the meeting took place, and is thus almost uninformative (see the record of the nearly thirty closed meetings held in 2008).

Presidential Statements

In addition to resolutions, increasingly the Council makes pronouncements in statements by its President ('Presidential Statements'). These are not voted on and therefore have to be agreed by consensus. They are not provided for in the Charter or in the Council's Provisional Rules of Procedure.[30] Some of them may have certain legal effects.[31]

Voting (including the veto)

Each member of the Council has one vote but, unlike the General Assembly, *procedural* matters are decided not by a percentage of votes cast, but by the affirmative vote of nine or more members (Article 27(2)). And, the veto does *not* apply. Under Article 27(3), decisions on all other (i.e. *substantive*) matters are also made by the affirmative vote of nine or more members, provided no permanent member has cast a negative vote (the veto). But the abstention, or even absence, of a permanent member does not count as a veto. This rule is contrary to the plain words of Article 27(3) that require 'the concurring votes of the permanent members'. Although this clearly envisages all of the permanent members having to cast an affirmative vote, the practice of the Council from 1946 has been to interpret 'concurring' as meaning only 'not objecting'. Thus, during the early stages of the Korean war in 1950, by absenting itself from meetings of the Council, the Soviet Union was not able to prevent the Council taking action.[32] The International Court of Justice in the *Namibia* case upheld the practice,[33] even though it seems from the *travaux* of the Charter that this result was not what the future permanent members had originally intended.[34]

There were 270 vetoes between 1946 and the end of the Cold War in 1990. Since then, only about 15 draft resolutions have been vetoed. Nine were Chapter VI resolutions about Palestine which were vetoed by the United

[30] Even 'resolutions' are not mentioned in the Charter, merely 'decisions' and 'measures'. Presidential Statements can be accessed online at www.un.org/Docs/sc/> Security Council President. For a rare reference to them in a resolution, see the first preambular paragraph to UNSC Res. 1441 (2002).

[31] See S. Talmon, 'The Statements by the Presidents of the Security Council' (2003) *Chinese YB of International Law* 419–65.

[32] See Bailey and Daws, p. 257.

[33] *ICJ Reports* (1971), p. 6, at paras. 20–2; 49 ILR 2.

[34] See Goodrich, p. 229.

States as they were seen as unbalanced. But, China and Russia have begun to flex their political muscles: see just below. One of the reasons for the rarity of the veto is that, when it appears from informal consultations, and P5 meetings, that a permanent member *is likely to cast a veto* (known as a 'virtual veto'), the draft resolution is usually either modified to make it acceptable to the permanent member(s) which may otherwise veto it, or it is just not put to the vote. Furthermore, abstention by *any* seven members will prevent any decision being adopted (15 − 7 = 8), and is known as the 'collective veto'.[35] In 2007, there were seven NAM States on the Council, although they do not necessarily all vote the same way. The other reason is the end of the Cold War.

These days most vetoes are cast on draft Chapter *VI* resolutions (see below on the important legal difference between Chapter VI and VII resolutions); and if the United States were to veto a resolution, France and the United Kingdom are content to abstain. But, China and Russia have recently vetoed draft resolutions concerning human rights: see the draft Chapter VI resolution on human rights in Myanmar (Burma), which they vetoed on 12 January 2007.[36] On 11 July 2008, they again used their vetoes to prevent the adoption of a Chapter *VII* resolution which would have imposed sanctions on President Mugabe of Zimbabwe and his inner circle.[37]

Whether a matter is procedural or substantive is itself a substantive question. Thus, a permanent member can cast a veto both on the proposition that a matter is procedural and on the substantive issue (the so-called double veto). Although Article 27(3) prohibits a member from voting on a question relating to a 'dispute' to which it is a party, this does not apply to Chapter VII action (see below). And, in most cases that involve a dispute the issue before the Council is not the dispute itself but the 'situation' arising from it,[38] for example the occupation of Kuwait by Iraq in 1990, even though Iraq (dishonestly) at first claimed that there was just a dispute with Kuwait over sovereignty.

Powers of the Security Council

Article 24 confers on the Security Council primary responsibility for the maintenance of international peace and security. Although a political body, the Council has the power to impose legally binding measures on all UN Members. Most Council resolutions contain only exhortations or recommendations, and are informally referred to as 'Chapter VI resolutions', since under that chapter the Council *cannot* impose legally binding measures. That can be done only under Chapter VII (or Chapter VIII when the Council authorises enforcement action by regional bodies). The combined effect of Articles 25 and 48 is to place a legal obligation on all

[35] In June 2004, the United States was unable to gather nine votes for the renewal of its draft annual resolution about the International Criminal Court: see p. 261 below.

[36] See the record of the meeting (S/PV.5619) and the draft resolution (S/2007/14).

[37] See S/PV.5935 and S/2008/447.

[38] See Arts. 34–36 of the UN Charter, on disputes and situations.

UN Members to carry out such measures. A 'Chapter VII resolution' has therefore become shorthand for a legally binding measure. Ironically, since the main value of a Chapter *VI* resolution is only political, it needs to be adopted unanimously for it to carry any real weight. For example, Resolution 1559 (2004) on Lebanon was only a Chapter VI resolution, and adopted by the minimum of nine votes with *six* abstentions. Although it was much mentioned during the Israel–Lebanon war in 2006, from the start it had no influence. Not only was it *not* made under Chapter VII, but politically the Council was very far from unanimous. In contrast, a Chapter VII resolution needs only nine votes in favour – and no veto – for it to be legally binding on all UN Members.

Before the Council can decide to impose a measure, Article 39 requires it to determine first the existence of a threat to the peace, breach of the peace or act of aggression. This is usually expressed in a general statement in a preambular paragraph to a resolution that the Council determines that there is 'a threat to international peace and security'. The Council does not categorise further the nature of the threat, such as aggression. Although UNSC Resolution 660 (1990) condemned Iraq's invasion of Kuwait, it did not describe the invasion as aggression. Even though objectively there was no doubt that Iraq's action would fall squarely within any definition of aggression, there is still no internationally agreed definition of it.[39] Only occasionally is Article 39, or the other articles of Chapter VII, mentioned in a resolution. If the whole of the resolution is intended to be legally binding, the final preambular paragraph will state that the Council is 'acting under Chapter VII'. If only part of the resolution is intended to be binding, the reference to Chapter VII will precede that part.

Unfortunately, the Council is not always consistent in the drafting of its resolutions. Sometimes there is no express Article 39 determination or even a reference to Chapter VII. Nevertheless, it can usually be inferred from the rest of the resolution, by a statement by the President of the Council or from the circumstances, that the determination has been made and that the Council is acting under Chapter VII. When the resolution is one of a series of resolutions on the same subject, and it is clear that the Council considers that the threat to international peace and security remains, if a new resolution is only modifying, elaborating or adding to existing measures, there may be no reference either to the determination or to Chapter VII.

An Article 39 determination is a political act. In considering whether to make the determination, the governments of the members of the Council in practice ask themselves essentially political questions: does something really have to be done? If so, what? Could it really be effective? Even if it would not be effective, do we still have to be seen to be doing something? The best example of a futile gesture was Resolution 836 (1993) establishing the 'safe areas' around certain Bosnian towns, including Srebrenica. If the members believe that something has to be done, or seen to be done, they do not indulge in painstaking legal

[39] See p. 253 below.

analysis, although sometimes a member will seek to justify inaction by referring to the UN Charter. This happened in 2007 when China and Russia vetoed the draft resolution under Chapter VI which criticised Myanmar over its human rights record because it was not a matter which concerned international peace and security; instead, it was an internal matter. In fact, the Council has taken action on what would have been seen in 1945 as essentially an internal matter. Although Article 2(7) prohibits the United Nations from intervening in matters that are 'essentially within the domestic jurisdiction' of a State, the article expressly states that this prohibition does not apply even to enforcement measures under Chapter VII. And human rights have long been regarded in the United Nations as not 'essentially' an internal matter (see the wording of Article 2(7)), but of international concern, as evidenced by the action taken by the Council against the white rebel regime in Southern Rhodesia and the apartheid government of South Africa. In the 1990s, when the Council was considering whether to intervene in situations which could well have been seen as essentially internal, a threat to international peace and security was discerned in factors such as the destabilising effect on neighbouring States of civil wars or other internal disturbances (see Resolutions 713 (1991) (Yugoslavia), 794 (1992) (Somalia) and 841 (1993) and 917 (1994) (Haiti)). This is reflected in the wording of the preambles to these resolutions. But, given that precedents were being set, some of the resolutions emphasise the 'unique character' of the situation requiring 'an immediate and exceptional response' (Somalia), or the 'unique and exceptional circumstances' (Haiti). More recently, the Council has recognised the global threat posed by international terrorism to international peace and security.[40]

Obligations of Members under the Charter (which include the obligation to carry out Chapter VII resolutions) prevail over their obligations under any other treaty (Article 103). Sometimes sanctions resolutions will therefore have the effect of overriding or suspending treaty obligations.[41] The trade embargo imposed on the Federal Republic of Yugoslavia required goods traffic on the Danube to or from the FRY to cease, despite the freedom of navigation obligations of the riparian States under the Danube Convention.[42]

The European Court of Justice (ECJ) created a serious legal situation in 2008. Resolution 1267 (1999), and subsequent resolutions, were adopted under Chapter VII. The Council required that all UN Members freeze the assets of certain persons and organisations who were believed to be terrorists or helping them. Although an affected person or organisation could challenge their listing, this could only be done through one of the UN Members, not by the person or organisation directly. As with other such Council resolutions under Chapter

[40] See pp. 276 et seq. below.

[41] *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya* v. *United Kingdom*) (Provisional Measures), *ICJ Reports* (1992), p. 3, para. 39; 94 ILR 478; ILM (1992) 662.

[42] UNSC Res. 787 (1992), para. 13 and 820 (1993), paras. 15–17.

VII, which required to be implemented in domestic law, since the European Union has competence to enact regulations to implement the resolution, it did so.[43] Although affected by the regulations, Mr Kadi, was not successful in challenging them before the European Court of First Instance (CFI).[44] The CFI held that EU Member States were bound by Chapter VII Security Council Resolutions, except for ones that were against *jus cogens*. Therefore, the CFI had no jurisdiction to question an EU regulation implementing such a resolution. Mr Kadi then appealed to the ECJ. It held that the EU regulations did not adequately protect the 'fundamental' human right of Mr Kadi to challenge personally the application of the regulations to him, and gave the European Commission three months to redraft the regulations. This decision overlooked the fact that the relevant human right to a fair trial is not absolute (unlike the prohibition on torture) and therefore could be derogated from in certain circumstances. This is essentially what the UN Security Council had done due to the threat posed by terrorism. Of serious concern is that the ECJ did not recognise that it was the court of a regional international organisation and that, under the UN Charter, all EU Member States (who are also UN Members) were legally bound by Chapter VII resolutions of the Security Council. The Court therefore, and presumably knowingly, set up an important confrontation with the United Nations.[45]

In the forty-four years before the invasion of Kuwait in 1990, there had been only a handful of Chapter VII resolutions (84 (1950) on Korea; 221 (1966), 232 (1966), 253 (1968), 399 (1976) and 409 (1977) on Southern Rhodesia; and 277 (1970) and 418 (1977) on South Africa). The end of the Cold War has meant that, among other things, from 2 August 1990 there have been *numerous* Chapter VII resolutions.

The Council has the power to *demand*, *prohibit* or *authorise*. In Resolution 660 (1990) it demanded that Iraq cease its illegal occupation of Kuwait. In itself, the demand cannot make a State comply, and in most cases it will not do so until more pressure is put on it. Resolution 660 (1990) was followed by Resolution 661 (1990) prohibiting trade with Iraq. Three months later, Resolution 678 (1990) authorised a coalition to use force to liberate Kuwait and to restore peace and security in the area, although the authorisation was not legally necessary for the liberation of Kuwait.[46] Resolution 662 (1990), which declared the annexation of Kuwait without legal validity and so null and void, was also very pertinent to domestic legal proceedings.[47]

[43] See Regulations 467/2001 and 881/2002.

[44] See the judgments in *Kadi* 3 September 2008 (C-402/05P). See also the comments on the CFI judgment in *Kadi* by C. Tomuschat in (2006) 43 CMLR 537–51.

[45] See comments on the ECJ judgment in *Kadi* in ICLQ 2009, pp. 229–40; and in *International Organisations Law Review*, 5(2) and 6(1).

[46] See pp. 208–11, esp. 211 below.

[47] See *Kuwait Airways* v. *Iraqi Airways* [2002] 2 AC 883; [2002] 2 WLR 1353; [2002] 3 All ER 209; 125 ILR 602.

There are many variations within these three main categories of measures. We will now examine those prohibiting normal activities. But, one must always remember, especially when the Council does not impose sanctions, or does so but they are ineffective, that the only other options open to the Council is either to do nothing or to authorise the use of force (see pp. 205 et seq. below). It has authorised the use of force on certain occasions. Whether that action was effective or not, or even counter-productive, is not for me to say.

Sanctions

The word 'sanctions' is not found in the Charter or used in Council resolutions, but sanctions are a favourite means used by the Security Council to bring pressure on a UN Member. They are always imposed before the use of force is even contemplated, although this is not legally necessary. Sanctions require States to stop (or prevent their nationals from doing) what would otherwise be lawful. Article 41 contains examples: the interruption of economic relations and means of communication and the severance of diplomatic relations. Until 1990, the prohibition of imports and exports, and associated financial measures, were the main sanctions imposed. Beginning with Iraq, the Council developed a much wider range. I shall not catalogue all the sanctions imposed by the Council. Instead, I will deal mostly with those that were imposed from 1990 onwards in the years after the Cold War had eventually ended, and with the difficulties later experienced by the Council.

Trade embargoes

A trade embargo is usually the first sanction to be imposed. It is often limited to a prohibition on supplying arms (Resolution 713 (1991) on Yugoslavia), and may go no further. A full trade embargo will prohibit the export to, and import from, the embargoed State of all goods, with the exception of food and medical supplies which are needed for humanitarian purposes, and sometimes other humanitarian goods. The embargo may be partial. That on Libya was limited to a prohibition on the supply of arms, aircraft and aircraft equipment, and oil pipeline and refinery equipment (Resolutions 748 (1992) and 883 (1993)). Imports of oil – Libya's main export – were never prohibited because some large West European States, both on and off the Council, were concerned at the consequent disruption of their oil imports from Libya. Services are not usually subject to a general prohibition, but financial sanctions normally make it difficult for the providers of services to get paid lawfully.

A trade embargo, whether full or partial, has a serious effect on existing contracts and licences with the embargoed State and its nationals, since most can no longer be performed lawfully. Each Member must do what is necessary in its law to implement and enforce the embargo – as it may have to do for other sanctions. Some States will have to legislate, usually by secondary

legislation.[48] In others, the resolution may be superior law, although there may still be need for legislation, for example to make a violation of sanctions a criminal offence and to prescribe penalties.

Financial sanctions

Closely linked to a trade embargo are financial sanctions. Without them, the embargoed State would be much better able to pay for smuggled goods. There may be a comprehensive freeze on all existing funds held by the embargoed State, and a prohibition on making new funds available to it. Exceptions are made for payments exclusively for humanitarian purposes (see Resolution 757 (1992) for the FRY). But the sanctions may be more limited, the proceeds of future Libyan oil sales not being affected (Resolution 883 (1993)). The sanctions may apply to the State and its agencies, companies and nationals (Resolution 661 (1990)) or be limited to the State and State entities (Resolution 883 (1993)), which naturally makes sanctions that much easier to evade.

Sequestration and impounding of assets

Resolution 778 (1992) broke new ground in requiring the taking possession (sequestration, not confiscation) of Iraqi funds representing the proceeds of oil sales and transferring them to the United Nations for the Compensation Commission (see p. 201 below). Resolution 820 (1993), paragraph 24, required the impounding of ships controlled by FRY interests and their forfeiture if they were found to be violating sanctions.

Flight restrictions

Aviation sanctions were first used in Resolution 670 (1990) and required flights to Iraq to be searched to ensure that embargoed goods were not being carried. The first comprehensive prohibition on flights to and from an embargoed State was in respect of Libya (Resolution 748 (1992)). The only exceptions were for significant humanitarian need (such as pilgrim flights to Mecca), subject to the approval of the sanctions committee (see below). The resolution also required the closure of all offices of Libyan Arab Airlines. Later, Resolutions 757 (1992) (FRY) and 1070 (1995) (Sudan) had comprehensive prohibitions on flights.

Diplomatic and similar sanctions

Resolutions 748 (1992) and 883 (1993) (Libya), and Resolution 757 (1992) (FRY), required the scaling down of diplomatic relations. Resolution 757 (1992) also required participation by FRY sportsmen in international events to be prevented, and the suspension of government-sponsored scientific and cultural

[48] For example, under the one-section (UK) United Nations Act 1946. The European Union now implements such embargoes for the United Kingdom by means of regulations, except that Orders under the Act have still to be made where there is no EU competence, such as on certain defence matters, and for implementation of a resolution in UK overseas territories.

exchanges. Some later sanctions regimes have required the refusal of visas to certain high-level officials.

Weapons of mass destruction

Resolution 687 (1991) is unique in many ways, not least for its indefinite prohibition on the supply to Iraq of weapons of mass destruction (WMD) (chemical, biological and nuclear) and long-range missiles, and the means to make them. A Special Commission (later replaced by UN Monitoring, Verification and Inspection Commission (UNMOVIC)) and the IAEA were given the immensely intrusive task of finding any such weapons, destroying them and ensuring that Iraq did not acquire or manufacture them again. Their mandates were terminated on 29 June 2007 by Resolution 1762 (2007).

Even when the five permanent members are in agreement that certain regimes are a threat to international peace and security because they are determined to develop WMD (in particular nuclear weapons and the means to deliver them), imposing sanctions is usually ineffective. The problems of Iran and North Korea, are well known. In both cases, the Council was usually not prevented by the veto from taking action, but nevertheless sanctions were shown to be ineffective against intractable regimes.[49] One can only hope that in the two recent cases, where very different regimes are involved, diplomatic pressure by the permanent members and others will eventually be effective. It must always be borne in mind that if sanctions, or diplomatic pressure, are not enough to make a regime see sense, the only remaining option is the use of force.

Compensation

Another innovation in Resolution 687 (1991) was the establishment of the UN Compensation Commission with the task of compensating those foreign States, corporations and individuals who had suffered loss or damage as a result of Iraq's invasion of Kuwait. The funds to do this are produced by a levy (initially 30 per cent, later reduced to 25 per cent, and now 5 per cent) on the proceeds of the sale of oil by Iraq.[50]

Border demarcation

Another first in Resolution 687 (1991) was the request to the UN Secretary-General to help Iraq and Kuwait establish a commission of experts to demarcate their common border. This task was speedily achieved.[51]

[49] See the latest UNSC Res. (Iran) 1803 (2008) and (North Korea) 1874 (2009), the previous UNSC resolutions referred to in their preambles, and the Presidential Statement (see p. 194 above) on North Korea (S/PRST/2009/7 of 13 April 2009).

[50] See also UNSC Res. 833 (1993), 1483 (2003) and 1546 (2004), para. 24; and p. 411 below for more details.

[51] See p. 34 above for details.

International criminal tribunals

Having jurisdiction over war crimes and crimes against humanity, the International Criminal Tribunal for the Former Yugoslavia (Resolution 827 (1993)) and the International Criminal Tribunal for Rwanda (Resolution 955 (1994)) are not typical sanctions. The establishment of the tribunals was a necessary consequential measure to help maintain international peace and security in the region and elsewhere, as well as a warning that others who commit such crimes in the future may not escape justice. UN Members are required to cooperate with the tribunals by handing over to them persons suspected of such crimes, as well as evidence. Although the seat of the International Criminal Court (ICC) is, like the International Court of Justice, in The Hague, and the United Nations played an important role in the creation of the ICC, it is *not* a UN body, but established by a treaty to which many UN Members are not parties. The ICC still has only 109 parties, and they do not yet include the United States.

Sanctions committees

For each sanctions regime, the Council sets up a committee on which the fifteen members of the Council each have a seat. However, the chairmanship of the committees does not rotate each month, the post being held for a year. Also, all decisions are taken by consensus, so, in practice, every member has a veto. A committee's functions are to monitor compliance with the relevant sanctions regime and to carry out such tasks as the Council gives it. These will depend on the terms of each regime, but can include authorising, expressly or tacitly, humanitarian supplies or flights. Although only the Council itself can interpret the resolutions,[52] in practice the committees do so as well, although difficult cases may be referred to the Council when a committee cannot agree.

Termination of sanctions

Sanctions are usually terminated, wholly or partly, by another Chapter VII resolution. Those against Libya were 'suspended' automatically on the UN Secretary-General reporting to the Council that the two persons accused of the Lockerbie bombing had arrived in the Netherlands for trial before a (specially arranged) Scottish court in the Netherlands.[53] There could be a similar provision for automatic termination. Since 2000, there has been a tendency for the Council to provide that some measures will be in force for a fixed period unless the Council decides later to extend it (see Resolution 1306 (2000) (Sierra Leone), paragraph 6, and Resolution 1330 (2000) (Iraq), paragraphs 1 and 4). However, such provisions rather defeat the purpose of sanctions since they may encourage the sanctioned State to wait in the hope that the members of the Council will not be able to agree to continue the measure.

[52] But see pp. 424 and 427 below regarding the role of the ICJ.

[53] See UNSC Res. 1192 (1998), para. 8. Libya having finally accepted responsibility for the crimes and payment of compensation, sanctions were terminated by UNSC Res. 1506 (2003).

Human rights

One has to be cautious of any argument to the effect that the Security Council cannot, when adopting Chapter VII measures, suspend human rights expressly or by implication.[54] There is no reason in principle why a measure should not suspend certain human rights, although in practice the members of the Council would not agree to this unless they considered it to be absolutely necessary. The members do not act unthinkingly, and within the Council there are checks and balances.[55] It may well be necessary for the Council to suspend certain human rights in emergency situations. Most human rights are not absolute and require a balancing of competing interests. Clearly, the Council cannot validly adopt, even by the use of express words, a measure contrary to *jus cogens*,[56] such as authorising the torture of suspected terrorists. But due process is not *jus cogens* and human rights treaties permit derogations to most of their articles. Article 4 (derogation) of the International Covenant on Civil and Political Rights 1966 applies to Article 14 (due process), and Article 15 (derogation) of the ECHR applies to Article 6 (due process).[57]

At first sight, Resolution 1373 (2001) may seem remarkable in being the first Security Council measure under Chapter VII to address a global and unspecific threat to international peace and security, as posed by terrorism. Previously, resolutions had been directed at a particular State, regime or group. The need for a measure with the broad and general scope of Resolution 1373 was due to the particular international nature of terrorism. Unlike a State that has aggressive intent towards a neighbour that can be detected by observing troop movements, terrorists work in small units and in great secrecy. In most cases, there will be no warning of an attack. Because attacks are so difficult to detect, States have to take such preventive measures as they can. This means that, in addition to physical security measures, the focus has to be on catching (if necessary even killing) terrorists before they can commit attacks, or starving them of the means, physical and financial, to commit them.

Those were the reasons behind Resolution 1373. There is no danger that the Council will be encouraged to use its Chapter VII powers to pronounce on international law in the way which is done by diplomatic conferences or by the General Assembly when it adopts a so-called law-making convention.[58] If anything, the establishment of the ICTY and ICTR are closer to law making in that their Statutes confirm or assert what the Council, acting on behalf of the

[54] See, for example, de Wet, *The Chapter VII Powers of the United Nations Security Council*, Oxford, 2004.

[55] See p. 192 above. [56] See p. 10 above.

[57] On derogation generally, see p. 228 below. See also, and in particular, the judgment in *Kadi* (pp. 197–8 above) where the ECJ ignored Art. 103 of the Charter (p. 197 above).

[58] In 'The Security Council Starts Legislating', (2002) AJIL 901–5, Paul Szasz was not concerned at this development, pointing out that earlier UNSC Res., such as 1265 (1999), 1291 (2000), 1296 (2000), 1314 (2000) and 1325 (2000) dealt in general terms with matters such as the protection of women and children during armed conflicts.

whole UN membership, considers to be international crimes. But it is only for the purpose of restoring international peace and security in a region, as well as sending a signal to those who might be tempted to commit such crimes in the future. The adoption in 1998 of the Rome Statute of the International Criminal Court shows that international law making will continue to be done by normal means.[59]

Uniting for peace

If, due to disagreement among the permanent members, the Council is unable to act to maintain international peace and security, the General Assembly can make *recommendations* to the membership as a whole for collective measures, including the use of force.[60] Although this course is occasionally suggested, it has been taken only twice. Following the 1956 illegal Suez adventure by France, Israel and the United Kingdom, and British and French vetoes in the Security Council, the General Assembly established the UN Emergency Force (UNEF) to secure and supervise the ceasefire.[61] In 1960, the General Assembly instructed the Secretary-General to assist the Government of the Congo, which later led to military operations against Katangan secessionists.[62] But the inherent weakness of the procedure is that its effectiveness depends entirely on the voluntary cooperation of all the Members concerned, including the host State.

Charter amendment

The UN Charter has been amended on only three occasions, the only significant one being to Articles 23 and 27 to enlarge the Security Council from eleven to fifteen members, which came into force in 1965. Under Article 108, an amendment comes into force for *all* UN Members when it has been adopted by a vote of two-thirds of the members of the General Assembly *and* ratified by two-thirds of the UN membership, *including* all the permanent members of the Security Council. Therefore, any talk of Security Council reform must take this legal and political reality into account.

It is easy to devise a solution to the issue of Council reform; there have been plenty of ideas. But, in practice, there can be no further change to the size or composition of the Council without a consensus that includes the five permanent members, who are all unwilling to see any change to their status or powers. Informal discussions in an ad hoc group of UN Members (known as the 'coffee club', either because Brazil first convened the meetings or because they were

[59] See also pp. 197–8 above about *Kadi*, and p. 259 below.
[60] Uniting for Peace Resolution 1950 (UNGA Res. 377(V), Part A). See also Shaw, pp. 1151–4 and the *Expenses*, Advisory Opinion, *ICJ Reports* (1962), p. 151; 34 ILR 281.
[61] UNGA Res. 1001 (ES-I). [62] UNGA Res. 1474 (ES-IV).

first held over coffee, or both) about enlargement of the Council have lasted for at least fifteen years. There appears to be general agreement that the Council should have no more than twenty-five members. Although, in 2009 UN Members are supposed to begin negotiations on expanding the Council to reflect the geopolitical realities of the twenty-first century, nobody who knows the United Nations well is holding his breath. The obstacles to reform of the Charter, or indeed the working methods of the United Nations, could be listed as vested interests: Great Power rivalry, third world suspicion of the West and rivalries among developing countries themselves. There are many difficult issues which need to be resolved. How many new permanent members should there be? Should there be some 'rotating' i.e. semi-permanent members? Should new permanent (or semi-permanent) members have the veto? Even permanent seats for Germany and Japan are now by no means assured. Each of the principal contenders has at least one rival within its regional group: India v Pakistan, Argentina v Brazil, Nigeria v South Africa, Indonesia v the Philippines.

Use of force

England is firmly resolved to employ, with all cunning and ruthlessness, the instrument of war which it possesses in its fleet, according to the principle 'Might is Right'.[63]

Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 1118–166 ('Shaw')
Gray, *International Law and the Use of Force*, 3rd edn, Oxford, 2008 ('Gray')
Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 417–27 ('Oppenheim')

In recent years, the use of force by States has produced a lively, sometimes impassioned, debate in the United Nations, parliaments, universities and the media. The rules on the use of force can be expressed simply; but, not surprisingly, the difficulty lies in how they apply in particular circumstances; and humanitarian intervention remains controversial in international law. The debate is vigorous because much is at stake, not least the life of possibly thousands of people, military and civilian. For any foreign ministry legal adviser, the legality of any proposed use of force is the most important issue he or she ever has to face. On two occasions, in 1986 and 2003, a senior FCO legal adviser resigned over the lawfulness of the United Kingdom condoning, or itself using, force. The first case was over the raid on Tripoli, Libya (which was carried out by US military aircraft using British bases in the United Kingdom); and, second, over the legality of the armed intervention in Iraq in 2003. But, the final decision to use force rests with the executive or parliament. International

[63] Captain Siegel reporting from the First Hague Peace Conference of 1899 to Berlin on the views of Admiral Fisher, quoted in Mackay, *Fisher of Kilverstone*, Oxford, 1973, p. 221.

law has been developed to make it possible for States to live together in peace and reasonable harmony. So, when a State decides to use force without either clear authorisation from the Security Council or a firm basis in international law – and with serious doubts being expressed by other States about its legality – the policy may need to be considered again. From the point of view of international law, for a State which is contemplating the use of force, the acid test is: one needs to be satisfied that the use of force would be lawful – not merely that there is a plausible or colourable case to justify its use. In other words, one should be able convince an international court that it was lawful.

It must also be emphasised that whether a particular use of force is lawful or not, all those involved in the conflict must still comply with the law of armed conflict (see Chapter 12 below).

Prohibition on the use of force

Declarations of war have not been made since the last days of the Second World War.[64] Tentative attempts were made after the First World War to make the use of force by States unlawful: Article 10 of the Covenant of the League of Nations[65] and the General Treaty for the Renunciation of War as an Instrument of National Policy 1928 ('Briand–Kellogg Pact').[66] Of course, neither was successful, and the UN Charter has not prevented war, even though Article 2(3) requires all disputes to be settled by peaceful means, and Article 2(4) requires all Members to:

> refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Thus, the use of force *within* a State to maintain or restore peace and security is still lawful, although it must be used in a manner consistent with international human rights obligations and the law of armed conflict. Similarly, a State may send forces to another State at its request to help restore order. (As to the responsibility of a leader of a State for an illegal use of force, see p. 395 below.)

We will now outline when the use of force would also be lawful.

Security Council authorisation for the use of force

When the Council authorises the use of force (although its resolutions never use the 'f-word' in this context), it is permitting States to do what otherwise might be unlawful.[67] Article 42 empowers the Council to authorise States to use force when it considers that other measures '*would* be inadequate or have proved to be

[64] See pp. 235–6 above. See also, *Oppenheim's International Law*, 7th edn, London, 1952, vol. II, pp. 293–300; and see p. 235 below on the terms 'war' and 'armed conflict'.

[65] 225 CTS 188; UKTS (1919) 4; 112 BSP 113. [66] 94 LNTS 57; UKTS (1929) 29.

[67] See p. 207 below on the liberation of Kuwait.

inadequate' (emphasis added). Thus, the Council does *not* have to impose economic sanctions, or wait to see if they have been ineffective, before it authorises the use of force; although, in practice, it always has. Article 42 is never expressly mentioned in resolutions.[68] (Articles 43–47, concerning the availability of forces to put at the disposal of the United Nations, have from the beginning been seen as a dead letter.) Although the Council can authorise Members to use force, it does not require them to use it. The actions listed in Article 42 are merely illustrative, force having been authorised for various purposes.

Intervention

In Resolution 678 (1990), the Council authorised a coalition of States (the so-called coalition of the willing) to use 'all necessary means' to liberate Kuwait and 'to restore international peace and security in the area'. The same authorisation was relied upon as the legal basis for the second intervention in Iraq by coalition forces in 2003.[69] On several occasions between 1992 and 1998, it was the legal basis for air strikes by UK and US aircraft on Iraqi military installations in response to breaches by Iraq of the WMD inspection regime established by Resolution 687 (1991), the Council having authorised such use of force in advance by Presidential Statements.[70] And, Resolution 1154 (1998) warned that further obstruction by Iraq of weapons inspectors would be a violation of Resolution 687 (1991) and would have the '[severest] consequences' for Iraq. Similar warnings had been made in the above-mentioned Presidential Statements in earlier years (where the terms 'material breach' and 'serious consequences' were used), the members of the Council being well aware that 'serious consequences' meant UK/US air strikes. These Statements are referred to in the first preambular paragraph to Resolution 1441 (2002), the resolution repeating the key formulations of the statements that failure by Iraq to cooperate fully would constitute a further 'material breach' and that it would face '[serious] consequences'.[71]

Resolution 794 (1992) authorised the US-led coalition of forces to use 'all necessary means' to establish a secure environment for humanitarian relief operations in Somalia. And, in Resolution 940 (1994), the Council authorised a coalition to use 'all necessary means' to 'facilitate the departure' from Haiti of the military leadership and the restoration of President Aristide. Sometimes the intervention may have to be longer than originally envisaged if a serious threat

[68] Although UNSC Res. 1737(2006), which imposed sanctions on Iran because of its nuclear activities, was made expressly under Art. 41: see the last preambular paragraph of the resolution. This was probably done more for political reasons: see also later resolutions about Iran's nuclear activities (UNSC Res. 1747 (2007) and 1803 (2008)).

[69] See ICLQ (2005) 767–8 (UK Attorney-General's advice); 'The Use of Force against Iraq' (2003) ICLQ 811; Lowe, 'The Iraqi Crisis: What Now?' (2003) ICLQ 859; and 'Agora; Future Implications of the Iraqi Conflict' (2003) AJIL 553–642.

[70] See, for example, Presidential Statement (S/25081), of 3 January 1993, in *The Iraq–Kuwait Conflict, 1990–1996*, United Nations, New York.

[71] See (2003) BYIL 792–6.

to human life remains; and in the case of Kosovo the NATO-led Kosovo Force (KFOR) was later joined by a UN administration (UNMIK).

Interdiction

This term is used in the sense of stopping and searching ships, and has effectively replaced blockade (see Article 42). Resolution 665 (1990) authorised States to do this in the Persian Gulf and the Red Sea to check whether merchant ships were carrying embargoed goods to or from Iraq. For this purpose, it authorised the use of minimal force, or in the coy words of the resolution, 'measures commensurate with the specific circumstances as may be necessary'. Similar interdiction regimes were authorised in the cases of the FRY (Resolution 787 (1992), paragraph 13) and Haiti (Resolution 917 (1994), paragraph 10).[72] See Resolution 1874 (2009), which reacted to another North Korean nuclear test and authorised the interdiction of ships believed to be carrying items prohibited under this and previous resolutions. (See also recent Council resolutions about piracy at p. 291 below.)

Protection of civilians and peacekeeping forces

In several cases, the use of force has been authorised for other, sometimes rather more limited, purposes. Resolution 908 (1994) authorised Members to take 'all necessary measures' to extend close air support in defence of UN Protection Force (UNPROFOR) personnel in Croatia.[73]

Self-defence

Article 51 provides that:

> Nothing in the present Charter shall impair the *inherent* right of *individual* or *collective* self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has *taken* measures necessary to maintain international peace and security. [emphasis added]

Although the article is found in Chapter VII, it is a saving provision, albeit of vital importance. Written in terms that were soon seen as too restrictive even in 1945, the Article 51 is now regarded as confirmation that the obligations of the Charter do not affect the exercise by a State of its inherent right in customary international law to defend itself, so that the right continues to be a important

[72] As for further Council action in 2004, see S/PRST/2004/4 of 26 February 2004 and UNSC Res. 1529 (2004) and 1542 (2004).

[73] UNSC Res. 958 (1994). See also UNSC Res. 1270 (1999) and 1289 (2000) about Sierra Leone. UN peacekeeping forces are known colloquially as the 'blue helmets'. In 1989, Austria seriously proposed that there should be a UN force to protect the environment, that then being much in the news. Several members of its UN mission were then called Helmut, and the author (then in the UK mission) suggested informally that the proposed force be known as the 'Green Helmuts'. The idea was then quickly dropped. Years later, the fatuous suggestion was still remembered with much affection by the then members of the Austrian mission.

exception to the Charter prohibition on the use of force.[74] Moreover, the right of self-defence has been developed, and continues to develop, to meet new threats. This is recognised by members of the Security Council and other States by their reactions (often mere acquiescence) when faced with justifications of the use of force based on self-defence, although one has to bear in mind that the views of States on such matters may sometimes be influenced by political considerations. The second paragraph of Article 51 requires Members to report immediately to the Security Council any measures taken by them in exercise of the right of self-defence. In practice, the carrying out of this obligation is patchy, often late, and sometimes just ignored.

US Secretary of State Webster made the classic statement of the law on self-defence in 1841 in respect of the *Caroline* incident.[75] British forces had seized and destroyed in US territory a vessel being used by US nationals assisting an armed rebellion by Canadians over the border, Canada then being a British colony. Two of the US nationals were killed. Webster declared that, in order to be lawful, recourse to force in self-defence required:

> a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation [and involving] nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

Webster's criteria were subsequently developed in order to be more in tune with the realities of international life, where there is usually a choice of means and some time for deliberation. Although everything will depend on the facts and circumstances of each particular case, to be a lawful exercise of the right of self-defence the threat or use of force against another State must be:

(1) *In response to an imminent armed attack* (economic pressure is not enough) on its territory, ships, aircraft, embassies, consulates or nationals. The Israeli commando raid on Entebbe airport in 1976 to release Israeli nationals who had been taken hostage by Palestinians was justified because Uganda was unwilling or unable to do anything. Article 51 does not require that the attack be by a State: force can be used in response to a terrorist attack even if no other State is involved. This was recognised expressly by the UN Security Council in Resolution 1368 (2001), following the 11 September 2001 terrorist attacks on the United States.[76] And it is not necessary to wait to be attacked:

[74] *Military and Paramilitary Activities (Nicaragua* v. *US)* (Merits), *ICJ Reports* (1986), p. 14, paras. 172–82; 76 ILR 1.

[75] 29 BSP 1137 and 30 BSP 195. See R. Jennings, 'The *Caroline* and *McLeod* Cases' (1938) AJIL 82–99.

[76] See also p. 274 below. The ICJ got this completely wrong: see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* (2004), para. 139; 129 ILR 37; ILM (2004) 1009; and the separate opinions of Judges Higgins (para. 34) and Kooijmans (para. 35), and the declaration of Judge Buergenthal (para. 6). See also, K. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-defence against Non-state Terrorist Actors' (2007) ICLQ 141–56.

force can be used in anticipation of, and to pre-empt, an attack which is *imminent* (i.e. about to happen, or is expected anytime). No State is obliged to wait until the enemy missile actually strikes or the terrorist bomb explodes. This is, however, an area where there is also scope for abuse. The Council condemned the destruction in 1981 by Israel of an Iraqi nuclear reactor that Israel suspected was being used in connection with developing a nuclear weapon.[77] The cross-border attacks in 2008 by US forces in Afghanistan against terrorists operating from the safety of Pakistan; and the attacks in 2009 by Israel on terrorists operating from Gaza, could be categorised as the use of force in self-defence. (This is so even if the Israeli attacks also involved some breaches of the law of armed conflict. Although that may have happened a meticulous and impartial investigation was needed.) But, there have been cases where even the justification of self-defence of one's nationals was spurious, such as in the case of the US military interventions in Grenada (1983) and Panama (1989).[78] Such so-called democratic intervention has also been invoked in other unconvincing attempts to justify the interventions.[79]

(2) *Necessary*. There must be no viable alternative.[80] The more imminent the attack, the more cogent will be the legal basis for the use of force.

(3) *Limited* to the immediate purpose. Reprisals,[81] retribution or exemplary or punitive attacks are not permitted, since, by definition, they would be disproportionate.

(4) *Reasonable and proportionate* to the threat or the force used against it. The US carried out air raids on Tripoli in 1986 in response to supposed Libyan involvement in a terrorist attack on a Berlin discotheque a few days before in which two US nationals were killed and seventy-nine injured, and to try to prevent further attacks. The raid was considered by many States to be a disproportionate use of force. But, when force is justified, it sometimes means that lives have to be sacrificed in order to prevent even greater loss of life. The obvious example would have been the shooting down of the four hijacked airliners before they could carry out their suicide missions on 11 September 2001, assuming of course that there had been evidence at the time of their real intention.[82]

In the case of collective self-defence (as under Article V of the North Atlantic Treaty),[83] there must first be a request from the State that has been threatened

[77] UNSC Res. 487 (1981). At the time, Israel could not make a convincing case, not being able to foresee what would be discovered later. See also V. Lowe, '"Clear and Present Danger": Responses to Terrorism' (2005) ICLQ 185.

[78] Gray, pp.156–60. [79] Ibid., pp. 55–9.

[80] In *Oil Platforms (Iran* v. *US), ICJ Reports* (2003), paras. 74–8; ILM (2003) 1335, the ICJ held the test of necessity to be strict.

[81] See p. 240 below on reprisals during an armed conflict.

[82] See also pp. 325–6 below on new Art. 3*bis* of the Chicago Convention.

[83] 34 UNTS 243 (No. 541); UKTS (1949) 56.

or attacked. But, if a collective security organisation like NATO 'decides' to use force, that is only an *internal* decision. Therefore, it can be lawfully carried out only if there is Security Council authorisation or a basis in customary international law, such as self-defence. Article V has been invoked only relatively recently after the terrorist attack on the United States on 11 September 2001. The resulting military operation against Al-Qaida in Afghanistan was carried out originally by an ad hoc coalition led by the United States acting in self-defence against international terrorists.[84] UNSC Resolution 1386 (2001) replaced the coalition forces with an International Security Assistance Force (ISAF), which since August 2003 has been led by NATO.

When territory has been occupied illegally, the use of force to retake it will be a lawful exercise of the right of self-defence. Although Resolution 502 (1982) demanded that Argentina end its occupation of the Falkland Islands, it did not authorise (or prohibit) the use of force to retake the islands. This was then done by the United Kingdom in exercise of its right of self-defence over its territory. Although Resolution 678 (1990) authorised a coalition of States to use 'all necessary means' to liberate Kuwait, this could *also* have been done by the coalition at the request of the Government of Kuwait in exercise of its right of self-defence, and this was expressly recognised in the preamble to Resolution 661 (1990).

Article 51 requires that any use of force in self-defence must be reported immediately to the Council. Moreover, the State must cease using force once the Council has 'taken measures necessary to maintain international peace and security'. But, this does not mean that the State must stop using force in self-defence as soon as the Council adopts measures: the measures have first to be shown to be *effective*. This is no more than common sense: a measure which may look good on paper, but does not protect the State attacked, cannot legally stop the State using force in self-defence.

Humanitarian intervention[85]

The Security Council can authorise military intervention for humanitarian *purposes* (Resolution 794 (1992) on Somalia) provided that the situation is a threat to international peace and security. But here we are concerned with intervention in another State to deal with extreme human distress, *without* Council authorisation – a vital distinction that is sometimes overlooked.

The Charter is capable of dealing with any threat to international peace and security and has been interpreted and applied by the Council pragmatically; and some interventions done without Council authority have been commended by the Council, or at least been acquiesced in.

[84] See the text to n. 78, p. 209 above.

[85] See the differing views given to the UK Parliament by Brownlie, Chinkin, Greenwood and Lowe in (2000) ICLQ 876–943.

After the first intervention in Iraq, which had been authorised under Chapter VII by Resolution 678 (1990), in April 1991, British, French and US forces entered northern Iraq to protect thousands of Iraqi Kurds who were under serious threat from Iraqi forces. These internally displaced persons were in a critical physical condition: unless food, water, medicine and shelter could be provided quickly, it was plainly evident from the media that they would begin to die in great numbers. The Kurds could be helped only if they and the aid workers assisting them could be protected from the Iraqi forces. Due to threatened vetoes in the Council if the resolution authorised the use of force, and so would have been made under Chapter VII, Resolution 688 (1991) was instead made under Chapter VI. Therefore, it could not authorise the use of force. Instead, it condemned Iraq for the repression of its civilian population generally; found that the situation 'threaten[ed] international peace and security in the region';[86] and demanded that Iraq end its repression and allow access to international humanitarian organisations. The armed intervention which followed was *not* therefore authorised by the Resolution 688 (1991), and was justified solely on the ground that it was necessary to deal with a situation of extreme human distress.[87] A so-called 'no-fly zone' was established over northern Iraq in April 1991, and over the south of Iraq in August 1992, by the United Kingdom and the United States in order to monitor compliance by Iraq with the demands of Resolution 688 (1991). Up to the 2003 Iraq war, British and US military aircraft patrolled the zones, and, when attacked or threatened with attack, fired in self-defence, not on the basis of any Council authority. The zones were not criticised by the Security Council or the General Assembly.[88]

In August 1990, the Economic Community of West African States (ECOWAS) deployed a military force, known as a monitoring group (ECOMOG) to intervene in the bloody conflict between rival parties in Liberia where law and order had totally broken down. No authority was sought from the Security Council, which seventeen months later commended the action.[89]

In September 1998, in Resolution 1199 (1998), the Council expressed its grave concern at the use of excessive and indiscriminate attacks by Serbian and FRY forces on the majority ethnic Albanian population in the Serbian province of Kosovo, leading to the displacement of over 230,000 people. The Council therefore demanded that the FRY cease its repression, and warned of an impending humanitarian catastrophe. The situation worsened. A draft resolution to authorise NATO intervention was opposed by Russia and China, and so was not put to the vote. Nevertheless, in March 1999, NATO forces at first mounted a bombing campaign against Serbia in an attempt to stop the attacks

[86] It had been drafted by the present author as a Chapter VII resolution, but was watered down once China had indicated informally that it would veto such a resolution. That Res. 688 was *not* made under Chapter VII is a point that for some time various commentators did not understand.

[87] See (1992) BYIL 822–8. [88] See (1993) BYIL 736–40.

[89] S/22133. Later ECOWAS procured a UN arms embargo against Liberia (UNSC Res. 788 (1992)).

on civilians in Kosovo. The action was explained as justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe.[90]

The legal basis for such humanitarian intervention remains controversial, both politically and legally. As with self-defence, the justification of humanitarian intervention may be used as a cover for other, much less worthy, purposes. States contemplating using it thus need to satisfy themselves, and preferably other States, that the following criteria are met: (a) there must be a compelling and urgent situation of extreme humanitarian distress which demands immediate relief; (b) the State most directly involved must either not be willing or able to deal with it (it may of course be the cause of the distress); (c) there is no alternative, the Security Council being unable to agree on authorising intervention; and (d) the action must be limited in scope and time to what is necessary to relieve the distress.[91] These criteria may well have been satisfied in the case of Darfur, especially in 2004/5, although the United States in particular was, and still is, heavily engaged in Iraq and Afghanistan. Moreover, the logistical problems would have been enormous.

The sole purpose of humanitarian intervention is to help to defend people against a threat to their life. The fact that they are foreign nationals is no longer a good reason for doing nothing. Provided there are good grounds for saying that a limited use of force for the sole purpose of relieving extreme human distress, to stop genocide or ethnic cleansing or other serious violations of international law, is not a violation of Article 2(4). Its full text is seldom quoted: it requires Members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State 'or in any other manner inconsistent with the Purposes of the United Nations'. Those Purposes include the promotion of human rights and the solving of humanitarian problems (Article 1(3)). When upholding of the Purposes comes into acute conflict with the sovereignty of a State that is the very obstacle to achieving them, respect for its territorial integrity or political independence has to give way to the overriding needs of humanity or, as the International Court of Justice put it, 'elementary considerations of humanity, even more exacting in peace than in war'.[92] The situation is not affected by a failure to get Council authorisation for intervention, since such use of force would not violate the Charter. Just as the liberation of Kuwait did not need Security Council authorisation – self-defence would have been an adequate legal basis – NATO's intervention in Kosovo in 1999 was neither authorised, nor condemned by the Security Council,[93] although it has

[90] See (1998) BYIL 593 and (1999) BYIL 592–3. See also the House of Commons, Foreign Affairs Select Committee, Report on Kosovo, 23 May 2000; and Gray, pp. 39–51.

[91] See (1998) BYIL 593 and (2001) BYIL 696.

[92] *Corfu Channel* (Merits), *ICJ Reports* (1949), p. 4, at p. 22; 16 ILR 155, and see C. Greenwood, 'Humanitarian Intervention: the Case of Kosovo' (1999) 10 *Finnish YB of International Law* 141–75.

[93] UNSC Res. 1244 (1999) did not authorise NATO's campaign. On 26 March 1999, a draft resolution (S/RES/1999/328) condemning the NATO bombing was overwhelmingly defeated 3–12–0: see S/PV.3989. Only China, Namibia and Russia voted for it.

been criticised by some States and experts in international law. The most cogent criticism would seem to be the *manner* in which force was used: air strikes on other parts of Serbia rather than the use of ground forces in Kosovo. If from the beginning force had been used directly on the ground in Kosovo, it might well not have been seen as unreasonable, and the reaction might have been more like that towards the use of force to protect the Kurds in northern Iraq in 1991.

Alternatively, it is still argued that humanitarian intervention without Security Council authorisation is not lawful in international law. But, as in domestic law, sometimes an illegal act can be legitimate *morally*. It may then be overlooked by the law-enforcement authorities or treated leniently. This way around the dilemma (some might see it as simply dodging the issue) is unsatisfactory, since it only moves the debate from the legal to the even more uncertain plane of morality. International law has shown itself able to cope with new challenges. If foreign forces had not been so stretched because of their enormous involvement in Iraq and Afghanistan – and despite difficult logistical problems – they might have been deployed in Darfur to protect civilians in, say, 2005.

A responsibility to protect?

Originally a Canadian idea, it is now embodied in a UN General Assembly resolution entitled the 2005 World Summit Outcome.[94] It is therefore not legally binding.[95] Moreover, although it is well meaning, it is phrased in guarded terms. In particular, paragraph 139 makes it clear that the 'international community' (whatever that may be) is prepared to take collective action on a case-by-case basis to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. But, as the Outcome clearly states, action has to be done 'through the Security Council, in accordance with the Charter, including Chapter VII'. In other words, the paragraph is aspirational. Action still rests with the Security Council, where it is subject to the veto. The draft of the Outcome was a modified version of a report by a high-level panel of experts, former UN ambassadors and other senior persons. The US Permanent Representative to the United Nations, John Bolton, has been castigated for watering down the draft of the Outcome. But, what may not be well understood is that he was wielding the hatchet that would otherwise have been used on the draft by other UN members, both large and small. They were only too delighted for the odium to be heaped on him.

[94] UNGA Res. 60/1 of 16 September 2005, paras. 138–9. It has 178 paragraphs and is 40 pages long – never a good sign. See also, Gray, pp. 51–3.

[95] See pp. 6–7 above.

11

Human rights

… unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world.[1]

Brownlie and **Goodwin-Gill**, *Basic Documents on Human Rights*, 4th edn, Oxford, 2002 ('BGG')

Van Dijk, van Hoof, van Rijn and **Zwaak** (eds.), *The Theory and Practice of the European Convention on Human Rights*, 4th edn, Antwerp and Oxford 2006 ('van Dijk')

Harris, O'Boyle and **Warbrick**, *Law of the European Convention on Human Rights*, 2nd edn, Oxford, 2009 ('Harris')

Jacobs and **White**, *The European Convention on Human Rights*, 4th edn, Oxford, 2006

Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 2nd edn, London, 2006 ('Reid')

Clayton and **Tomlinson**, *The Law of Human Rights*, 2nd edn, Oxford, 2009 ('Clayton')

Council of Europe, *Human Rights in International Law: Collected Texts*, 3rd edn, 2007

UN High Commissioner for Human Rights, www.ohchr.org[2]

Introduction

The terms 'humanitarian law' or 'international humanitarian law' (IHL), if correctly used, refer only to that area of international law concerned with the protection of members of armed forces and civilians during an armed conflict or military occupation of territory (see Chapter 12). However, human rights do not cease completely to apply once IHL applies. They continue except in so far as the special rules (*lex specialis*) of IHL apply or human rights treaties have

[1] John F. Kennedy's inaugural address, 20 January 1961.

[2] Often confused with the UN High Commissioner for Refugees (www.unhcr.org).

been validly derogated from.[3] Human rights jurisprudence may be relevant also to the interpretation of IHL, such as the meaning of torture, for which there are many instances also in peacetime. In other words, IHL and human rights should not be seen as entirely separate areas of international law. Particularly in the United States, the term 'civil rights' usually refers to human rights in domestic, not international, law.

The Nazi period was notorious for massive violations of human rights. The next sixty years were marked by the development of sophisticated international human rights treaties. Although influenced by domestic principles, such as those in the US Bill of Rights, the French Declaration of the Rights of Man or the English common law, human rights are no longer regarded as a purely domestic matter. The United Nations is prohibited by Article 2(7) of its Charter from intervening in 'matters which are *essentially* within the domestic jurisdiction' [emphasis added] of a State. But, although the actual promotion and protection of human rights within a State must necessarily be primarily the responsibility of its government, human rights are no longer regarded as a matter 'essentially' within each State's jurisdiction. The United Nations has adopted many human rights treaties; and from its early days has adopted resolutions condemning human rights abuses, although they were usually not legally binding.

The number of treaties and other instruments on human rights is now so great that it is possible only to describe the main principles and the basic international and regional enforcement mechanisms. The wealth of jurisprudence, which has been built up, and is constantly developing, can be understood only by consulting specialised books. But, as Robin Cook, the idealist British Foreign Secretary, was soon to discover, an 'ethical foreign policy' is just not possible. Although upholding and promoting human rights is important in itself, it is also done in exercise of the State's self-interest, which can sometimes include altruism.

Who enjoys the rights?

A State is required to protect the human rights of 'everyone within [its] jurisdiction' (Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR))[4] or 'all individuals within its territory and subject to its jurisdiction' (Article 2(1) of the International Covenant on Civil and Political Rights 1966 (ICCPR)).[5] In practice, there may be little difference between the ECHR and the ICCPR formulations: attempts to apply the ECHR to acts taking place outside the territory of a party have generally been unsuccessful. In 2001, in *Banković* v. *Belgium*, the

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports* (2004), paras. 102–13; 129 ILR 37; ILM (2004) 1009.
[4] 213 UNTS 221 (No. 2889); UKTS (1953) 71; BGG 398.
[5] 999 UNTS 171 (No. 14668); ILM (1967) 368; UKTS (1977) 6; BGG 182.

European Court of Human Rights (the Court or the ECtHR) unanimously held that the ECHR did not protect civilians in the Federal Republic of Yugoslavia who had been killed in attacks there by certain Member States of NATO, since under the ECHR jurisdiction is essentially territorial.[6] But, the British courts have held that the ECHR does apply to the actions of British officials and members of the armed forces abroad in situations where they have effective control, as in diplomatic or consular premises or a military prison.[7]

The rights normally apply only to natural persons, but certain of them (mostly in respect of property) apply to legal persons, such as corporations.[8]

What is a human right?

Human rights treaties require the parties to protect the rights by properly implementing and enforcing them, although too many parties do not take these obligations seriously enough. The rights are against the State, not *private* persons. In other words, they are for lack of protection by public authorities. So, an attack by a burglar, however serious and disagreeable, is, in itself, not a breach of the victim's human rights. But, if a policeman attacks you (or fails to protect you), or a *private* care home is not properly supervised by the local *public* authority, your human rights may have been violated. You may then be entitled to take the matter directly to an international tribunal or body. But, if there are remedies available in domestic law, you must first exhaust them,[9] unless it would be unreasonable to insist on your doing so if, for example, the process would be exceedingly long or the remedy ineffective.[10]

Universal human rights treaties

United Nations

In 1948, the United Nations adopted the Universal Declaration of Human Rights.[11] Although often cited as if it were legally binding, it is *not* a treaty.

[6] *Banković*, App. 52207/99; 123 ILR 94; ILM (2002) 517. In 2007 in *Behrami* (App. 71412/01; 133 ILR 1; ILM (2007) 742), the Court held that NATO forces were not subject to the ECHR if the United Nations has effective control, such as KFOR personnel in Kosovo under UNSCR 1244 (1999), see esp. paras. 21–7 and 124–52. In 2007, the House of Lords held that detention done under a UN mandate was not subject to the ECHR: see *R. (Al-Jedda)* v. *Secretary of State for Defence* [2007] UKHL 58. In 2007, in *Al-Skeini* ([2007] UKHL 26; 133 ILR 693; ILM (2007) 776) the House of Lords held that the ECHR applied to British military detention facilities in Iraq, but not to British soldiers on patrol there who were acting pursuant to a UN mandate. In 2009 in *Al-Saadoon* (App. 61498/08), the Court held that Iraqi detainees interned in Iraq by British forces on the authority of an Iraqi criminal court were nevertheless in British custody.

[7] See p. 170 above on diplomatic asylum, and *R. (B. Children)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2005] 2 WLR 618; and *Al-Skeini* (n. 6 above). See also the views of the Human Rights Committee in General Comment 31 of 2004 (www2.ohchr.org/english/bodies/hrc/> general comments), and p. 233 below on the status of such comments.

[8] See p. 227 below.

[9] See, for example, ICCPR, Art. 41(1)(c) and ECHR, Art. 35.

[10] See Shaw, pp. 273–4.

[11] UNGA Res. 217 (III); BGG 18.

But it provided the foundation for the treaties, universal[12] and regional, that were to follow. The same year, the Genocide Convention was adopted.[13] The UN General Assembly bodies most concerned with drafting human rights treaties for adoption by the General Assembly are (a) ECOSOC, and its subsidiary, the Human Rights Council (HRC),[14] (b) the Third Committee and (c) the Sixth Committee.

The Universal Declaration was followed by treaties on specific subjects, such as the Refugees Convention 1951,[15] the Conventions on Statelessness of 1954 and 1961[16] and the Convention on the Elimination of All Forms of Racial Discrimination 1966 (CERD).[17] But it was not until 1966 that two *general* treaties were adopted: the International Covenant on Civil and Political Rights (ICCPR)[18] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[19] The two Covenants now have 164 and 160 parties respectively. The Covenants cover all the most important human rights, but of the two, the ICCPR has been the more influential because it covers the 'harder' individual rights enunciated in the Universal Declaration of Human Rights, and has a monitoring mechanism, the Human Rights Committee.[20] The ICESCR is concerned more with collective rights.[21] Because they are broader, and require positive action by the State, such as provision of work, housing, food, health and education, this makes their implementation that much more problematic. They are therefore expressed more in terms of aspirations.[22] But the ICESCR has led to the formulation of more detailed obligations in treaties such as the Convention on the Rights of the Child 1989.[23] The so-called *right to development* is not included in the ICESCR and, despite the importance of development, the assertion that it is a right in international law cannot be sustained.[24] The other UN human rights treaties of most significance are the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW),[25] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1989.[26] In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities.[27]

[12] See p. 51 above. [13] For genocide and other crimes against humanity, see pp. 251–2 below.
[14] See also p. 232, n. 88 below about the HRC and the HRC.
[15] See p. 171 above.
[16] See p. 165 above. In practice, these conventions have been overtaken by the Refugees Convention.
[17] 660 UNTS 195 (No. 9464); UKTS (1969) 77; BGG 160.
[18] 999 UNTS 171 (No. 14668); ILM (1967) 368; UKTS (1977) 6; BGG 182.
[19] 993 UNTS 3 (No. 14531); UKTS (1977) 6; BGG 172. [20] See p. 232 below.
[21] The right to self-determination is found in both the ICCPR and the ICESCR; on the right, see pp. 22–3 above.
[22] For a different view, see Higgins, pp. 99–104.
[23] 1577 UNTS 3 (No. 27531); ILM (1989) 1448; UKTS (1992) 44; BGG 241.
[24] Higgins, pp. 103–4. [25] 1249 UNTS 13 (No. 20378); ILM (1980) 33; UKTS (1989) 2; BGG 212.
[26] 1465 UNTS 85 (No. 24841); ILM (1984) 1027; UKTS (1991) 107; BGG 229. An Optional Protocol providing for visits by the Committee on a Prevention of Torture to parties was adopted in 2002 and entered into force in 2006: 1465 UNTS 113 (No. 24841); ILM (2003) 26. It now has nearly fifty parties.
[27] UNTS (No. 44910); ILM (2007) 443. It entered into force in 2008 and now has some sixty parties.

ILO

In the field of work, the International Labour Organization has since 1919 produced some 190 treaties (termed conventions) to improve labour standards. In 1946, it became a UN specialised agency. It is unique in that representatives of governments, employers and workers have equal representation in the decision-making bodies.[28]

Regional human rights treaties

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

The (more commonly called) European Convention on Human Rights (ECHR) is the most important treaty adopted by the Council of Europe (CoE). The ECHR is therefore *not* an EU instrument, *nor* is the European Court of Human Rights (the ECtHR or simply in this context, the Court) an EU court. The Court sits in *Strasbourg* whereas the European Court of Justice (ECJ) sits in *Luxembourg*. It is a precondition of admission as a member of the CoE that the Applicant State becomes party to the ECHR and accepts (a) the compulsory jurisdiction of the Court, (b) the right of individual application[29] and (c) all the Protocols to the ECHR. The ECHR has had a number of protocols, although only seven are still relevant: Nos. 1, 4, 6, 7, 12, 13 and 14.[30] The substantive articles of the protocols are (except for Protocol 14 which is not yet in force) are regarded as additional articles to the ECHR. The United Kingdom at long last effectively made the ECHR part of its law by the Human Rights Act 1998.[31] This means that if a person thinks his rights under the ECHR have been infringed by a UK public authority, he can now take the claim through the UK courts rather than go directly to the Court in Strasbourg, although he may end up there even if he wins on appeal in the highest UK court.

Several CoE Members still have overseas territories, and the ECHR (Article 56), and each Protocol, gives, to those Members which still have such territories, the right to extend the instrument to all, any or none of them. If they have no permanent inhabitants, there may be no need to extend them.

The human rights in the ECHR are not quite as extensive as in the ICCPR, although the rights that are common to both instruments are generally formulated in a similar way, the drafters of the ICCPR having benefited from the experience of the ECHR. The real strength of the ECHR lies in the effectiveness

[28] See www.ilo.org,which is not that easy to navigate. The conventions are to be found at: www.ilo.org/ilolex/english/convdisp1.htm.

[29] See p. 231 below.

[30] The ECHR was amended by Protocol No. 11 to restructure the enforcement mechanism. For the text as amended by Protocols Nos. 11, 14 and 14 bis, see www.echr.coe.int or BGG 398. On reform of the Court's procedures and the present status of Protocol 14, see p. 230 below.

[31] For a short description of the Act, see Aust MTLP, p. 192.

of its enforcement mechanism, the Court and the maturity of its jurisprudence.[32] And, if a case before the ECJ involves a question of human rights, the ECJ is likely to apply the ECHR, to which all EU Member States are parties.[33] Article 17 of Protocol No. 14 provides for the European Union to accede to the ECHR, but this cannot happen until both the Protocol and the Lisbon Treaty[34] have entered into force.

American Convention on Human Rights 1969[35]

This is often referred to as the Inter-American Convention, probably because it created an Inter-American Commission (and Court) of Human Rights. Established by the Organization of American States (OAS) based in Washington, DC, it entered into force in 1978. The parties do not include Canada, some Caribbean States or the United States, probably because they consider their own national human rights provisions are good enough. The Convention follows generally the ECHR.

African Charter on Human and Peoples' Rights 1981[36]

The African Charter on Human and Peoples' Rights 1981 (the Charter) is a treaty which entered into force in 1986, and all members of the African Union (formerly the Organization of African Unity (OAU)) are parties to it. The Charter follows generally the ICCPR and the ICESCR, but goes further by providing that 'peoples' shall have certain rights, such as the right to development.[37] It also includes a chapter on the 'duties' of the individual. Although some of these duties are to do with the family, others, such as the duty not to compromise the security of the State, may have a similar purpose to the qualifications to certain articles of the ICCPR and the ECHR that can have the effect of limiting the extent of a right (see below).

Arab Charter on Human Rights 1994[38]

The Charter (also a treaty) lists the usual human rights, but Article 27 allows for restrictions on the exercise of freedom of belief, thought and opinion if they are imposed by law. It is very controversial.

[32] For a very brief overview of the jurisprudence, see Shaw, pp. 356–60.

[33] See also ibid., pp. 369–79, who also discusses the role of the EU, OSCE and the CIS in human rights; and pp. 197–8 above about the *Kadi* judgment.

[34] See p. 446 below.

[35] 1144 UNTS 144 (No. 17955); ILM (1970) 99; www.oas.org.

[36] See www.africa-union.org; 1520 UNTS 218 (No. 26363); ILM (1982) 58. See Evans and Murray (eds.), *The African Charter of Human and Peoples' Rights*, 2nd edn, Cambridge, 2008.

[37] See the text to n. 24 above.

[38] For a translation from the Arabic, see BGG 774 or www.al-bab.com/arab/human.htm. It entered into force in 2008 when seven of the twenty-two members of the League of Arab States had ratified it. Of course it does not bind the States which have not ratified it.

Outline of the principal civil and political rights

It may be helpful to summarise very briefly the more important civil and political rights, and make some comparisons between the ECHR, ICCPR and ICESCR. But, for a more authoritative accounts, reference must be made to specialised works. Some actual cases are mentioned. These are some older leading cases, as well as some recent ones, which attempt to illustrate how the treaties have been applied. (The references are to articles of the ECHR (and its Protocols), the ICCPR and the ICESCR, as the case may be.)

Right to life (ECHR, Article 2; ICCPR, Article 6)

Taking a person's life must be done in accordance with law, not arbitrarily. The ECHR is more specific about the circumstances in which a person can be killed, such as in self-defence or to effect an arrest. In 1998, in *Osman* v. *United Kingdom*, the Court decided that, since a State had a duty to protect human life, it must put in place effective criminal law provisions to deter offences against the person and effective law enforcement.[39] In 2007, *Bracknell* v. *United Kingdom* the Court held that Articles 2 and 13 required that when there was a credible allegation that a particular person was responsible for an unlawful killing, the authorities were obliged to carry out further investigations.[40]

Protocol No. 6 to the ECHR abolished the death penalty, except in connection with a war. Since 1994, new members of the Council of Europe have either to become a party to Protocol No. 6 or introduce a moratorium on the carrying out of death sentences. Protocol No. 6 is binding on all parties to the ECHR, except for Russia that has been observing a moratorium since it became a member in 1996. Protocol No. 13 of 2002 abolishes the death penalty in all circumstances. So far, it has forty-one parties.

The ICCPR does not itself prohibit the death penalty, but requires that it be limited to the most serious crimes, and not be imposed retrospectively or for crimes committed when under the age of 18, or carried out on a pregnant woman. When ratifying the ICCPR, the United States reserved the right to execute a person (except a pregnant woman) even if at the time of the crime the person was under 18.[41] The Second Optional Protocol to the ICCPR of 1989[42] requires a party to abolish the death penalty. It entered into force in 1991, and so far has some seventy-one parties, about 70 per cent being parties to the ECHR.

[39] App. 23452/94; 29 EHRR 245. See also *Powell* (App. 45305/99); (2000) 30 EHRR CD 362.

[40] App 32457/04; 2008 46 EHRR 42. In 2008, the House of Lords held that the UK Government did *not* owe a duty of care under Art. 2 of the ECHR to UK troops and their families to hold a public enquiry into whether it had obtained adequate legal advice before it invaded Iraq in 2003: see *Gentle* [2008] UKHL 20.

[41] The reservation was held to be unconstitutional by the US Supreme Court on 1 March 2005, but the reservation does not seem to have been deleted, or amended to make it clear that the Supreme Court judgment applies only to federal crimes, if that be the position.

[42] 1642 UNTS 414 (No. 14668).

Prohibition on torture (ECHR, Article 3; ICCPR, Article 7)

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.[43] The ICCPR adds 'cruel' treatment or punishment, and that no one shall be subjected to medical or scientific experiments without his free consent. (The definition of torture in Article 1 of the Torture Convention 1984 is designed for the purposes of that treaty, which requires the parties to make torture a criminal offence subject to quasi-universal jurisdiction.)[44]

In *Soering*, the Court decided that the extradition of a person to any (in practice, non-ECHR) State where he is wanted for a crime for which he could be sentenced to death, would, if he would then be likely to spend a lengthy period on 'death row', would be a breach of Article 3.[45] This obstacle can be overcome if the requesting State gives an undertaking that the person will not be executed. But, nevertheless, the judgment has had severe repercussions for ECHR States which wish to extradite or deport a person who may be a threat to its security, but who might suffer ill-treatment by the authorities of the destination State. The prohibition in Article 3 is absolute and not subject to any national security exception, express or implied.[46]

The Court has also held that where the applicant claimed that he would be at risk of suffering ill health if sent back to his home country there would only be a violation of Article 3 where the circumstances were exceptional and compelling humanitarian considerations were at stake.[47]

Prohibition of slavery and forced labour (ECHR, Article 4; ICCPR, Article 8)

The two Articles are identical in substance. Forced or compulsory labour does not include labour as part of a criminal punishment, military service, to deal with emergencies or normal civil obligations.

[43] See *Chitayev* v. *Russia*, 2007, App. 59334/00. It is clear from *Mouisel* v. *France* (App. 67263/01; (2004) 38 EHRR 34) and *Uyan* v. *Turkey* (App. 7496/03) that the use of restraint (e.g. handcuffs) during medical treatment must now be justified objectively.

[44] See Nowak, *The United Nations Convention Against Torture*, Oxford, 2008; see also below.

[45] *Soering*, App. 14038/88; Series A, No. 161, 1989; ILM (1989) 1063; (1989) 11 EHRR 439; 98 ILR 270. See also *Kafkaris* v. *Cyprus* (App. 21906/04) regarding the legitimacy of whole-life sentences.

[46] *Chahal* (1997) 23 EHRR 413; 108 ILR 385; and *Saadi* v. Italy (App. 37201/06). On the unsuccessful attempts by the UK Government to deport suspected terrorists to certain other States which had given 'diplomatic assurances'– i.e. in MOUs (see p. 51 above) about their treatment – see *Saadi* v. *Italy* (above) – which was applied by the UK Court of Appeal in *AS and DD* v. *Secretary of State* [2008] EWCA Civ 289. But in 2009, in *A.* v. *United Kingdom* (App. 3455/05), the Court held that there had been no violation of Art. 3 since, although detention was indefinite, there was still hope of release and the applicant had been able to challenge successfully before the House of Lords the legality of the detention (but see comments below on Art. 5).

[47] Compare *D.* v. *United Kingdom* (successful) (App. 30240/96; (1997) 24 EHRR 423) with *N.* v. *United Kingdom* (unsuccessful) (App. 26565/05). As to the general rules on restrictions on the expulsion of failed asylum seekers, see *NA* v. *United Kingdom* (App. 25904/07).

Right to liberty and security (ECHR, Article 5; ICCPR, Article 9)

Although the ECHR is more detailed, the two articles are the same in substance. No one shall be deprived of his liberty except in accordance with law. Anyone arrested or detained shall be told the reason and the charge, and shall be brought promptly before a judge and entitled to trial within a reasonable time.[48] He shall be entitled to challenge without delay the lawfulness of his detention before a court, for example by *habeas corpus*. A person wrongfully arrested or detained shall be entitled to compensation.

Right to a fair trial (ECHR, Article 6 and Protocol No. 7; ICCPR, Article 14)

Both the ECHR and the ICCPR provide that civil and criminal trials shall be a fair and public hearing within a reasonable time,[49] and before an independent and impartial tribunal. In a criminal trial, the accused shall be presumed innocent until proved guilty, and accorded certain minimum rights: to be told, in a language he understands, and in detail, of the case against him; to have adequate time and facilities to prepare his defence; to defend himself or through a lawyer of his choosing, with legal aid where necessary;[50] to examine witnesses against him and to call witnesses in his defence; to have an interpreter free if he cannot understand or speak the language of the court; to have the right to appeal to a higher court against conviction or sentence; and to receive compensation for a miscarriage of

[48] In *Kakal* v. *Poland* (App. 3994/03) in 2007 the Court held that pre-trial detention of six and a half years was unjustified. See also, H. Fox, *The Law of State Immunity*, 2nd edn, Oxford, 2008, p. 562 (last para. of the text). In 2009, in *A.* v. *United Kingdom* (App. 3455/05), the Court held that there had been a violation of Art. 5.1, since the UK effect of derogation from the ECHR was disproportionate in that it discriminated between UK nationals and non-nationals. In *Austin* v. *Commissioner of Police* [2009] UKHL 5, the House of Lords held that use of the 'kettle' (not allowing anyone to leave a police cordon for several hours) was not a breach of Art. 5(1). This judgment may well be referred to the Court. In *Saadi* v. *United Kingdom*, App 13229/03 (2007) 44 EHRR 50) the Court held that a delay of seventy-six hours in providing reasons for the detention of an asylum-seeker was incompatible with Art. 5.2. In *Jabari v Turkey* (App. 40035/98) the Court said any claim that deportation would infringe his human rights must be scrutinised rigorously.

[49] Each case must be decided on its particular circumstances. A trial could still be fair if there had not been an unreasonable delay: see *Scordino* v. *Italy* (App. 36813/97; 45 EHRR 207). See also *Bullen and Soneji* v. *United Kingdom* (App. 3383/06). Similarly, if a conviction was to a sole or decisive degree the result of a statement which the convicted person had no opportunity to challenge, the trial may not have been fair: *Doorson* v. *the Netherlands* (App. 20524/92; (1996) 22 EHRR 330) and *Al-Khawaja* v. *United Kingdom* (App. 26766/05). In 2007, in *O'Halloran* v. *United Kingdom* (App. 15809/02; 2008 46 EHRR 21) the Grand Chamber of the Court held that the rights under Art. 6.1 were not absolute. therefore, a person can be required to tell the police who was driving a particular vehicle on a particular occasion. This is simply common sense. In 1996, in *Saunders* v. *UK* (App. 19187/91; (1996) 23 EHRR 313), the Court held that use in foreign criminal proceedings of the transcript of a public examination in bankruptcy infringed Saunders' right not to incriminate himself and therefore prejudiced his right to a fair trial. For control orders, see pp. 228–9 below.

[50] See *Steel and Morris* v. *UK* (App. 6841/01; (2005) 41 EHRR 22).

justice. No one shall be tried or punished again for an offence for which he has already been convicted or acquitted (the double jeopardy rule or *ne bis in idem*).

Confiscation proceedings are not within Article 6.2 but are part of the sentencing process.[51]

No punishment without law (ECHR, Article 7; ICCPR, Article 15)

No one shall be convicted of an offence on account of an act that did not constitute an offence at the time (*nullum crimen sine lege*), or be given a heavier penalty than that which applied at the time.

Respect for private and family life (ECHR, Article 8; ICCPR, Article 17)

This right, being rather nebulous, has been a fruitful source of law making by the Court. For example, in 2001 in *Hatton*, the Court held that, although the ECHR does not include environmental rights as such, nevertheless Article 8 protects family life from unreasonable aircraft noise intrusion (in this case at London Heathrow). But the Court had to apply a test of 'fair balance', so taking into account the interests of both individuals and the wider community.[52] (See also the cases mentioned in that footnote.)

Freedom of thought, conscience and religion (ECHR, Article 9; ICCPR, Article 18)

This includes the freedom to change one's religion or belief and, either alone or in community, in public or in private, to manifest one's religion or belief in worship, teaching, practice or observance.[53] The ICCPR adds that no one shall be coerced to adopt a religion or belief.

[51] *Phillips* v. *United Kingdom* (App. 41087/98) and *Van Offeren* v. *The Netherlands* (App. 19581/04).

[52] 2003 37 EHRR 28. See also, *R. (Countryside Alliance)* v. *Attorney-General* ([2007] UKHL 52) in which the House of Lords in 2007 rejected the argument that the legislation prohibiting hunting with dogs was contrary to the UK legislation implementing the UK's obligation under Arts. 8, 11, 14 and Art. 1 of Protocol 1 of the ECHR. See also *Dickson*, App. 44362/04 2008 46 EHRR 41, where the Grand Chamber held that a male or female prisoner had a right to IVF (artificial insemination) treatment; and *Marber* v. *United Kingdom* (Apps. 30562/04 and 30566/04), in which the Court decided that the police cannot keep indefinitely DNA evidence legally obtained from a person in connection with an alleged crime, if the person was then acquitted, even though the DNA might later help in identifying the person as having committed other crimes. In *McCann* v. *United Kingdom* (App. 19009/04) the Court held that a local authority which evicted a tenant by bypassing a statutory scheme had been in breach of Art. 8. In *Liberty* v. *United Kingdom* (App. 58243), the Court held that complaints by telephone, fax, email, etc. to tribunals, had been inadequately dealt with, so infringing the applicants' rights under Art. 8. In 2009 in *Szuluk* v. *United Kingdom* (App. 36936/05) the Court held that monitoring of a prisoner's medical correspondence by the prison authorities was a breach of Art. 8.

[53] See *Ivanova* v. *Bulgaria* about discrimination against Christian evangelical groups (App. 52435/99). See also, T. Lewis, 'What not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) ICLQ 396–414.

Freedom of expression (ECHR, Article 10; ICCPR, Article 19)

Everyone has the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[54] The right was severely tested in *Garaudy* v. *France*.[55] An author had been convicted of writing a book denying the Holocaust. (Such legislation is also found in Germany and in some other European States, but not in the United Kingdom.) In considering the usual restrictions on the right set out in Article 10, paragraph 2, the Court cited Article 17, which provides that nothing in the ECHR: 'may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms [in the ECHR] or at their limitation to a greater extent than provided for in the Convention.' Following its previous Holocaust denier decisions, the Court found that since the conviction had not breached the author's human rights, the application was manifestly ill-founded, and therefore inadmissible.

Freedom of assembly and association (ECHR, Article 11; ICCPR, Articles 21–22)

Everyone has the right to peaceful assembly (meeting with others in public or private), freedom to associate with others, and to form and join a trade union. The latter right is elaborated in Article 8 of the ICESCR.

Right to marry (ECHR, Article 12; ICCPR, Article 23)

Despite the explicit wording of Article 12 of the ECHR ('Men and women … have the right to marry and to found a family'), and its own previous judgments, the Court held in *Goodwin* that it was a breach of the article to bar totally a transsexual (male to female) from marrying a man.[56]

Right to an effective remedy (ECHR, Article 13; ICCPR, Article 2(3))

Anyone whose rights are violated shall have an effective remedy before a national authority even if the violation had been committed by a public official.

[54] But, in *Verein gegen Tierfabriken* v. *Switzerland* (App. 24699/94; (2001) 34 EHRR 159) the Court held that a prohibition in national law on political advertising was necessary in a democratic society and was not incompatible with the freedom of expression guaranteed by Art. 10. In *Leroy* v. *France* (App. 36109/03) the Court upheld the French law under which Leroy was convicted of complicity in condoning terrorism by his cartoon.

[55] App. 65831/01.

[56] App. 28957/95; (2002) 35 EHRR 18, p. 447; (2003) AJIL 658. See also *Grant* (2007) 44 EHRR 1. In *Baiai* (EWCA Civ 478) the UK Court of Appeal held that legislation which required all persons subject to immigration control had to have Home Office permission to marry, was contrary to Arts. 12 (and 14) in so far as it applied to all possible marriages, not just, for example, to so-called sham marriages.

(The ICCPR provision is rather more detailed.) In 2008, in *R. K. and A. K.* v. *United Kingdom*,[57] although the removal of a child from its parents was not a breach of Article 8, there was nevertheless a breach of Article 13 since at the time there was no means of redress available to the applicants.

Prohibition of discrimination (ECHR, Article 14; ICCPR, Article 26)

The right shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[58] No one shall be discriminated against on any such grounds by a public authority (ECHR Protocol No. 12).[59] But, in 2008, in *Carson* v. *United Kingdom*[60] the Court held that the exclusion of pensioners living abroad from the scheme of cost-of-living increases to the State pension, which applied to all pensioners resident in the United Kingdom, was not a breach of Article 14, or with Article 1 of Protocol No. 1 (see below).

Freedom of movement (ECHR, Protocol No. 4; ICCPR, Article 12)

Everyone lawfully within the territory of the State has liberty of movement and the freedom to choose his residence. He is also free to leave a country, including his own. A national shall not be expelled from his own State or arbitrarily prevented from entering it. The United Kingdom is not a party to the Protocol, and has entered a reservation to the Covenant in effect reserving the right to control immigration in respect of certain UK nationals without close connections with the metropolitan territory.[61]

Right to free elections (ECHR, Protocol No. 1 (Article 3); ICCPR, Article 25)

Elections must be held by secret ballot to allow every citizen to give free expression to his opinion. In *Hirst (No. 2)*,[62] the Court held that the United Kingdom was in breach of the Protocol by denying *all* convicted prisoners the right to vote. The United Kingdom appealed the judgment to the Grand Chamber of the Court, but lost in 2005. Although the national legislature has a wide margin of appreciation as to what would be fair restrictions on that right, the British Parliament had never considered the matter in modern times, and is yet to decide what to do. The judgment is an example of the creative approach of the Court which sees the ECHR as 'a living instrument to be interpreted in

[57] App. 38000/05.
[58] In *Burden*, the Court held that for two unmarried sisters who owned and lived together in a house, the UK applicable tax treatment, which was less favourable than that for a married couple, was *not* discriminatory: App. 13373/05; (2007) 44 EHRR 51.
[59] Adopted in 2000 and now in force. The United Kingdom is not a party.
[60] App. 42184/05.
[61] See p. 164 above on British nationality.
[62] App. 74025/01; (2004) 38 EHRR 40, p. 825.

the light of present-day conditions',[63] rather like the way the US Supreme Court views the (much older) US Constitution.

Right to property (ECHR, Protocol No. 1 (Article 1)

The right not to be deprived of possessions, except in the public interest and in accordance with the law, is also enjoyed by legal persons, such as corporations. Deprivation without compensation would normally be a breach.[64] However, the right of a State 'to enforce such laws as it deems necessary to control the use of property in accordance with the general interest' is not affected and should usually not require compensation.[65] Most complaints are about nationalisation or planning decisions. Neither the ICCPR nor the ICESCR has an equivalent provision. This may be because at the time communist States were still numerous.

Right to education (ECHR, Protocol No. 1 (Article 2); ICESCR, Article 13)

The later provision in the ICESCR is much more detailed.

General qualifications to rights

It would be a mistake to think that all human rights are expressed as absolute. Although some rights in the ECHR and the ICCPR (the right to life, prohibitions on torture and slavery, and punishment not in accordance with law) are absolute, others are not but rather subject to specific conditions or qualified in general terms. This seeks in a democratic society to balance the rights of the individual and the interests of the community. Depending on the particular right, the qualifications may allow for exceptions for the protection of morals, health, private life, juveniles and the rights and freedoms of others, or in the interests of public order, public safety, crime prevention, national security or justice. Each qualification is carefully formulated, and most provide that any exception must also be in accordance with the law and be necessary in a democratic society. These provisions allow a necessary degree of flexibility in implementation. And, the jurisprudence of the Court adds that any qualification must also be *proportionate* in the way that it is applied. Furthermore, the jurisprudence also allows to States a *margin of appreciation* in complying with

[63] *Banković* (n. 6 above), para. 64.

[64] See *Lithgow* v. *UK* (1986) 8 EHRR 329, para. 121. In *Pye* v. *UK* (App. 44302/02; (2008) 46 EHRR 42) on 1 October 2007, the Grand Chamber held that the English law allowing squatters to obtain the right to title over land after twelve years of adverse possession was *not* an intrusion into the disposed owner's title. See also *Kozacioğlu* v. *Turkey* (App. 2334/03), where compensation for expropriation of property was increased to €75,000 because of a violation of Art. 1 of Protocol 1. See also *Ofulue* (n. 66 below).

[65] See *Alconbury* v. *Secretary of State* [2003] 2 AC 295, paras. 72–3; *Anheuser-Busch* v. *Portugal* (App. 73049/01); (2007) 45 EHRR 36.

the ECHR, which is broader in cases involving personal morality.[66] This sensible approach avoids the danger that the ECHR might have become a one-size-fits-all instrument that could not accommodate the varying social and cultural differences to be found in European countries.

Reservations

The treaties necessarily express human rights in fairly general terms. When ratifying, a State may formulate reservations to modify the effect on it of the obligations.[67]

Derogations

In very similar terms, both the ECHR (Article 15) and the ICCPR (Article 4) enable a party to take measures derogating from its obligations. For this there must be a public emergency threatening the life of the nation. The measures must be taken only 'to the extent strictly required by the exigencies [i.e. urgent needs] of the situation' and must not be inconsistent with other obligations under international law. The ICCPR adds that they must not involve discrimination solely on the ground of race, colour, sex, religion or social origin, and no doubt that is how the Court would interpret Article 15. No derogation is permitted by the ECHR from the right to life (except in wartime), torture, slavery, punishment not in accordance with law or the complete prohibition on the death penalty imposed by Protocol No. 13 (see above regarding Article 2). The ICCPR includes some other rights, including the freedom of thought, from which a party cannot derogate.[68]

Any derogation, and the reasons for it, must be communicated to the Council of Europe or the United Nations, as appropriate. *Numerous* derogations have been made.[69] In the case of the ECHR, it is ultimately for the Court to decide in a particular case whether the conditions for derogation exist, but the State has a wide 'margin of appreciation' as to whether the life of the nation is threatened.[70] In 2001, the United Kingdom gave notice of derogation from Article 9 of the ICCPR and Article 5(1) of the ECHR due to the public emergency existing in the UK caused by the threat of international terrorism.[71] As a result of the emergency, the Anti-Terrorism, Crime and Security Act 2001 was enacted. This

[66] See Shaw, p. 356–7; and *Ofulue* [2008] EWCA Civ 7.

[67] See p. 221 above on the US reservation to the ICCPR on the right to life. For more on reservations generally, see pp. 64 et seq. above.

[68] Note, however, the US reservation to the definition of torture in the ICCPR.

[69] See *UN Multilateral Treaties*, Ch. IV.4.

[70] See *Lawless* v. *Ireland* (1979–80) 2 EHRR 1; 31 ILR 290; and *Ireland* v. *UK* (1979–80) 2 EHRR 153; 58 ILR 190. See p. 227 above on the principle of a margin of appreciation.

[71] In connection with the ECHR derogation, see the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001 No. 3644).

enabled foreign nationals to be detained indefinitely under so-called control orders which amount to house arrest and other restrictions on what one can use and who one can meet, electronic tagging and requirements about reporting to the police regularly. Although subject to regular judicial scrutiny, the persons concerned were considered to be a threat to national security being suspected of being a terrorist, yet unwilling to leave the UK and cannot be deported or extradited because that could breach their human rights, in particular the right to life, not to be subjected to torture, etc.: see *Chahal*.[72] In 2004, the House of Lords held that detaining only foreign nationals under the Act was a breach of their human rights.[73]

Enforcement

Ratifying human rights conventions is all very well, but unless they can be enforced *effectively* they are worth little. Unfortunately, in too many States even the most basic human rights are constantly abused. Both the ECHR (Article 13) and the ICCPR (Article 2(3)) provide for the right to an effective remedy for a violation of any of the rights. Some States ratify human rights conventions without any real intention to respect them or to put in place the domestic mechanisms by which the rights could be properly protected. To be effective, a human rights convention needs not only international machinery, such as an international court or tribunal to which an individual can complain of a breach of his rights, but also domestic legal mechanisms by which judgments of the international court or tribunal can be properly implemented, either by paying compensation or by changing the law, or both. And, the mechanisms need to be truly effective. In practice, this is more likely in truly democratic States which thus have the rule of law. This means having an independent judiciary. It is therefore better to have a domestic legal system that protects rights effectively, so making it less necessary for people to seek redress from an international court or tribunal.

European Court of Human Rights (the Court)[74]

In 1998, the original two institutions created by the ECHR, the European Commission of Human Rights (the Commission) and European Court of

[72] (1997) 23 EHRR 413; 108 ILR 385.

[73] *A*. v. *Home Secretary* [2004] UKHL 56. The discriminatory provisions were replaced by the Prevention of Terrorism Act 2005, which applies also to British nationals. In *Secretary of State* v. *AF (No. 3)* ([2009] UKHL 28) on 11 June 2009 the House of Lords (following the judgment of the Court of 19 February 2009 in *A*. v. *the United Kingdom* (App. 3455/05)) decided that when a control order was made against a person he had to be given sufficient information of the case against him, so as to enable him to give effective instructions to the special advocate representing him.

[74] For information on the Court, including the text of the ECHR, the Protocols, other basic documents, judgments and other useful information, see www.echr.coe.int. See also,

Human Rights (the Court), were replaced by one institution: a revised Court on which each of the (at present forty-seven) parties to the ECHR is entitled to one judge. The jurisdiction of the Court extends to all matters concerning the interpretation or application of the ECHR. An individual, a legal person, an NGO or a group of individuals can make an application to the Court alleging a violation of the ECHR. A member State may also allege a breach of the ECHR by another member State (an 'inter-State case'), but this is rare. An application will not be admissible unless all local remedies have first been exhausted.[75] The application must then be made within six months. Applications can be made in any official language of a member State, but if declared admissible, all subsequent documentation must be in an official language of the Court: English or French. The application and pleadings are normally available to the public.[76]

The Court sits either as *Committees* of three judges, *Chambers* of seven judges or a *Grand Chamber* of seventeen judges. An application is first examined by a Rapporteur (one of the judges) who decides whether it should go to a Committee or straight to a Chamber. A Committee, by a unanimous vote, may declare inadmissible or strike out an individual application. Otherwise, by majority vote, a Chamber will decide on the admissibility of the case and, if it is declared admissible – but is not settled – on the merits of the application. If the case raises a serious question of interpretation of the ECHR, or might result in a judgment inconsistent with a previous judgment of the Court, the Chamber may, before giving judgment, and provided no party to the case objects, relinquish jurisdiction to the Grand Chamber. In exceptional cases, judgment of a Chamber may be referred by a party to the case to the Grand Chamber. But, it will be heard by the Grand Chamber only if that party accepts that the judgment of the Chamber raises a serious question of interpretation or application of the ECHR, or a serious issue of general importance.

Because of the huge and increasing backlog of cases, it was suggested that decisions on admissibility should be decided by a single judge with two assessors/rapporteurs, and that manifestly well-founded cases (where the situation is similar to previously decided cases so that no new question of law is involved) should be heard by a three-judge panel. The essence of these reforms has been included in Protocol No. 14, which will enter into force once all parties to the ECHR have ratified it. At the moment Russia is the only party yet to ratify.

Most of the facts and legal arguments are presented in writing. If a Chamber or the Grand Chamber agrees to an oral hearing (only in a minority of cases), this consists mostly of prepared Statements rather than a dialogue between judges and counsel. A final judgment of a Chamber or the Grand Chamber is binding on the State that is a party to the case. Execution of the judgment is, if

L. Wildhaber (a former president of the Court), 'The European Convention on Human Rights and International Law' (2007) ICLQ 217–31.

[75] See pp. 406–7 below for the relevant rules of international law.

[76] See P. Leach, *Taking a Case to the European Court of Human Rights*, 2nd edn, Oxford, 2005.

necessary, supervised by the Committee of Ministers of the Council of Europe.[77]

The Court may also give advisory opinions at the request of the Council of Europe's Committee of Ministers on the interpretation of the ECHR or its Protocols, although not on the content or scope of the rights and freedoms, there being a judicial procedure available to complainants, whether individuals or States.

Perhaps the greatest single factor that makes the Court so effective is the right of individual application (petition). Under Article 34, applications no longer need the consent of the State party concerned, but about 9 per cent of applications are held inadmissible. The most common grounds are that they are manifestly ill-founded or out of time, domestic remedies have not been exhausted, or the application amounts to an appeal on the merits from a domestic judgment. The following are the figures for the end of 2008. There were about 100,000 applications still pending, of which 60 per cent were by applicants from five States: Italy, Romania, Russia, Turkey and the Ukraine, not all of whom are new parties to the ECHR. In the same year, 24,200 applications were held inadmissible and 1,205 judgments given. But, despite reforms made to the system, the backlog is growing. The most troublesome is the large number of individual applications against Russia. This is not due just to the size of the population but, more significantly, to the lack of protection given by Russian courts to human rights. There are various ways by which the process could be speeded up, and in some cases these have been used. But it will be many years before the huge backlog of cases has been significantly reduced.

The Court has recently been criticised again for reversing decisions made by the House of Lords sitting as the final court of appeal for the United Kingdom.[78] The decisions of the Court are sometimes criticised for not being realistic,[79] and thus can cause problems not only for the Member directly affected, but also for the other Member States. This is not a new problem, although it has been partly alleviated by the Court's doctrine of the 'margin of appreciation'.[80] Judges, being only human, will sometimes come to decisions which may cause problems for governments or the people. When one sets up any court, whether national or international, one has to be prepared for this. This is especially so when the balance between public and personal interests are seen to be at issue. Any court may expand the scope of its jurisdiction in ways not envisaged when it was set up.[81] It is clear from Section 3(2) of the European Communities Act

[77] See, Council of Europe, E. Lambert-Abdelgawad, *The Execution of Judgments of the ECHR*, 2nd edn, Council of Europe, Strasbourg, 2008.

[78] Except for *criminal* appeals from Scotland. Sitting as a final appeal court, the House of Lords sat as a committee of the House. That committee was replaced on 1 October 2009 by a new body, the Supreme Court for the United Kingdom.

[79] See the speech by Lord Hoffmann on 19 March 2009 (www.jsboard.co.uk/> annual lectures).

[80] See pp. 227–8 above.

[81] See the seminal 1803 judgment of the US Supreme Court in *Marbury* v. *Madison* (5 US 137 (Cranch)) in which the Court stated that it could hold that a federal law was unconstitutional, though this power was not in the US Constitution.

1972 that our courts are bound by decisions of the (EU) European Court of Justice (ECJ). The Human Rights Act 1998 is not quite so clear that our courts are bound by decisions of the Court, although in practice they follow them.[82]

Other regional treaties

The American Convention on Human Rights 1969 has a Commission and a Court of Human Rights, based in San José, Costa Rica, which were inaugurated in 1979.[83] The African Charter on Human and Peoples' Rights 1981[84] has fifty-three parties. A 1998 Protocol on the Establishment of an African Court of Human and Peoples' Rights[85] entered into force on 25 January 2004 and so far has twenty-five parties. The Arab Charter on Human Rights 2004[86] is not fully compliant with international human rights standards, and has no human rights court.

Human Rights Committee[87]

In contrast to the ECHR and the American Convention, there is no court established to enforce the ICCPR. Instead, it has an eighteen-member Human Rights Committee.[88] The Committee is composed of nationals of parties, mostly judges or professors of law elected by secret ballot of the parties to serve in a *personal* capacity for a four-year, renewable term. The Committee meets three times a year in New York or Geneva. It operates, by consensus, in three ways: reports, general comments and individual complaints.

Reports

A party to the ICCPR must, within one year of becoming a party, submit a report to the Committee on how it is implementing the ICCPR. Thereafter, it must

[82] Section 2(1)(a) makes it clear that all our courts 'must take into account' any decision of the Court. Although that formula is less explicit than the UK legislative provisions concerning the decisions of the ECJ, in practice the result seems to be the same. As a party to the ECHR the United Kingdom is bound by decisions of the Court (Art. 46(1) of the amended ECHR). If the UK Supreme Court (see n. 78 above) were to depart from the jurisprudence of the Court, it is most likely that the judgment would then be reversed by the court. Yet it has been suggested that the courts of France and Germany feel free not to follow the jurisprudence of the court.

[83] 1144 UNTS 144 (No. 17955); ILM (1970) 99; BGG 671; Harris and Livingstone (eds.), *The Inter-American System of Human Rights*, Oxford, 1998; www.corteidh.or.cr; if necessary, click on the English version.

[84] 1520 UNTS 218 (No. 26363); ILM (1982) 58; BGG 728; www.africa-union.org> documents.

[85] BGG 741, and as above.

[86] BGG 774.

[87] Higgins (for ten years a member of the Committee), pp. 108–10; and D. McGoldrick, *The Human Rights Committee*, Oxford, 1991. For the annual reports of the Committee (and of the Committee against Torture and the CERD Committee), see www.unhchr.org.

[88] The Human Rights Committee (HRC) was often confused with the (completely different) UN Commission on Human Rights (CHR) on which States sit. In 2006, the CHR was replaced by the Human Rights Council (also known by its abbreviation, HRC), which is even more politically motivated than the CHR, but at least has the merit of being even easier to confuse with the other (and much more serious and effective) HRC. For both bodies, go to www.unhchr.org.

submit a report every five years, although ad hoc reports can also be requested. The Committee also accepts information from NGOs. Representatives of the party are questioned about its report at a public hearing of the Committee. Thereafter the Committee issues to all parties specific 'Observations' on each report. If a party fails to submit a report, the Committee can still consider the matter and give its views.

General Comments

The Committee is empowered to issue a 'General Comment' (GC) on implementation of the ICCPR. It has issued some thirty-three GCs. Although the object of a General Comment is to help the parties, and to further the purposes of the ICCPR, the Committee has been strongly criticised for occasionally straying into controversial questions of international law (as in GC 24).[89] Since the Committee is not a court, its pronouncements are not based on the facts of a particular case and without the benefit of hearing legal argument from the parties concerned. For example, compare GC 24 with GC 32 (on the interpretation of Article 14). But such of its GCs as have received wide support may be regarded as a secondary source of international law.[90]

Individual complaints

The (First) (1966) Optional Protocol to the ICCPR[91] enables the Committee to consider a 'communication' (petition) from an individual (not a legal person) who is subject to the jurisdiction of a party to the Protocol and who claims that he is the victim of a violation of the ICCPR by that party. The petitioner must first have exhausted all available domestic remedies, provided they have not been unreasonably prolonged.[92] The party has six months to respond. The Committee will not consider a communication that is already being investigated under another international procedure, such as by the European or Inter-American Courts of Human Rights. A Special Rapporteur of the Committee processes new communications, and the Committee's Working Group on Communications, decides by unanimity if a communication is admissible. The Committee considers the communication in private and then sends its views to the petitioner and the party.[93]

Although the procedure may at first sight seem similar to that of individual applications to the European Court of Human Rights, the Committee's views are not binding and there is no prescribed sanction for ignoring them, the chief

[89] See p. 71 above.
[90] To read them, go to www2.ohchr.org/english/bodies/hrc/> general comments). On subsidiary sources, see pp. 10–11 above.
[91] 999 UNTS 171 (No. 14668); ILM (1967) 368; UKTS (1977) 6; BBG 182. It now has some 111 parties.
[92] See pp. 406–7 below.
[93] See the comment of the Human Rights Committee of 29 October. 2008, under Art. 5(4) of the Optional Protocol, that Belgium had violated Arts. 12 and 17 of the ICCPR.

weapon being publicity. A summary of its activities under the Optional Protocol is published in the Committee's annual report to the UN General Assembly.[94]

A party may withdraw from the (First) Optional Protocol 1966.[95] Some States, such as the United Kingdom, which are parties to the ECHR, are not parties to the First Optional Protocol, since they consider the protection given by the UK courts and European Court of Human Rights is so effective that there is no need for an alternative procedure. But the United Kingdom is a party to the CEDAW Protocol (see below).

Other UN monitoring bodies[96]

There are committees to monitor the implementation of the Racial Discrimination Convention (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Torture Convention. They operate in a similar fashion to the HRC, and include provisions for individual petitions, subject to the State concerned making a general declaration of acceptance in the case of CERD and the Torture Convention, or ratifying the Optional Protocol to CEDAW. There is also a monitoring committee under the Rights of the Child Convention.

[94] For a sample of its work, see ILR, vols. 115 and 118.
[95] See p. 98 above on the Trinidad and Tobago manoeuvre.
[96] See www.unhchr.org.

12

The law of armed conflict (international humanitarian law)

Then every soldier kill his prisoners!

'Tis expressly against the law of arms.[1]

Roberts and **Guelff**, *Documents on the Laws of War*, 3rd edn, Oxford, 2000 ('R&G') or the ICRC website: www.icrc.org

UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004 ('Manual')

Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Geneva, 1953–60, 4 vols. ('Pictet')

Oppenheim, *Oppenheim's International Law, 7th edn, London, 1952*, vol. II ('Oppenheim') www.icrc.org

Introduction

The first quotation is from Shakespeare's story of Henry V's reaction at the Battle of Agincourt in 1415 to the murder of the boy servants of his army. The reply is that of his Welsh captain, Fluellen, who clearly had a better understanding of the Law of Arms (later the Laws of War). This chapter is headed 'The law of armed conflict' since that is now the better term to describe the international law governing the conduct of hostilities, including military occupation. (International lawyers sometimes also use the Latin term *jus in bello* to distinguish it from *jus ad bellum*, the law on the use of force).[2] But the currently fashionable term used by the United Nations, the International Court of Justice and the International Committee of the Red Cross is 'international humanitarian law' (IHL).[3] This reflects the law's fundamentally humanitarian purpose, but may mislead people into thinking that the subject covers all human rights, or even that it is concerned with humanitarian aid. Yet, IHL is a neat abbreviation and so will be used for the rest of this chapter.

Even if a State resorts unlawfully to the use of force, IHL will still apply to *all* parties involved in the conflict.[4] There does not have to be a declaration of war

[1] W. Shakespeare, *Henry V*, Act IV, scenes 6 and 7. [2] See pp. 205 et seq. above.

[3] The ICTY has jurisdiction over 'serious violations of International Humanitarian Law'.

[4] See the 'Reaffirming' paragraph of the preamble to Additional Protocol I of 1977 (n. 12 below).

or the recognition of a state of war,[5] the mere fact that there is an armed conflict is enough.[6] In IHL, the term 'armed conflict' has now replaced 'war'. IHL is very detailed and complex. There are over thirty treaties. It is not possible here to do more than mention the more important treaties and principles. For a much fuller treatment of the subject, one must consult specialist books.

Sources

Most IHL is now found in multilateral treaties, although an IHL treaty creates in effect a network of bilateral obligations and so usually enters into force after only *two* States have ratified it. Also, unlike most other treaties, the rights and obligations are not reciprocal: if a treaty is violated by one party to a conflict (e.g. by the murder of POWs) another party is *not* entitled to respond in like form or by committing a different breach of IHL.[7]

Broadly speaking, IHL treaties can be divided into two main streams: those stating the rules on how hostilities can be conducted in a lawful manner (Hague Law) and those governing the treatment of non-combatants (Geneva Law). These terms reflect the fact that the modern law was first comprehensively promulgated by the Hague Conventions of 1907[8] and then by the Geneva Conventions, of which the latest are the four of 1949, and which now have 194 parties.[9] A sub-species of Hague Law are those treaties restricting the use of certain weapons (rather than banning their production), the most recent being the Convention on Cluster Munitions 2008 (CCM).[10] Geneva Law has been supplemented by Additional Protocols I and II of 1977.[11] The first supplements the four Geneva Conventions and applies also to armed conflicts between a State and a national liberation movement. The second deals with internal conflicts. Both have been widely ratified. Additional Protocol I now has 168 parties and Additional Protocol II 164 parties. But it would be a mistake to see Hague Law and Geneva Law as mutually exclusive. There has been a tendency for the two streams to merge. For example, a significant part of Additional Protocol I modernises rules of combat, in particular by emphasising the hugely important principle of proportionality. Additional Protocol II also

[5] See C. Greenwood, 'The Concept of War in Modern International Law' (1987) ICLQ 283.

[6] See common Art. 2 of the four Geneva Conventions.

[7] But see p. 240 below on reprisals.

[8] Only the following are still applicable: Hague Convention IV (War on Land) and its Regulations, V (Neutrality), VII (Conversion of Merchant Ships into Warships), VIII (Automatic Submarine Contact Mines), IX (Naval Bombardment), XI (Right of Capture in Naval Warfare) and XIII (Neutrality in Naval Warfare). For their texts and very useful introductions, see R&G, pp. 67–137.

[9] I (Wounded and Sick on Land), II (Wounded and Sick at Sea), III (POWs) and IV (Civilians): see 75 UNTS 3 (Nos. 970–973); UKTS (1958) 39; R&G, pp. 195–369. For an authoritative commentary on them, see Pictet.

[10] See p. 239 below.

[11] 1125 UNTS 3 (No. 17512); ILM (1977) 1391; UKTS (1999) 29 and 30; R&G, pp. 419–512. And see Sandoz *et al.* (eds.), *Commentary on the Additional Protocols 1977 to the Geneva Conventions 1949*, Geneva, 1987.

deals with rules of combat. Similarly, the borderline between IHL and human rights law is becoming less distinct.[12]

Even when a State is not party to an IHL treaty it will be bound by those of its rules that now also reflect customary international law.[13] The degree to which IHL treaties reflect, or have come to represent, customary law is controversial.[14] The original Hague Law, and much of Geneva Law, although not yet all of Additional Protocols I and II, are now regarded as reflecting customary law and constitute the main body of IHL.[15] The importance of customary law is emphasised by the principle in the so-called Martens Clause, first enunciated in the Hague Conventions and later in the Geneva Conventions.[16] Article 1(2) of Additional Protocol I reaffirmed the application of the principle in cases not covered by the Protocol or by other treaties: 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.[17]

International and internal armed conflicts

Most IHL deals with international armed conflicts, that is, those between States. Even when a State sends armed forces to another State at its request to fight insurgents, that does not give the conflict an international character.[18] Common Article 3 of the four Geneva Conventions 1949 has some rather inadequate humanitarian principles applicable to 'armed conflict not of an international character'. So, with the increased concern about armed conflicts that are solely or partly internal, such as civil wars, Additional Protocol II developed and supplemented common Article 3 in respect of armed conflicts within a State between its forces and dissident forces or other organised armed groups. But, unlike the rest of the Geneva Conventions, neither Article 3 nor Additional Protocol II has enforcement provisions.

The legal distinction between international and internal armed conflicts is, however, becoming smaller. In *Tadić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) ruled that it has, albeit by implication, jurisdiction over Article 3 crimes. Its sister court, the International Criminal Tribunal for Rwanda (ICTR), has express jurisdiction over breaches of Article

[12] See also p. 215 above. [13] See pp. 6 et seq. above.

[14] Although useful, J.-M. Haenckaerts (ed.), *ICRC Study on Customary Rules of International Humanitarian Law*, Cambridge, 2005, overstates many claims to customary law status.

[15] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ICJ Reports* (2004), para. 89; 129 ILR 37; ILM (2004) 1009. There are still significant States that are not yet parties to the two Protocols, in particular the United States.

[16] E.g. Art. 63 of the First Geneva Convention.

[17] The preamble to Additional Protocol II has a simpler version.

[18] See the decision of the Appeals Chamber in *Tadić* (Jurisdiction), www.icty.org (Case IT-94-1-AR72); 105 ILR 453 at 489 et seq.

3 and Additional Protocol II;[19] and the International Criminal Court (ICC) has jurisdiction over crimes committed during an internal armed conflict.[20] The more recent treaties on weaponry, such as the 1996 amended Protocol II to the Certain Conventional Weapons Convention (CCWC) (on landmines) and the Landmines Convention 1997,[21] apply also to internal armed conflicts. The ICTY decision suggests that the customary law on internal armed conflicts is essentially the same as for international armed conflicts. Although the two Additional Protocols are significantly different, and many internal armed conflicts do not reach the Additional Protocol I threshold, the *Tadić* ruling is realistic and likely to be followed by other courts and tribunals, international and national. Article 8(2)(c) to (f) of the ICC Statute lists extensively war crimes committed during internal conflicts. So, the sensible course for a force commander is to treat *any* military operation as if it is an *international* armed conflict.

The central principles of IHL are that *belligerents* do not have an unlimited choice of means to attack the enemy; the distinction between combatants and non-combatants must be respected; non-combatants, whether prisoners of war, the sick or wounded, or civilians, must be treated with humanity; and attacks must be directed against military, not civilian, objectives.[22] In the two World Wars there were deliberate attacks on civilian objects, widespread plunder and acts of revenge. Today, it is clear that only those acts that are necessary to defeat the enemy are permissible, and so the means (e.g. weapons), and the objects against which they are used, are restricted. The basic rules for land warfare apply also to warfare at sea or in the air, subject to the necessary adaptations.

Weaponry

The use of certain types of weapon is prohibited.

Conventional weapons

Article 35 of Additional Protocol I reconfirms that the means of injuring the enemy are not unlimited, and thus it is 'prohibited to employ arms, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'. The means are set out in treaties and other instruments that are now regarded as representing customary international law, such as the 1868 St Petersburg Declaration,[23] the 1899 Hague Declarations 2 (Asphyxiating Gases) and 3 (Expanding Bullets)[24] and Hague Convention IV and its annexed

[19] See pp. 236–7 above. [20] See pp. 259 et seq. below.
[21] 2056 UNTS 241 (No. 35597); ILM (1997) 1509; UKTS (1999) 18.
[22] In *Anonymous* v. *Israel* (Cr. App. 6659/06), the Supreme Court of Israel held on 11 June 2008 that so-called unlawful combatants were, under the Incarceration of Unlawful Combatants Law, 5762–2002, protected as civilians by the Geneva Conventions.
[23] R&G p. 53. [24] Ibid., pp. 59 and 63 respectively.

Regulations Respecting the Laws and Customs of War on Land.[25] The principal and most detailed modern treaty is the CCWC, which has complex technical provisions in its three original Protocols on (I) Non-Detectable Fragments, (II) Mines, Booby-Traps etc. and (III) Incendiaries.[26] On ratifying the CCWC, a State has to consent to be bound by at least two of the Protocols. Although Protocol II prohibits only the *indiscriminate* use of landmines, Amended Protocol II of 1996 applies also to internal armed conflicts and the transfer of landmines, but still not their use, stockpiling or production, which are covered by the Landmines Convention 1997.[27] Protocol IV on Laser Weapons was adopted in 1995 and Protocol V on explosive remnants of war in 2003.[28] A general amendment to the CCWC and its Protocols to apply them to all non-international armed conflicts was adopted in 2001 entered into force in 2004, and now has sixty-eight parties.[29]

The Convention on Cluster Munitions 2008 (CCM)[30] will enter into force when thirty States have ratified it; so far, only six have done so. It goes further than Protocol V of the CCWC and bans the use, development, acquisition, stockpiling, retention and transfer of cluster munitions (CMs); that is weapons which disperse sub-munitions or small bombs (bomblets) over a wide area, Israel is alleged to have 'sown' some 4 million bomblets during its war with Lebanon in 2006. CMs are more likely to injure or kill civilians, especially when the conflict is over. They are not accurate and are liable to do disproportionate harm to civilians.

Nuclear, chemical and biological weapons (WMD)

Although no treaty specifically prohibits the use of nuclear weapons, it is widely agreed that IHL applies equally to their use. The International Court of Justice has held, unanimously, that IHL applies to the threat or use of nuclear weapons, but decided, only by the casting vote of its president, that it could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'.[31] The Court does not appear to have considered

[25] Ibid., pp. 67 and 73 respectively.

[26] UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects 1980, 1342 UNTS 137 (No. 22495); ILM (1980) 1523; UKTS (1996) 105; R&G, pp. 515–60. For the status of the Convention and Protocols, go to UNTC, status of treaties, Ch. XXVI.2. After thirty years, the Convention has only some 109 parties; the number of parties to each Protocol vary, but on average there are about 100. For some of the reasons, see A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243, at 259–60.

[27] 2056 UNTS 241 (No. 35597); ILM (1997) 1509; UKTS (1998) 18.

[28] Access: www.cicr.org/ihl.nsf/TOPICS?OpenView, and go to Methods and Means of Warfare.

[29] See www.icrc.org/ihl.

[30] www.clusterconvention.org/.

[31] *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* (1996), p. 226; 110 ILR 163.

the, admittedly paradoxical, possibility that in certain exceptional situations the threat or even use of nuclear weapons might be done altruistically to support demands by it or the United Nations for the observance of fundamental human rights, such as the prohibitions on genocide or, indeed, the use of other weapons of mass destruction against a third State. The advisory opinion may not weigh that heavily with a State that feels that morally it has no choice but to use a nuclear weapon, however terrible that would be.

The so-called Geneva Gas Protocol 1925[32] prohibited the first use of asphyxiating, poisonous or other gases and bacteriological methods of warfare, and is now generally recognised as representing customary international law. It has been supplemented by the Biological Weapons Convention 1972[33] and the Chemical Weapons Convention 1993.[34] Although they are more in the nature of disarmament treaties, the prohibitions on the possession of such weapons means that their use is also banned. They specifically prohibit their use in retaliation for an attack using them, so casting doubt on whether this would still be possible under the Gas Protocol, as some parties to it have asserted.

Reprisals

A reprisal in wartime is a form of retaliation, but one which goes further than is normally permitted. When a belligerent commits a breach of IHL, the enemy may, exceptionally, respond by action that would normally be illegal, provided a warning has been ignored and the purpose is to stop the breach, *not* to wreak vengeance. The reprisal must not target civilians or be disproportionate. Additional Protocol I prohibits certain reprisals.[35]

Prisoners of war

The Third Geneva Convention spells out in great detail how POWs must be treated. To take a simple example, on capture a POW can be hooded and restrained only as a *temporary* measure of military necessity. The most difficult problem is that of determining under Article 4 if a person is entitled to POW status. The principal category is that of members of the armed forces of a party to the conflict, including militias or volunteer corps that are a part of the forces. There is also the category of members of other militias and other volunteer corps, including 'organised resistance movements' belonging to a party to the conflict if they: (a) are commanded by a person responsible for his subordinates; (b) have a fixed distinctive sign recognisable at a distance; (c) carry arms openly; and (d) conduct operations in accordance with IHL. Civilian personnel

[32] R&G, p. 157. [33] 1015 UNTS 163 (No. 14860); ILM (1972) 309; UKTS (1976) 11.
[34] 1974 UNTS 317 (No. 33757); ILM (1993) 800; UKTS (1997) 45.
[35] See refs in n. 11 above, Arts. 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4). Some parties to Protocol I, including the UK, have reserved the right in certain very limited situations to take reprisals prohibited by Art. 56(4). See Manual, paras. 16.16–16.18.

accompanying a force are also included. If there is doubt as to whether a captured person is a POW, he enjoys the protection of the Convention until a 'competent tribunal' has determined his status (Article 5).

The POW categories were enlarged by Additional Protocol I, Articles 43 and 44, to cover also irregular or resistance forces, such as those often used by national liberation movements, which do not identify themselves by distinguishing marks, but provided they are under proper command and carry arms openly when attacking or when visible to the enemy while deploying to attack. Thus, terrorists are unlikely to be covered.[36]

The detainees held by US forces at Guantánamo Bay included some captured during the international armed conflict in Afghanistan that followed the terrorist attacks in the United States on 11 September 2001; some captured during subsequent hostilities in Afghanistan; and others detained in other States and suspected of terrorism.[37] In January 2009, the new US President announced that the detention facility at Guantánamo Bay would be closed within the year, although what will be done with the detainees is not yet clear.

Mercenaries

Because States, both developed and developing, find them useful, mercenaries have always existed, and are now often supplied by so-called private military companies. Latterly, the legal status of civilians employed by armed forces to carry out military or quasi-military tasks has been questioned. Article 47 of Additional Protocol I provides that a mercenary shall not have the right to be a combatant or prisoner of war. The meaning of 'mercenary' is set out in a complex and cumulative definition, the essential elements being that he is:

> *motivated* to take part in the hostilities essentially by the *desire for private gain* and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation *substantially in excess of* that promised or paid to combatants of similar ranks and functions in the armed forces of that Party. [emphasis added]

The definition was taken over by the Mercenaries Convention 1989,[38] but for the very different purpose of making it a criminal offence to recruit, use, finance or train mercenaries or, being a mercenary, to participate directly in hostilities. The definition may be just adequate for the purpose of Additional Protocol I, but is not precise enough to create a criminal offence, since the prosecution would have to prove all the elements of the definition, in particular the motivation of private gain. The Convention did not enter into force until 2001, and now has only twenty-six parties.[39]

[36] See further pp. 265–7 below. [37] As to the so-called war on terror, see p. 264 below.
[38] 2163 UNTS 96 (No. 37789); ILM (1990) 89.
[39] See A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243, at 260–2.

Civilians and civilian objects

The treatment of civilians is the subject of the Fourth Geneva Convention, which addresses the treatment of enemy aliens in the territory of a belligerent and the inhabitants of occupied territories. They are also the subject of Additional Protocol I, which adds significantly to the duty to protect civilians and civilian objects during active hostilities. The fundamental rule expressed in Article 48 of Additional Protocol I is that belligerents must distinguish between civilians and combatants, and between civilian and military objectives, and direct their operations only against combatants and military objectives. The civilian population and civilian objects must not be attacked deliberately or force used indiscriminately (Article 51(4)), as was done in the 'carpet bombing' of cities during the Second World War. But the death or injury of civilians or damage to civilian property is not illegal if it is accidental or unavoidable. In assessing such matters, one has to apply the rule of proportionality: whether the effect on civilians would be excessive. 'Military objectives' are those which, at the time, offer a definite military advantage if destroyed, captured or neutralised (Article 52). The bombing of a munitions factory will therefore usually be lawful even though civilian workers may be killed, and even if the factory is situated in a populated area with civilians living nearby. This is often described, euphemistically, as 'collateral damage', and can now be lessened by the use of laser-guided, precision missiles. The same considerations apply to strategic targets such as roads, bridges, power stations and airports. More difficult questions are whether, and in what circumstances, civilian officials (e.g. government ministers) or installations (civil radio transmitters) are legitimate military targets.

Occupied territory

Section III of the Hague Regulations,[40] the Fourth Geneva Convention and Articles 61–78 of Additional Protocol I lay down the rights and duties of a military occupant of foreign territory. The Convention governs most of the relations between the occupant and the local population and, although it applies only for one year after the end of hostilities, the provisions specifically applicable to occupied territory continue for so long as the occupant governs it (Article 6). An occupant's primary duty is to maintain public order and safety and to ensure the basic needs of the population. Local law can be amended or suspended, but not so that it affects legal rights, and local courts should be allowed to function. Private property must not be confiscated. The occupant may collect taxes, but any new taxes must be for the administration of the territory. Local nationals must not be deported, either individually or collectively.

[40] Annexed to Hague Convention IV (1907): R&G, pp. 73–84.

Although the inhabitants of an occupied territory are not prohibited by IHL from resisting the occupying forces, Article 5 of the Fourth Geneva Convention allows the occupier to try saboteurs, and others actively hostile to the occupying forces, for any crimes they commit.

Palestine

The claim by Israel that the Fourth Geneva Convention applies to the occupied Palestinian territories only *de facto* has been dismissed by the International Court of Justice,[41] which has advised that they are under military occupation, and so subject to the limitations imposed by the Hague Regulations and the Fourth Geneva Convention.[42] The Court also found that Israeli settlements in the occupied territory, including East Jerusalem, have been established in breach of international law, and that the wall and its associated regime gravely infringes, under IHL and international human rights treaties, a number of rights of the Palestinians living in the occupied territory and cannot be justified by military necessity, national security or public order.[43]

Enforcement

Although the four Geneva Conventions and Additional Protocol I all require the parties to penalise 'grave breaches' of them (e.g. Articles 49 and 50 of the First Geneva Convention), they deal with only certain war crimes. But all war crimes are crimes for which there is universal jurisdiction, so that any State can prosecute them.[44] The most authoritative, and convenient, list of war crimes, committed in international or internal armed conflicts, is now to be found in the ICC Statute.[45] The defence that an accused was acting under the order of a superior is available only in very limited circumstances.[46]

Since the end of the Cold War, the UN Security Council has had a considerable role in the enforcement of IHL. Numerous (legally binding) resolutions adopted under Chapter VII of the Charter reaffirmed the duty of belligerents to observe IHL, and authorised the use of force to protect civilians from grave and persistent breaches of IHL.[47] The Security Council also established the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda to try persons for war crimes and crimes against humanity.[48]

[41] *Legal Consequences* (n. 15) above, paras. 90–101. It is only an advisory opinion.
[42] See also UNSC Res. 242 (1967), 252 (1968), 465 (1980), 497 (1981) and 672 (1990); UNGA Res. 2253 and 2254 (1967) and 2949 (XXVII) (1972).
[43] *Legal Consequences* (n. 15) above), paras. 123–37. [44] See p. 44 above.
[45] Article 8 and the Elements of Crimes. See also pp. 258 et seq. below.
[46] See p. 254 below. For the historical background, see *Oppenheim*, 7th edn, vol. II, 1952, London, pp. 568–82.
[47] And see p. 208 above. [48] See pp. 255–6 below.

UN forces

The members of the armed forces of a UN Member deployed on a UN peacekeeping mission are entitled to use force in self-defence. If under Chapter VII the Security Council authorises Members to use force against another State (as in Resolution 678 (1990)), their armed forces will be taking part in an international armed conflict and IHL will apply to them. If they are on a UN peace-enforcing mission, IHL will still apply to them. Although the United Nations and other international organisations are not parties to IHL treaties, the armed forces of Members made available for UN missions remain bound by IHL and will benefit from its protection.[49] Problems may, however, arise if a Member which is part of a 'coalition', is not party to a particular IHL treaty (such as one of the Additional Protocols), but other members of the coalition are bound by it and it is not clear if the relevant provision also represents customary international law. This problem can be alleviated if the coalition forces operate under common rules of engagement. Enforcement by means of disciplinary or criminal proceedings against members of such armed forces is a matter for the Member concerned.

International Committee of the Red Cross[50]

The ICRC promoted the 1864 and all subsequent Geneva Conventions and the two Additional Protocols. It plays a central role in the practical implementation of IHL, in particular under the Geneva Conventions. The role of the ICRC is particularly important for helping to safeguard the health and welfare of POWs, including tracing them, visiting them and enabling them to correspond with their families,[51] as well as the welfare of civilians in occupied territory. Common Articles 9 and 10 (Articles 10 and 11 in the Fourth Geneva Convention) recognise the humanitarian role of the ICRC and provide that it may, with the consent of the parties to the conflict, act as the Protecting Power of one or more of them, and this is usually done. The role of Protecting Power (which can also be done by States) is to safeguard the interests of the parties to the conflict. The ICRC would therefore act as an impartial go-between, passing messages, making representations and suchlike.

[49] See common Art. 1(1) of the Geneva Conventions; the UN Secretary-General's Bulletin on Observance by UN Forces of IHL 1999 (R&G, pp. 725–30); and UN *Treaty Manual*, paras. 14–14.16.

[50] See also p. 178 above.

[51] See, in particular, Arts. 54, 56, 74–77, 79–81 and 122–126 of the Fourth Geneva Convention. The ICRC headquarters are well worth a visit, even as a tourist, albeit a serious one.

13

International criminal law

The most serious crimes of concern to the international community as a whole must not go unpunished and … their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation[1]

Cryer (ed.), *An Introduction to International Criminal Law and Procedure*, Cambridge, 2007 ('Cryer')
Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992 ('Oppenheim')

Introduction

The term 'international criminal law' is merely a useful way of describing those aspects of international law that are concerned with crimes which have an international aspect or dimension. We will first look briefly at mutual legal assistance in criminal matters and extradition, and then at international crimes and how international law seeks to deal with them. (Terrorism is dealt with in the next chapter.)

Mutual legal assistance

Oppenheim, pp. 484–8

Although only a tiny number of criminal cases have an international element, the few that do are often serious in nature. The greater ease with which people now travel abroad means that the authorities of a State investigating or prosecuting a crime may need the help of other States, who may also have an interest. Depending on the law and procedure of the requested State, assistance may be given on an informal basis. The association established by national police forces, Interpol, may be used to exchange criminal *intelligence* (not extradition, etc.).[2] Within the European Union, the European Police Office (Europol) plays a similar

[1] Preamble to the Rome Statute of the International Criminal Court. [2] See www.interpol.int.

role.[3] More direct assistance can be provided by a State, yet without a treaty.[4] But, if there is a frequent need for help, bilateral or multilateral treaties or schemes for mutual legal assistance in criminal matters may be desirable.[5] Their principal purpose is to help in tracing persons and the obtaining of evidence, including witnesses. The execution of a request is subject to the law of the requested party. Some of the treaties deal with specific crimes, such as drug trafficking.[6]

Extradition

Oppenheim, pp. 948–72
Stanbrook and **Stanbrook**, *Extradition Law and Practice*, Oxford, 2000

Extradition (sometimes called rendition)[7] is the procedure by which a person accused or convicted of a crime (although not usually *in absentia* – in his absence) is transferred *formally* to a State where he is wanted for trial or to serve his sentence. In the absence of a treaty, a State has no obligation to extradite. But extradition can take place without a treaty if this is acceptable to both States and permissible under their laws. It can be done ad hoc[8] (although this may require the requesting State to agree to accord reciprocal treatment) or pursuant to a non-treaty scheme implemented by parallel legislation in the participating States.[9]

But most extradition is done under the hundreds of extradition treaties concluded during the last 150 years in response to the enormous increase in international travel following the invention of the railway, steamship, sealed

[3] For the text of the Europol Convention 1995: 2156 UNTS 200 (No. 37663); UKTS (2000) 103; OJ C316 of 27 November 1995 or go to www.europol.europa.eu/.
[4] See the (UK) Criminal Justice (International Co-operation) Act 1990.
[5] See the Colombia–UK Mutual Legal Assistance in Criminal Matters Agreement 1997, 2115 UNTS 47 (No. 36782); UKTS (2000) 40; and the European Convention on Mutual Assistance in Criminal Matters 1959 and the Additional Protocol of 1978, 472 UNTS 185 (No. 6841) and 1496 UNTS 350 (No. 6841); UKTS (1992) 24; the EU Convention on Mutual Assistance in Criminal Matters 29 May 2000, OJ 2000 No. C197/3; the 1990 UN Model Treaty on Mutual Assistance in Criminal Matters, A/RES/45/117; ILM (1990) 1410; the UK–US Treaty on Mutual Assistance in Criminal Matters 1994, as amended 2002, 1967 UNTS 102 (No. 33632) and 2144 UNTS 392 (No. 36773); UKTS (1997) 14 and UKTS (2002) 8. See also the Commonwealth (Harare) Scheme Relating to Mutual Assistance in Criminal Matters, as amended, at www.thecommonwealth.org (click on 'What we do', then 'Law', then 'Documents'). This and other Commonwealth schemes (n. 9 below) are *not* embodied in treaties, and so depend on Commonwealth countries enacting 'matching' national legislation to implement them.
[6] Chile–UK Agreement on Mutual Assistance on Drug Trafficking, 2225 UNTS 21 (No. 34354); UKTS (1997) 63.
[7] 'Rendition' is a generic term covering all the means of returning alleged offenders (extradition, deportation, expulsion and exclusion) that are lawful. See p. 249 below on so-called irregular rendition. Abduction (p. 47 above) is also illegal.
[8] (UK) Extradition Act 2003, s. 194.
[9] See the London Scheme for Extradition within the Commonwealth, as amended in 2002: go to www.thecommonwealth.org >'What we do' >'Law' >'Documents'.

road, motor vehicle and aeroplane. Most are bilateral and specify the crimes that are extraditable, usually serious offences such as those punishable by imprisonment for at least one year.[10] They will almost always incorporate the *double criminality* principle (extradition is granted only if the act for which extradition is sought is a crime in both the requesting and the requested States, although it does not have to be called by the same name), and the *principle of speciality* (if extradited, the accused will be tried only for the crime for which he was extradited). Most treaties will also require that the requested State be satisfied that there is at least prima facie evidence of the guilt of the accused (but see below on simplified extradition).

The request for extradition is normally made formally through the diplomatic channel, accompanied by the arrest warrant, information about the identity of the accused and the basic facts of the offence. Often, the request will ask for provisional arrest pending arrival of all the necessary paperwork. In most States, the request will be scrutinised by the courts, where the accused can challenge it. Usually, the final decision will be taken by the executive, to which the domestic law will usually give discretion to refuse the request, subject only to treaty obligations, including those on human rights.

The constitutions of many States, including some European States, prohibit the extradition of their own nationals, but their laws enable them to prosecute their nationals for serious crimes committed abroad. Other States, including the United Kingdom, can extradite their own nationals and therefore their laws enable prosecution of their nationals for only a few categories of serious crimes committed abroad. The problems created by the prohibition on extraditing their own nationals can be partly[11] overcome by universal or quasi-universal jurisdiction regimes, although such regimes are limited to 'international crimes'.[12]

The accused may successfully plead that it would be contrary to the human rights obligations of the requested State to extradite him to the requesting State. This is particularly so if there are grounds for believing that the accused may be tortured or subject to other cruel or inhuman treatment.[13]

Extradition should be effected directly between the two States by the police of the extraditing State taking the person in their custody to the requesting State (and if by air or sea, preferably in an aircraft or ship registered in the extraditing State) and there handing him over to its police. A transit stop in a third State should not cause problems if the accused remains on the aircraft or ship. But

[10] See the Hong Kong SAR–UK Agreement for the Surrender of Fugitive Offenders 1997, 2038 UNTS (No. 35239); UKTS (1998) 30 and the 1990 UN Model Treaty on Extradition, A/RES/45/117; ILM (1991) 1410. See also the (CoE) European Convention on Extradition 1957, 359 UNTS 221 (No. 5146); UKTS (1991) 97, although it is now largely overtaken by the new EU Framework Decision (see the text to n. 19 below).

[11] But on the *Lockerbie* dilemma, see p. 222 below.

[12] See pp. 44 above and 275 below.

[13] See p. 222 above, and, in particular, *Soering* (1989) 11 EHRR 439; ILM (1989) 1063; 98 ILR 270; and *Chahal* (1997) 23 EHRR 413; 108 ILR 385.

once he leaves the aircraft or ship, there is the danger that he may challenge the lawfulness of his custody, and a request for extradition from the third State may then be needed.[14]

There are also treaties providing for prisoners to be transferred from the State where they were convicted to serve the whole or part of their sentence in another State, normally their State of nationality.[15] Such arrangements can be mutually beneficial: the first State gets rid of an undesirable, and the offender is nearer his family.

Political offence/exception[16]

Domestic law and extradition treaties often provide that a 'political offence' is not extraditable. This political exception is not required by international law, and must be clearly distinguished from provisions in domestic law or mutual legal assistance or extradition treaties that assistance or extradition may be refused if the real purpose of a request is to prosecute or persecute the person for his political opinion rather than for the crime itself.[17] There is no agreement internationally on what constitutes a political offence: whether it is the purpose or motive that is political or the crime is directed at the State, such as the assassination of a Head of State. In the past, US courts have several times refused extradition to the United Kingdom of members of the Irish Republican Army accused of politically motivated terrorist offences.

The political exception has been excluded in respect of some especially cruel offences, such as genocide and certain terrorist offences.[18]

Simplified extradition

Between States with similar standards of criminal justice, it may be possible to replace traditional extradition by simplified procedures. This was done in the EU Framework Decision on the European arrest warrant and surrender procedures between Member States of 13 June 2002, which aims to simplify and speed up the extradition ('rendition' in the Decision) of accused or convicted

[14] The UN flew the two accused of the Lockerbie bombing to the Netherlands for trial before a Scottish court exercising jurisdiction there with Dutch consent. Once they had landed, they had then to be extradited from Dutch jurisdiction to Scottish jurisdiction. Luckily, there was no challenge: see A. Aust, 'Lockerbie: The Other Case' (2000) ICLQ 278–96.

[15] See the European Convention on the Transfer of Sentenced Persons 1983, 1496 UNTS 92 (No. 25703); ILM (1983) 530; UKTS (1985) 51, as amended by an Additional Protocol of 1997, 2138 UNTS 244 (No. 25703); and the London Scheme for the Transfer of Convicted Offenders within the Commonwealth, at www.thecommonwealth.org >'What we do' >'Law' >'Documents'. See also the Sri Lanka–UK Agreement on Transfer of Prisoners 2003, 2309 UNTS (No. 41160); UKTS (2004) 31.

[16] For a most detailed account, see Oppenheim, pp. 962–72.

[17] See p. 272 below.

[18] See p. 251 below on genocide, and p. 272 below on the trend to exclude the political exception in terrorist cases.

persons.[19] As between EU Member States, it does this by radical means. All previous extradition procedures, including Council of Europe extradition treaties and bilateral treaties, are replaced. Each Member State must comply with a request from a court or prosecutor of another Member State for the execution of an arrest warrant issued by him for a person accused of an offence carrying a minimum sentence of twelve months' imprisonment or who has been convicted and sentenced to a minimum of four months' imprisonment. The arrest warrant need only contain a description of the circumstances in which the offence was committed. The judicial authorities (not the executive) decide on the request, which must be done within ninety days of the arrest, although in practice it is often quicker. Member States *cannot* refuse a request to hand over their own nationals, as some could before. The principles of double criminality and speciality no longer apply, although a Member State may list those offences that it will exclude from the new procedure on the ground that it would be contrary to fundamental principles of its legal system. And, the double jeopardy rule remains.

A new UK–US Extradition Treaty was signed on 31 March 2003.[20] It is on largely traditional lines, except that an extradition request by the United Kingdom to the United States still has to make a prima facie case, but those by the United States to the United Kingdom will have, in effect, to show only *probable cause*. Despite what has been said by US spokespersons, this is a lower threshold.[21] Thus, the new treaty creates a new principle of double standards. On 25 June 2003, EU–US treaties on mutual legal assistance and extradition were signed.[22] These supplement, and will require amendments to, existing bilateral treaties on the subjects with EU States. Although they should enhance cooperation in tackling serious crime, they are on more traditional lines.

Irregular means[23]

Sometimes a State seeks to bypass extradition procedures by deporting a fugitive ('disguised extradition').[24] But such actions may well be contrary to both domestic law and international law, such as the alleged complicity of several States with the United States in irregular renditions of suspected

[19] 2002/584/JHA (OJ No. L190/1 of 18 July 2002). See Keijzer (ed.) *The European Arrest Warrant in* Practice, 2nd edn, Cambridge, 2009. As to the legal nature of EU framework decisions, see p. 441 below.

[20] UNTS (No. 44681); UKTS (2007) 13.

[21] Contrast Art. 8(3)(c) with Art. IX of the previous 1972 Extradition Treaty, 1049 UNTS 167 (No. 15811); UKTS (1977) 16; TIAS 8468. The actual wording applicable to requests by the United Kingdom is in section 8(3)(c): 'for requests to the United States such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested'. See also C. Warbrick, (2007) ICLQ 199–208.

[22] ILM (2004) 749.

[23] See Oppenheim, pp. 388–90, n. 16.

[24] See *R.* v. *Governor of Brixton Prison, ex parte Soblen* [1963] 1 QB 829; [1963] 2 QB 243; and Oppenheim, p. 947, n. 7.

terrorists during the so-called war on terror. Even if they, or the United States, said that such renditions were done with the approval of the States in question, the human rights both under international and *domestic* law of the persons rendered were not respected.[25] Indeed, a State will even in ordinary times sometimes seize (abduct) a wanted person without the consent or acquiescence of the State where he is.[26]

International crimes

There is no agreed definition of 'international crime', but it is a convenient term for those crimes that are of concern to every State because of their corrosive effect on international society or their particularly appalling nature. For such crimes, international law does not place criminal responsibility on the State on whose behalf the crime may have been done (although the State may incur international responsibility),[27] but on the individual who committed the crime. In addition, although it is by no means universally agreed, it is likely that international law allows a State to prosecute such crimes regardless of where they were committed or the nationality of the accused (universal jurisdiction).[28] Whether the crime is one which can be prosecuted in the domestic courts of a State depends on the laws of that State. Although many international crimes will also amount to ordinary crimes such as murder, domestic courts will not necessarily have jurisdiction over them; specific legislation may be needed to confer jurisdiction.[29] The acts that today constitute international crimes are nothing new but, with the notable exception of piracy, it was only in the twentieth century that a concerted effort was made to treat them as international crimes.

The crimes discussed below are *not* the only ones to be called 'international crimes'. The term is also sometimes used to describe crimes covered by treaties (various terrorist crimes, drug offences, etc.) which impose obligations on the parties to criminalise the activities concerned and to prosecute or extradite suspected offenders. The crimes are ones that the international community has considered as sufficiently serious in effect internationally to warrant a particular form of international cooperation.

Piracy

Customary international law has for centuries treated pirates as international outlaws subject to the jurisdiction of any State. Piracy is any illegal act of violence or detention committed on the high seas for *private* ends by a *private* ship against another ship. Warships of any State may board a foreign-registered

[25] See the Opinion of 17 March 2006 of the Venice Commission of the Council of Europe (www.venice.coe.int/).

[26] See p. 47 above. [27] See p. 379 below. [28] See p. 44 above for details.

[29] The House of Lords has held that English law has no crime of aggression: *R.* v. *Jones* [2006] UKHL 16; ILM (2006) 988.

ship on the high seas that is suspected of piracy. If it proves to be a pirate ship, it can be seized and those on board arrested and tried in the flag State of the warship, provided the domestic law of that State allows for a trial,[30] or another State is willing to exercise jurisdiction. Despite this, piracy is again a curse in many parts of the world.

Slavery

Slavery is an even older practice, and is still with us today. Although there have been various treaties seeking to combat slavery, and it is now accepted that the abhorrent practice is prohibited by customary international law, it is still not clear if slavery is subject to universal jurisdiction.[31] However, the 1998 Statute of the International Criminal Court (ICC)[32] includes 'enslavement' in its definition of crimes against humanity, defining it as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'. Although for the purposes of the jurisdiction of the ICC slavery is limited to acts committed as part of a widespread or systematic attack directed against a civilian population, it is now more probable that national courts would be willing to exercise universal jurisdiction in respect of isolated acts of slavery.

Genocide

W. Schabas, *Genocide in International Law*, 2nd edn, Cambridge, 2009 ('Schabas')

Genocide has been practised for centuries. But the term was invented only in 1944 by a historian to describe the Holocaust. In 1946, the UN General Assembly adopted, unanimously and without debate, Resolution 96 (I) declaring genocide to be an international crime. In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted.[33] It defines genocide as: any of the following acts committed *with intent to destroy*, in whole or in part, a national, ethnical, racial or religious group, as such: [emphasis added]

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;

[30] The law is now codified in the UN Convention on the Law of the Sea 1982, 1833 UNTS 3 (No. 31363); ILM (1982) 1261; UKTS (1999) 81 (Articles 101, 105, 107 and 110). For more details, see Chapter 15 below. See also UNSCR 1816 (2008), esp. preambular paras. 4 and 5 and op. para. 7; and UNSCR 1846 (2008).

[31] See Oppenheim, pp. 978–82. [32] For the ICC, see p. 258 below.

[33] 78 UNTS 277 (No. 1021); UKTS (1970) 58.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Although the Convention still has only 140 parties, this may be because there can no longer be any doubt that genocide is regarded as a crime in customary international law. The International Criminal Tribunals for the Former Yugoslavia and for Rwanda and the International Criminal Court each have express jurisdiction over genocide as defined in the Convention.

A State can be responsible (although not criminally) for genocide even if no person has been convicted of the crime.[34] The mass murder in Rwanda in 1994 of the Hutu by the Tutsi was clearly genocide. If committed today, the atrocities committed on the Turkish Armenians in 1915 would amount to genocide if it could be established that there had been an intent to destroy, in whole or in part, the Armenian population.

Genocide is sometimes grouped together with crimes against humanity, and which, like the latter, can be committed in peacetime as well as during an armed conflict. But what distinguishes it from crimes against humanity is that the acts must be committed 'with intent to destroy' a group, so putting it in a class of its own. The definition, and the Elements of Crime that supplement the ICC Statute,[35] suggest that many of the crimes committed in the former Yugoslavia against ethnic groups could be classified as genocide, and that most of the acts described as 'ethnic cleansing' were rather crimes against humanity, such as forcible transfers of population.

The Genocide Convention places criminal responsibility on all individuals, Article IV making no exception for Heads of State or lesser public officials. But the enforcement of the Convention is left to the courts of the party in whose territory the crime was committed (Article VI). Article VII provides that genocide shall *not* be considered a political crime for the purposes of extradition. But the Convention does *not* establish a regime of universal jurisdiction.[36]

Crimes against humanity

Oppenheim, pp. 995–8
W. Schabas, *The International Criminal Court*, 3rd edn, Cambridge 2007, pp. 98–112 ('Schabas')

Here we are concerned with grave offences against life and liberty on an extensive scale, even if they are lawful under national law (as they were in

[34] See p. 259, n. 60 below.
[35] See *Genocide (Bosnia* v. *Serbia)*, *ICJ Reports* (2007) p. 1, paras. 142–210 and 377–438. On the 'control test' see R. Higgins, 'A Babel of Judicial Voices?' (2006) ICLQ, 791, at 794–5.
[36] See p. 44 above.

Nazi Germany). Crimes against humanity may also be seen as *collective* violations of basic human rights, rather than those of an individual. The Charter of the Nuremberg International Military Tribunal included crimes against humanity, although only in connection with war crimes or crimes against the peace.[37] This link no longer exists; crimes against humanity can be committed in peacetime. Article 7 of the Statute of the International Criminal Court lists the crimes (with some more recent additions). They include murder, extermination, enslavement, deportation or forcible transfer of population (e.g. ethnic cleansing), imprisonment, torture, rape, sexual slavery, enforced prostitution or sterilisation and enforced disappearance of persons. But, to be a crime against humanity, the Statute requires the acts to have been committed as part of a 'widespread or systematic attack directed against any civilian population' and to be done 'pursuant to or in furtherance of a State or organisational policy to commit such attack'; and the policy requires that the State or organisation 'actively promote or encourage' the attack (see the ICC Elements of Crimes).[38] Unlike genocide, there is no requirement that the acts must be committed 'with intent to destroy' a group. Nor is it clear if national limitation periods for crimes can still apply to them,[39] but the ICC has no such limitation on its jurisdiction (Article 29). The jurisdiction of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) include crimes against humanity, and in *Tadić* the ICTY declared that crimes against humanity are part of customary international law.[40]

War crimes

See pp. 235–44 above.

Aggression

Although the Nuremberg International Military Tribunal established that aggressive war is a crime against the peace, none of the international tribunals set up since the end of the Cold War has jurisdiction over that crime, and the International Criminal Court will be able to exercise jurisdiction over the crime of aggression only if and when a definition can be agreed.[41]

Responsibility of superiors

Article 7(3) of the ICTY Statute provides that a superior is responsible for an act done by a subordinate if the superior knew or had reason to know that the subordinate was about to commit the act, or had done so, and the superior

[37] See n. 37 below.
[38] See, N. Jørgensen, 'Genocide as a Fact of Common Knowledge' (2007) ICLQ 885–98.
[39] See Oppenheim, p. 997, n. 11. [40] ILM (1997) 908, at 935, paras. 618–23; 105 ILR 453.
[41] See p. 259 below.

failed to take the necessary and reasonable measures to punish the perpetrator or prevent repetition by him.[42] Article 28 of the ICC Statute distinguishes military and other superiors. A military commander is criminally responsible for crimes committed by his forces as a result of his failure to exercise proper control over them, if he knew, or should have known, that crimes were being or were about to be committed by them and he failed to take all necessary and reasonable measures within his power to prevent or repress them. Other superiors, such as a Head of State or government or minister of defence, are criminally responsible for crimes committed by subordinates under their effective authority and control as a result of their failure to exercise proper control over them, if the superior knew or ignored information about the crimes and failed to do all in his power to prevent or repress them. Although the ICC Statute resulted from lengthy and detailed UN negotiations, Article 28 may not represent the present consensus as to the law on this difficult and important issue.

Superior orders

Article 8 of the Nuremberg Charter[43] provided that acting pursuant to superior orders does not free an accused from responsibility, but 'may be considered in mitigation of punishment if the Tribunal determines that justice so requires'. Following on from that, Article 7(4) of the ICTY Statute provides that a superior order does not relieve the accused of responsibility, but may mitigate the punishment. Article 33 of the ICC Statute confirms that an accused cannot plead in his defence that he was carrying out the orders of his superior, but, as the result of a compromise in the negotiations for the Statute, it provides for a limited defence in the case of, in effect, war crimes: if the accused had been under a legal obligation to obey the order *and* did not know it was unlawful *and* the order was not 'manifestly' unlawful. But, an order to commit genocide or a crime against humanity is declared to be manifestly unlawful.

International tribunals

Schabas, *The UN International Criminal Tribunals*, Cambridge, 2006

Although there were earlier proposals for international criminal tribunals,[44] the first to be established was the Nuremberg International Military Tribunal,[45] followed by the Tokyo Tribunal.[46] Having been established by the leading

[42] See the ICTY judgment in *Celebići* (1998), ILM (1999) 677, paras. 370 et seq.
[43] See p. 6 above. [44] See Shaw, p. 399.
[45] See 82 UNTS 279 (No. 251); UKTS (1945) 4. The judgment is in (1947) AJIL 173–332. See also *The Charter and Judgment of the Nuremberg Tribunal, History and Analysis* (UN Doc. 1949 V 7); and Woetzel, *The Nuremberg Trials in International Law*, London, 1962.
[46] See 15 AD 356.

powers that had fought Germany and Japan, they were not truly international, but the law applied by them was proper and their procedures fair, suggestions of 'victors' justice' being nonsense.[47] The Charter and Judgment of the Nuremberg Tribunal laid down important principles of international law that were endorsed unanimously by the UN General Assembly in 1946.[48] The most important were that persons are individually responsible for international crimes; aggressive war is a crime against the peace; a Head of State and other senior officials can be personally responsible for crimes even if they did not actually carry them out; and the plea of superior orders is not a defence. These principles are now part of customary international law even though their precise scope may still not be clear.

International Criminal Tribunal for the Former Yugoslavia (ICTY)

Acting under Chapter VII of the UN Charter, the Security Council established the ICTY by Resolutions 808 (1993) and 827 (1993).[49] Located at The Hague, in the Netherlands, it has criminal jurisdiction over individuals accused of committing grave breaches of the Geneva Conventions 1949, war crimes, genocide or crimes against humanity in the former Yugoslavia since 1 January 1991, and has ruled that it has jurisdiction over crimes committed during an internal conflict and listed in common Article 3 of the Geneva Conventions.[50] It has concurrent jurisdiction with national courts, but can request them to relinquish jurisdiction in its favour. Cases are tried in one of three trial Chambers, each composed of three judges. These are drawn from the fourteen permanent judges (elected by the UN General Assembly for four-year, re-electable terms, one of whom serves as President of the ICTY), and a number of *ad litem* (temporary) judges elected for a four-year, non-re-electable term. A majority of the judges are experts in criminal law and procedure. The Appeals Chamber (which is also the Appeals Chamber for the ICTR) consists of seven of the permanent judges (five from the ICTY and two from the ICTR). Five judges hear each appeal. The Prosecutor is appointed by the UN Security Council, on the nomination of the UN Secretary-General, for a four-year, re-electable term, and acts independently of the Council or any government.

Article 7 of the Statute provides that a person who planned, instigated, ordered, or otherwise aided and abetted in the planning, preparation or execution of a crime, is individually responsible for it;[51] that former Heads of State or government and government officials are not relieved of criminal

[47] See *Oppenheim's International Law*, 7th edn, London, 1952, vol. II, pp. 579–82.

[48] UNGA Res. 95 (I). See A. Aust, 'The Security Council and International Criminal Law' (2002) NYIL 23, at 25.

[49] The Statute is not annexed, so see the annex to the UN Secretary-General's Report of 3 May 1993 (S/25704) or ILM (1993) 115. A slightly amended version of the Statute is at www.icty.org/. For more details of how the tribunal works, see Shaw, pp. 402–7, or the tribunal's website.

[50] See p. 237 above. [51] Cf. Article 25 of the ICC Statute and p. 261 below.

responsibility;[52] that a superior is responsible in certain circumstances for an act of a subordinate (see above); and that a superior order does not relieve the accused of responsibility (see above).

At first, there were doubts expressed (especially by the United Kingdom) whether the ICTY would be effective. Unlike the Nuremberg Tribunal, the suspects were still in their own countries, as were witnesses and physical evidence. Success would therefore depend on the cooperation of governments, especially those in the former Yugoslavia. But, despite the problems created by the Milošević and Karadžić trials, the ICTY has been very successful. So far, there have been 57 convictions; 36 indictments withdrawn, 13 persons referred to national jurisdiction and 10 acquitted.[53] At present 6 persons are at the pre-trial stage and 21 are on trial. The ICTY is very expensive, there being over 1,100 staff. The budget for 2008–9 is over US$ 342 million. The ICTY aims to finish its work by the end of 2012, although General Mladić is still at large.

International Criminal Tribunal for Rwanda (ICTR)

Following the massacres committed in Rwanda and some neighbouring States in 1994, acting under Chapter VII of the UN Charter the Security Council established the ICTR by Resolution 955 (1994), to which its Statute is annexed.[54] Located in Arusha, Tanzania, and with premises in Kigali, Rwanda, it has criminal jurisdiction over genocide, crimes against humanity and serious violations of common Article 3 to the Geneva Conventions, and of Additional Protocol II 1977 (non-international armed conflicts), committed in 1994 by individuals in Rwanda and by Rwandan citizens in neighbouring States. Its powers, composition and procedure are otherwise closely modelled on those of the ICTY. In June 2009, a former interior minister, Kalimanzira, was sentenced to thirty years for genocide. So far, some thirty-two judgments have been given and six are awaited. There are now some ten cases where a trial is pending or there is to be a retrial. Thirteen persons are still at large.

The Tribunal is now in a difficult phase. Its current and upcoming workload is exceptionally high, and recent developments have shown that the workload will probably increase in 2010 more than expected, although the Tribunal remains strongly committed to the goal of completing trials by the end of 2010. Whether this can be achieved will depend on the final number of new cases that will be tried that year.

[52] The provision was intended also to remove immunity from current heads of State, etc.: see the Report of the UN Secretary-General of 3 May 1993 (S/25704), para. 55, and *Milosšević*, Trial Chamber III, Decision of 8 November 2001, paras. 26–34. See also p. 161 above.

[53] States can agree to hold convicted prisoners; see, for example, the UK–UN Agreement 2004, 2252 UNTS (No. 40107); UKTS (2004) 20.

[54] It is also in ILM (1994) 1598, and at www.ictr.org.

Sierra Leone Special Court[55]

The Court was established by a treaty between Sierra Leone and the United Nations of 16 January 2002,[56] although that does *not* make it a UN body. The Court, located in Freetown, Sierra Leone, began trials in 2004. It can sit outside Sierra Leone, and the trial of Charles Taylor is being held in The Hague. It has jurisdiction over persons accused of bearing the greatest responsibility for serious offences committed since 30 November 1996 and contrary to common Article 3 of the Geneva Conventions and Additional Protocol II 1977, over other serious violations of international humanitarian law (such as intentionally directing attacks against civilians and conscripting children under 15), and over certain serious crimes under Sierra Leonean law. In most other respects, the Statute of the Court follows that of the ICTR.

The main role of the United Nations is for the UN Secretary-General to appoint, upon nomination by States (in particular, those of the Economic Commission for West Africa (ECOWAS) and the Commonwealth) two of the three judges of the Trial Chamber and three of the five judges of the Appeals Chamber. He also appoints the prosecutor after consultation with the Government of Sierra Leone.

By comparison with the ICTY and ICTR, the number of indictments will be much more limited; in practice, there are likely to be indictments against a maximum of twenty persons. It is intended that the Court should limit its indictments to those persons bearing the greatest responsibility for the crimes listed above. The Court will also have a much shorter life than the ICTY or the ICTR, and is expected to complete most of its work in a few years. So far, two trials have been completed, included appeals.

Extraordinary Chambers of the Courts of Cambodia

The Extraordinary Chambers are *not* an international court, but part of the Cambodian court system. However, under a treaty between Cambodia and the United Nations in 2003,[57] Cambodia agreed that Cambodian judges should sit together with foreign judges nominated by the United Nations to hear serious accusations of genocide, crimes against humanity and grave breaches of the Geneva Conventions committed by senior leaders of Democratic Kampuchea between 17 April 1975 and 6 January 1979. In the trial chamber there are three Cambodian and two 'UN' judges, with four judges needed to convict; in the appellant chamber, the numbers are four and three, with five judges needed to

[55] See Shaw, pp. 423–6 and 428–9, which deals with special courts and other bodies on Kosovo, Timor Leste, Bosnia, Iraq and Serbia. See also, Romano, Nollkaemper and Kleffner (eds.), *Internationalized Criminal Courts*, Oxford, 2004.

[56] See www.sc-sl.org. The text of the treaty is also in S/2002/246 and 2178 UNTS 138 (No. 38342). See also R. Cryer, 'A "Special Court" for Sierra Leone' (2001) ICLQ 435.

[57] 2329 UNTS 1 (No. 41713). See Shaw, pp. 421–3 and www.unakrt-online.org/01_home.htm.

uphold a conviction. The judges apply both Cambodian and international law. The first trial, of so-called Duch, began on 30 March 2009.

Special Tribunal for Lebanon

Following the murder in 2005 of the former Lebanese Prime Minister, Rafiq Hariri, and an international investigation into his death, in Resolution 1757 (2007), the UN Security Council established the Special Tribunal for Lebanon. It is based in The Hague and opened on 1 March 2009. It is hybrid, having both international and Lebanese judges. It has jurisdiction for the murder, and for other attacks in Lebanon between 1 October 2004 and 12 December 2005. It is particularly mandated to try those alleged to be responsible for the assassination of, and/or attempting to assassinate, Rafiq Hariri and other high-profile political figures. So, it is the first international tribunal specifically created to try those responsible for 'political' crimes. It applies both the Lebanese penal code (excepting death penalty and forced labour provisions) and international criminal law. In respect of four generals accused of involvement in the murder of Rafiq Hariri, and who had been in custody for four years, on 29 April 2009 the Tribunal said they should be freed as there was no credible evidence against them. The Tribunal has for the period 2008–11 a budget of $US120 M.[58]

International Criminal Court (ICC)

R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague, 1999

W. Schabas, *An Introduction to the International Criminal Court*, 3rd edn, Cambridge, 2007 (the appendices include the ICC Statute, the Elements of Crimes and the Rules of Procedure and Evidence) ('Schabas') www.icc-cpi.int/

Unlike the ICTY and the ICTR, the ICC was created by treaty, the Rome Statute, which was adopted at a UN conference on 17 July 1998, and which entered into force on 1 July 2002.[59] It now has 108 parties. It is the first permanent and universal international criminal court. Its main limitation is in the number and importance of the States that are not yet parties, such as China, Egypt, India, Indonesia, Iran, Pakistan, Russia, the United States and Arab States.

The seat of the ICC is at The Hague in the Netherlands, although it can sit elsewhere. It has eighteen judges elected by the parties to serve nine-year, non-renewable terms. All judges must have practical experience of either criminal law and procedure or international humanitarian law or human rights law. The ICC sits in three divisions: Appeals (five judges), Trial (three judges) and

[58] See www.un.org/apps/news/infocus/lebanon/tribunal/factsheet.shtml and Shaw, pp. 427–8.
[59] 2187 UNTS 91 (No. 38544); ILM (1998) 998; UKTS (2002) 35.

Pre-Trial (one to three judges). The Office of the Prosecutor is a separate organ. The Prosecutor must have extensive practical experience of the prosecution or trial of criminal cases, and is elected by the parties for a nine-year, non-renewable term. The working languages are English and French.

Jurisdiction

It must not be thought that in future all major crimes of international concern will be prosecuted in the ICC. Even for most crimes over which it would have jurisdiction it will not actually exercise that jurisdiction. Because of the 'complementarity' rule (see below), the vast majority of crimes that are within the jurisdiction of the ICC will still be dealt with by domestic criminal courts. Nevertheless, the ICC will be explained in some detail since it is of great legal and political importance. The chief value of the ICC is that, when a domestic legal system cannot, or will not, deal with an international crime, the ICC may be available to deal with it; there should be no need for the UN Security Council to set up an ad hoc international criminal tribunal, such as the ICTY or the ICTR.

The ICC does not have either general criminal jurisdiction, or jurisdiction over terrorism or drug trafficking. For the moment, it can exercise jurisdiction only with respect to genocide, crimes against humanity and war crimes. The crimes in the first three categories are exhaustively defined in Articles 6, 7 and 8 of the Statute, and elaborated in the Elements of Crimes.[60] The ICC will not be able to exercise jurisdiction over the crime of aggression until the Statute has been amended to define that crime and the conditions under which the ICC may exercise jurisdiction over it (Article 5(2)).[61] The UN General Assembly adopted its own definition of aggression in 1974,[62] but this is not in itself suitable for the purpose of a criminal prosecution, and there is also disagreement about whether Article 39 of the UN Charter, which gives to the Security Council the – essentially political – responsibility of determining whether aggression has occurred, requires that the Council should act as a filter for the exercise of jurisdiction by the ICC.[63]

Under Article 13, the jurisdiction of the ICC can be invoked by:

(a) a party referring an alleged crime to the Prosecutor;
(b) the UN Security Council, acting under Chapter VII of the UN Charter, referring an alleged crime to the Prosecutor;[64] or
(c) the Prosecutor initiating an investigation into an alleged crime.

But under (a) and (c), the ICC can exercise jurisdiction only if (a) the State on whose territory the conduct occurred (or if the crime was committed on board a

[60] See K. Dörmann, *Elements of War Crimes under the Rome Statute of the ICC*, Cambridge, 2003.
[61] See p. 253 above on aggression.
[62] UNGA Res. 3314 (XXIX); ILM (1974) 710. [63] See pp. 195 et seq. above.
[64] This was done for the first time in UNSC Res 1593 (2005), which referred the situation in Darfur (Sudan) to the prosecutor. See now p. 261, n. 67 below.

vessel or aircraft, the State of registration) or (b) the State of nationality of the accused person, is a party to the Statute. But if neither State is a party, either can accept the jurisdiction of the ICC, voluntarily and ad hoc (Article 12).

Thus for the ICC to have jurisdiction the accused does *not* have to be a national of a party to the ICC if the crime was committed in the territory of a party (or on board one of its registered ships or aircraft), or be referred to the ICC by the Security Council.

The exercise of jurisdiction by the ICC, including the power of the prosecutor to invoke the ICC's jurisdiction, is further restricted by the important so-called *complementarity* rule in Article 17, under which the ICC must not exercise jurisdiction if it determines that:

(a) the case is being investigated or prosecuted by a State that has jurisdiction over the crime, unless 'the State is unwilling or unable genuinely to carry out the investigation or prosecution';
(b) the case has been investigated by a State that has jurisdiction over the crime and it has decided not to prosecute, unless this was because of the 'unwillingness or inability of the State genuinely to prosecute';
(c) the accused has already been properly tried; or
(d) the case is not of 'sufficient gravity' to justify action by the ICC.

The unwillingness of a State to prosecute may be indicated where there is evidence that it is shielding the accused, where there is an unjustified delay in bringing the accused to justice, or where proceedings were not conducted independently or impartially. It may therefore be desirable for parties to revise their domestic criminal laws, procedures and practices so that they will be able themselves fully to deal with the crimes.

There are further limitations on ICC jurisdiction:

- In respect of any party, the crime must have been committed after the entry into force of the Statute for that party (Article 11).
- No person can be tried by the ICC and a national court for the same crime (*ne bis in idem*) (Article 20).
- No person can be tried for an offence committed before the entry into force of the Statute (Article 24).
- The accused must have been 18 or over when the alleged crime was committed (Article 26).

Surrender of accused persons[65]

A party to the ICC Statute is required to arrest and surrender to the ICC a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber, unless the case is inadmissible on the basis of double jeopardy (Articles 58 and 89).

[65] See Schabas, pp. 257–72.

A party cannot refuse to surrender its own nationals even where its law prohibits their extradition: Articles 89 and 102.

Personal responsibility

Article 25 sets out rules on the *personal responsibility* of the individual, including accessories, conspirators and those who order, solicit or induce a crime. Heads of State or government, parliamentarians and government officials, past or present, are all within the jurisdiction of the ICC (Article 27). This means that on a request for surrender to the ICC such a person cannot plead immunity, although a party is not obliged to surrender a national of a *third* State if he enjoys State or diplomatic immunity in the territory of the party (Article 98).[66]

United States

Under George W. Bush, the United States was opposed to the ICC and had no intention of becoming a party to the Statute. Its concerns particularly addressed the fact that the ICC can take jurisdiction in certain circumstances even over the nationals of States that are not parties (see top of p. 260 above). Accordingly, the Security Council adopted two US-sponsored resolutions (1422 (2002) and 1487 (2003)) which requested – purportedly consistent with Article 16 of the ICC Statute – that, if a case were to arise involving the official acts of officials or personnel of a State contributing to an operation established or authorised by the UN, the ICC should not proceed with any investigation or prosecution of such persons for twelve months, unless the Council were to decide otherwise; and that the Council intended to renew the request indefinitely. There were serious doubts whether Article 16 was ever intended to be used in this way, since it appears to envisage only specific cases where the Security Council has determined that there was a threat to international peace and security, not a blanket exclusion.[67] But in June 2004, there were not enough votes in the Council to renew the resolution.

The United States has also concluded about 100 bilateral treaties (some forty with parties to the ICC Statute) under which the other party agrees not to surrender US military personnel, government officials, or civilian employees or contractors, to the ICC.[68] Such treaties may not be compatible with the ICC Statute since the purpose of Article 98(2), under which the treaties purport to be

[66] Ibid., pp. 127 and 145–162.

[67] See p. 195 above, Lee, pp. 149–52 and Schabas, pp. 166–70. Although the ICC has issued a warrant for the arrest of the Head of State of Sudan, Omar al-Bashir, in respect of Darfur, Sudan (and most other Arab States) are not parties to the ICC Statute. In 2009, both the Arab League and the African Union announced that they would not help the ICC to obtain Mr Bashir.

[68] For example, the US–Uzbekistan Agreement of 18 September 2002, ILM (2003) 39. See also the EU guidelines, ILM (2003) 241; and Schabas, pp. 27–32.

made, was to preserve status-of-forces and similar agreements,[69] not to shield all nationals of non-parties from ICC jurisdiction.

To meet partially US concerns, UNSC Resolution 1593 (2005) exempted from ICC jurisdiction current or former officials or personnel of a State, who contributed to the UN mission to Sudan, but was not a party to the ICC Statute.

Procedure

Article 21 requires the ICC to apply the following law: first, the Statute, the Elements of Crimes and the Rules of Procedure and Evidence; second, treaties and principles and rules of international law, including the established principles of the law of armed conflict; and, third, general principles of law derived from national laws. The application and interpretation of law must be consistent with internationally recognised human rights. But, even if a person before the ICC is accused of a crime that is subject to a statute of limitations in force in the place where the crime was committed or in his State of nationality, the ICC is not bound by any such limitation (Article 29).

The procedure of the ICC is influenced by that of the ICTY and the ICTR, but draws less on the common law, consisting as it does of principles, rules and procedures drawn from both the civil and common law legal systems. The trial procedure is rather more adversarial than in civil systems, but the judges have greater powers of intervention and control of procedure, in particular over investigations, than in common law systems.

If, on the basis of the information he has received, the prosecutor considers there is a reasonable basis to proceed with the investigation, he must first seek the authorisation of the Pre-Trial Chamber (Articles 15 and 53). An effective investigation naturally depends upon the cooperation of States, usually one in particular. In the case of States that are parties, Articles 86–88 and 93–101 have detailed provisions requiring their cooperation in terms similar to those in treaties on mutual legal assistance.[70] If, as a result of his investigations, the prosecutor determines that a suspect should be arrested, he may apply to the Pre-Trial Chamber for a warrant of arrest (Article 58), and the party in whose territory the person is present is under an obligation to surrender him (Article 89 and 102). Since this procedure is *not* extradition, the request for surrender cannot be refused on the ground that the person is a national of the requested State.[71]

Warrants were also issued in 2005 for four Ugandan nationals, and in 2007, for Ntaganda (Democratic Republic of the Congo (DRC) national), and Ahmad Harun and Ali Kushayb (Sudanese nationals). On 4 March 2009, the ICC issued a warrant for the arrest of the President of Sudan, Omar Hassan Al Bashir as the perpetrator or indirect perpetrator (Article 25(3)(a) of the ICC Statute) of war

[69] See p. 159 above, and Schabas, pp. 28–32 and 72–3. [70] See p. 245 above.
[71] See Schabas, pp. 257–69 and pp. 260–1 above on surrender: and p. 275 below on Lockerbie.

crimes and crimes against humanity in Darfur in recent years. None of the accused has yet been surrendered for trial. In fact, not long after the warrant for his arrest was issued, President Bashir visited Qatar, which is not a party to the ICC.

Currently there are trials of Chui, Dyilo, Katanga and Gombo (DRC nationals). Article 67 (based on Article 14(3) of the International Covenant on Civil and Political Rights 1966)[72] accords extensive rights to an accused. There are of course also provisions for appeal against conviction and sentence (Articles 81–85). The ICC can impose a sentence of imprisonment for a specified number of years up to thirty, or life imprisonment. Once two-thirds of the sentence has been served (or twenty-five years in the case of life imprisonment), and not before, the ICC must review the sentence and may reduce it. As the ICC has no territory and no prison, sentences of imprisonment are served in the territory of a State (which need not be a party to the ICC) designated by the ICC from those States that have indicated to the ICC their willingness to accept such prisoners. If no State is designated, the prisoner will be held in a Dutch prison.

[72] See p. 217 above.

14

Terrorism

Terror is the feeling which arrests the mind.[1]

Lambert, *Terrorism and Hostages in International Law*, Cambridge, 1990[2]
Higgins and **Flory** (eds.), *International Law and Terrorism*, London, 1997
Aust, *Implementation Kits for the International Counter-terrorism Conventions*, Commonwealth Secretariat, London, 2002[3]
Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 1159–66
www.un.org/terrorism/

Introduction

The so-called war on terror may have begun on 11 September 2001, but terrorism has been practised for centuries. The international struggle against terrorism started in the early part of the last century, and, in 1937, the League of Nations concluded a Convention on the Prevention and Punishment of Terrorism.[4] But a world war intervened and it never entered into force.

Terrorist crimes are ordinary crimes even if they are carried out for political, ideological or religious reasons, and so can be prosecuted where they are committed. However, once a criminal has fled abroad, extraditing him may not be easy,[5] and if he cannot be extradited the State of refuge may not have jurisdiction over the crime.[6] When the crime is committed abroad, the person's State of nationality would have to exercise extra-territorial jurisdiction in order to try him, although that is not always possible for common law States. Nor do they normally assert criminal jurisdiction on the ground that one of their nationals was a victim.[7] And, it is unusual for States to have jurisdiction

[1] James Joyce, *A Portrait of the Artist as a Young Man*, 1916, Ch. 5.
[2] The book goes much wider than hostage-taking and also discusses previous counter-terrorism conventions.
[3] Includes detailed commentaries the author on the twelve universal conventions concluded up to 1999, as well as model legislation drafted by Nalin Abeyesekere: see www.thecommonwealth.org (click on 'What we do', then 'Law', then 'Documents'). Copies also should be obtainable from the Legal and Constitutional Affairs Division, Marlborough House, London SW1Y 5HX.
[4] Hudson (ed.), *International Legislation*, Dobbs Ferry, New York vol. VII, pp. 862 and 878.
[5] See pp. 246 et seq. above. [6] See pp. 42 et seq. above. [7] See p. 44 above.

under their law over crimes committed abroad by foreign nationals against foreign nationals.

However, it is now well established in customary international law that since piracy, slavery, war crimes and crimes against humanity are so terrible and affect the peace and security of all States, any State has the right to try persons for these crimes, irrespective of their nationality or where the crime was committed. This is known as universal jurisdiction.[8] Terrorism is not yet quite in that category, one reason being the lack of international agreement on a comprehensive definition of terrorism. Instead, universal treaties adopted by the United Nations or UN specialised agencies and, more recently, Chapter VII measures of the UN Security Council, have been the means by which international law contributes to the struggle against terrorism.

But, first, certain terms need explanation.

Definitions

'State terrorism'

This is a term for terrorist acts by one State against another State or the latter's nationals, such as the holding hostage of US diplomats in Iran in 1979–81, and done either by the State or commissioned or adopted by it. The term is also used to describe widespread acts of cruelty committed by a State against its own people by Hitler, Stalin, Pol Pot, Saddam Hussein, *et al.*

'State-sponsored terrorism'

This was a particular feature of international life in the last decades of the twentieth century, and is still with us. It consists of a State sheltering, training, financing or supplying arms to enable terrorists, often foreign, to attack another State or its nationals. It can also be applied to a State which does little or nothing to prevent terrorists training in its territory or even launching attacks from there. As surrogate warfare, State-sponsored terrorism is cheap and deniable. But, as the (UN) Friendly Relations Declaration 1970 makes clear, States are prohibited from aiding terrorism in any way.[9]

Universal terrorism conventions

No international definition of terrorism

The law of armed conflict (see Chapter 12) prohibits members of an *armed force* deliberately attacking civilians or committing acts of terror. But resistance to occupation is not prohibited by international law, and 'organised resistance movements', belonging to a party to the conflict, are recognised by the Geneva

[8] Ibid. [9] UNGA Res. 2625 (XXV); ILM (1970) 1292.

Conventions, provided they fulfil certain conditions and conduct operations in accordance with the law of armed conflict. This category was enlarged by Additional Protocol I to the Geneva Conventions to cover also members of irregular forces, such as national liberation movements (NLMs), who do not identify themselves by distinguishing marks, provided they are under proper command and carry arms openly when attacking or when visible to the enemy while deploying to attack.[10] Thus terrorists are unlikely to be covered, their secretive organisation and *modus operandi* (exemplified by the suicide-bomber) being such as not to bring them within the scope of the law of armed conflict, so leaving them subject to ordinary criminal law.[11]

But, there is still no internationally agreed comprehensive definition of terrorism.[12] Only the elements of the use or threat of force and seeking to create a climate of fear seem to be generally agreed. When acts like hijacking or hostage-taking are done for personal reasons or gain, they are regarded as terrorism because of the fear it produces in those directly or indirectly affected. The victims are not concerned with the motives of the terrorist, just that they might die. Following the murder of Israeli athletes by Black September at the 1972 Munich Olympic Games, UNGA Resolution 3034 (XXVII) established an Ad Hoc Committee on Terrorism. But that and later UNGA resolutions may be seen as an acknowledgement that NLMs[13] might still be justified in using terrorism because of the violence and repression of colonial, occupying and racist regimes, and that these 'underlying causes' merited equal attention. In the UN resolutions there is no express exception for NLMs, but neither is terrorism defined in such a way as to include actions on behalf of NLMs. Hence the hackneyed saying, 'one person's terrorist is another's freedom fighter'. For some regional conventions, motive is irrelevant, but on the other hand there is an express NLM exception in the Arab Convention 1998 (Article 2(a)), the Islamic Conference Convention 1999 (Article 2(a)) and the Organization of African Unity Convention 1999 (Article 3(1)).[14] In 1987, Syria proposed an international conference to define terrorism, but it has never been convened because of the NLM problem.

But, there are still States that believe that members of NLMs who carry out terrorist acts are fully justified. Paragraphs 81–91 of the World Summit Outcome recognised that terrorism (again not defined) is a criminal act that

[10] See pp. 236–7 above.

[11] The UK reservation to Art. 1(4) and 96(3) of Additional Protocol I to the Geneva Conventions is to the effect that the UK would only consider itself bound by a declaration of adherence to the Protocol (see Art. 96(3)) made by a body that has been expressly recognised by the UK as genuinely representing a people engaged in a liberation conflict: see UKTS (1999) 29. See also p. 267 below on the links between the terrorism conventions and the law of armed conflict, and C. Greenwood, 'War, Terrorism and International Law' (2003) *Current Legal Problems* 505.

[12] See Lambert, pp. 13–23; G. Guillaume, 'Terrorism and International Law' (2004) ICLQ 537–47. Schmid and Jongman, *Political Terrorism*, Amsterdam, 1988, identified only 109 definitions.

[13] See p. 13 above. [14] See n. 31 below

cannot be justified whatever the motive, and this is reflected in UNSC Resolution 1566 (2004), paragraph 3, so reflecting the view of many States.

The nearest approach to a comprehensive definition of terrorism in a legally binding document is to be found in the International Convention for the Suppression of the Financing of Terrorism 1999.[15] Since its purpose is to deal with the financing of terrorism, a definition of terrorism was essential. Therefore, Article 2 lists the offences defined in the (then) nine previous counter-terrorism conventions, and is followed by a kind of mini-definition of terrorism:

> Any other act *intended to cause death or serious bodily injury to a civilian*, or to any other person not taking an active part in the hostilities in a situation of an armed conflict, *when the purpose of such act, by its nature or context, is to intimidate a population*, or to compel a government or an international organization to do or to abstain from doing any act. (Emphasis added)

But the definition is only for the purposes of the convention. It does *not* create an international crime of terrorism, and so there is still no universally agreed legal definition of terrorism.[16]

Instead, the problem has been approached piecemeal.

The sectoral, segmental or incremental approach

All the universal conventions deal with certain categories of terrorism that are so manifestly wicked that, unlike some regional treaties, they have no NLM exception. They apply irrespective of where the crime was committed, the nationality of the accused or the motivation. Thirteen universal conventions were concluded between 1970 and 2005.[17]

- Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 ('Tokyo Convention').[18]
- Convention for the Suppression of Unlawful Seizure of Aircraft 1970 ('Hijacking' – or Hague – Convention');[19]

[15] 2178 UNTS 229 (No. 38349); ILM (2000) 268; UKTS (2002) 28; 2002 ATS 23. See A. Aust, 'Counter-terrorism – A New Approach' (2001) *Max Planck YB of UN Law* 285, at 288–94.

[16] The definition of 'terrorism' in the UK Terrorism Act 2000 is only for the purpose of proscribing terrorist organisations, in relation to its provisions on terrorist funding, and in connection with police investigations; the Act does *not* create an offence of 'terrorism'. See also the complex and uncertain definition in the EU Framework Decision on Combating Terrorism of 13 June 2002, No. 2002/475/JHA.

[17] For the texts, go to www.un.org/terrorism/ or the latest edition of the UN publication, *International Instruments Related to the Prevention and Suppression of International Terrorism*.

[18] 704 UNTS 219 (No. 10106); UKTS (1969) 126. The United Nations regards the Tokyo Convention as a terrorism treaty because it includes one article, albeit ineffective, on hijacking, and parts of the Convention were drawn upon when drafting later conventions.

[19] 860 UNTS 105 (No. 12325); UKTS (1972) 39.

- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 ('Montreal Convention');[20]
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973 ('Diplomats Convention');[21]
- International Convention against the Taking of Hostages 1979 ('Hostages Convention');[22]
- Convention on the Physical Protection of Nuclear Material 1980 ('Nuclear Convention');[23]
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation supplementary to the Montreal Convention 1988 ('Montreal Protocol');[24]
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 ('Rome – or SUA – Convention'); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988 ('Rome Protocol'); and Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 2005 (Second Rome – or Fixed Platform – Protocol);[25]
- Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991 ('Plastic Explosives Convention').[26]
- International Convention for the Suppression of Terrorist Bombings 1997 ('Bombings Convention');[27]
- International Convention for the Suppression of the Financing of Terrorism 1999 ('Financing Convention');[28]
- International Convention for the Suppression of Acts of Nuclear Terrorism 2005 ('Nuclear Terrorism Convention').[29] (The scope of the Nuclear Convention 1979 (above) being limited, it was felt this might be remedied by the conclusion of a comprehensive treaty on nuclear terrorism.)

[20] 974 UNTS 177 (No. 14118); ILM (1971) 10; UKTS (1974) 10. See also on Lockerbie, p. 275 below.
[21] 1035 UNTS 167 (No. 15410); ILM (1974) 41; UKTS (1980) 3.
[22] 1316 UNTS 205 (No. 21931); ILM (1979) 1460; UKTS (1983) 81. See also Lambert, generally.
[23] 1456 UNTS 101 (No. 24631); ILM (1979) 1419; UKTS (1995) 61.
[24] ILM (1988) 627; UKTS (1991) 20; 1990 ATS 39.
[25] 1678 UNTS 222 (No. 29004); ILM (1988) 672; UKTS (1995) 64; 1993 ATS 10 (See Lambert, pp. 4, 26–7 and 115–16). The Convention was to deal with 'shipjacking' as epitomised in the *Achille Lauro* affair: see n. 36 below.
[26] ILM (1991) 726; UKTS (2000) 134. The United Nations treats this ICAO treaty as also a terrorism treaty because of its practical importance, though it has no jurisdictional provisions. See Lockerbie, p. 275 below.
[27] 2149 UNTS 284 (No. 37517); ILM (1998) 251; UKTS (2001) 31; 2002 ATS 17.
[28] 2178 UNTS 229 (No. 38349); ILM (2000) 268; UKTS (2002) 28; 2002 ATS 23. For an account of its negotiation and a commentary on it, see A. Aust, 'Counter-terrorism – A New Approach' (2001) *Max Planck YB of UN Law* 285–306.
[29] UNTS (No. 44004); ILM (2005) 815.

- Optional Protocol on 2005 to the Rome (or SUA) Convention 1988 (see above).[30]

(For the text of these, and the regional counter-terrorism treaties, see below.)[31]

Comprehensive Convention on International Terrorism

This ambitious but unnecessary proposal, was made by India, though perhaps more for (perhaps understandable) political reasons. It has been discussed at the United Nations since 2001. It is an attempt to consolidate all the previous conventions and to fill in gaps. Progress has been delayed by, *inter alia*, the insistence of some States on an exemption for NLMs.

The main provisions of the universal terrorism conventions

The universal conventions vary in their terms, but, generally, share certain basic elements.

'International' terrorism

The conventions do not apply to offences that are solely internal. The way this is formulated varies according to the subject, but generally the conventions will not apply if the offence is committed within one State, the alleged offender and any victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis for exercising jurisdiction. But all these conditions have to be met if the convention is not to apply.

Definition of the offences

The offences formulated by the conventions require implementation by domestic legislation. But, since most of the offences will already be crimes under existing law (murder, causing explosions, kidnapping, etc.), in the conventions

[30] See IMO Doc. LEG/Conf. 15/22 (1 November 2005).

[31] Inter-American Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance 1971, 1438 UNTS 195 (No. 24381); European Convention on the Suppression of Terrorism 1977, 1137 UNTS 93 (No. 17828); ILM (1976) 1272; UKTS (1978) 93 (now updated by a 2003 Protocol (CETS 190) and supplemented by the European Convention on the Prevention of Terrorism 2005 (CETS 196), see Art. 26; SAARC (South Asian) Regional Convention on Suppression of Terrorism 1987; Arab Convention on the Suppression of Terrorism 1998; Commonwealth of Independent States Treaty on Cooperation in Combating Terrorism 1999; Islamic Conference Convention on Combating Terrorism 1999; OAU Convention on the Prevention and Combating of Terrorism 1999.

For these texts, try also www.un.org/terrorism/ or the latest edition of the (paper) UN publication, *International Instruments Related to the Prevention and Suppression of International Terrorism*.

it is the provisions on jurisdiction and cooperation which are the most valuable. The offences include attempts and being an accessory. Beginning with the Bombings Convention, the concept of conspiracy was added. The Financing Convention made a clearer distinction between the civil law concept of *association malfaiteur* and the similar common law concept of conspiracy.[32]

The essential principle on which the conventions rest is that an alleged offender should not find safe haven in the territory of any party. This is done by the establishment of quasi-universal jurisdiction *and* the so-called extradite or prosecute rule.

Quasi-universal jurisdiction

The effect of each convention is to create, as between its parties, a regime of universal jurisdiction. Since not all States will be parties to each convention – although most States are now parties to the Hijacking Convention 1970 – the regime is described as '*quasi*-universal jurisdiction', since the right to exercise jurisdiction is given by each convention to the parties to it; it does not exist otherwise.[33] Each party to a convention is required by it to establish its jurisdiction over the offences, not only if they are committed in its territory or by one of its nationals or have another connection with it (such as the offence having been committed on board a vessel flying the party's flag or an aircraft registered with it). It is enough that an alleged offender is *found* in the territory of a party. Even if neither the crime, nor the alleged offender, has any connection with that party, it must nevertheless be able legally to detain him.

Starting with the Rome Convention 1988, a party is also given *discretion* to establish its jurisdiction if the offence is committed abroad but against one of its own nationals or the State itself. This power had to be given by treaty since many States do not accept the 'passive personality' or 'protective' principles.[34]

Have the conventions which provide for quasi-universal jurisdiction been successful in combating terrorism and other serious crimes? That is an impossible question to answer. Certainly the crimes which the conventions deal with still occur, although hijacking and sabotaging an aircraft in flight are much less prevalent. However, this may mainly be due to more stringent security precautions. One can but hope that it may also be due to the deterrent effect of the conventions. There are hardly any examples of a prosecution being mounted on the basis of one of the conventions, even though there are still many examples of terrorism and in many countries. But, two examples of the rare use of quasi-universal jurisdiction can be given. In 2005, Mr Zardad had been resident in England for some years before he was discovered and later convicted by an

[32] See Art. 2(5)(c), which was taken from Art. 25(3)(a) of the Statute of the International Criminal Court, 2187 UNTS 90 (No. 38544); ILM (1998) 998; UKTS (2002) 35.

[33] On universal jurisdiction, see p. 44 above.

[34] See p. 44 above. A similar, but non-discretionary, provision is to be found in Art. 5(1)(c) and (d) of the Hostages Convention 1979 (n. 22 above).

English criminal court of hostage-taking and torture committed between 1992 and 1996 in Afghanistan, and sentenced to a long term of imprisonment. None of the evidence or witnesses were in England, and so had to be brought over. Another is the conviction by a US (i.e. federal) District Court in 2008 of Mr Charles Arthur Emmanuel (aka Charles Taylor Jnr),[35] for torture and hostage-taking in West Africa between 1997 and 2003. He was convicted under US federal legislation to implement the quasi-universal jurisdiction provisions of the Hostages Convention and the Torture Convention, and sentenced to ninety-seven years, imprisonment.[36] But, even if there would otherwise be jurisdiction, often there is not sufficient evidence to prosecute. It may be significant that, apart from the two cases mentioned above, and Hussein (n. 36) this chapter does not mention any others.

We will now look at the other main provisions of the conventions.

'Extradite or prosecute'

The detaining State might not extradite the alleged offender to another party. There can be many reasons: he may be one of its own nationals and its law may prohibit his extradition; the State may not have confidence in the fairness of the other legal system; or it may not trust the other State to prosecute diligently.[37] If it does not extradite, it is under an obligation 'without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its own authorities for the purpose of prosecution'. This principle (worded the same in all the thirteen conventions) of *aut dedere aut judicare* (extradite or prosecute) is essential for the effectiveness of the conventions: there is to be no hiding place in the territory of any of the parties for persons accused of terrorism. The requirement is not to prosecute but 'to submit the case to its own authorities for the purpose of prosecution'. There is no obligation to prosecute whatever the circumstances; there may not be sufficient evidence. In 2008, Karuna Amman, an alleged leader of a rebel movement in Sri Lanka, was imprisoned in England for an immigration offence. But, as there was insufficient evidence available in England of his involvement in terrorism or war crimes in Sri Lanka, after his release, he was allowed to return to Sri Lanka.

A party must investigate any allegation that there is a person in its territory who has committed an offence and, if the circumstances so warrant, ensure the person's presence for the purpose of extradition or prosecution. There is no provision as to which State has priority of jurisdiction, although in practice the State that has custody of the alleged offender has the first option to prosecute.[38]

[35] See p. 257 above about the prosecution of his father.

[36] In July 2009, Khaled Hussein, serving life for planning the attack on the cruise ship, *Achille Lauro*, died in an Italian prison aged 73.

[37] See p. 274 below on the exceptional factors in the *Lockerbie* case.

[38] See Lambert, pp. 163–5.

Extradition

If the crime was committed in the territory, or on a ship or aircraft, of another party, there is of course an important forensic advantage in sending the alleged offender for trial in the place where many of the witnesses are and the evidence is likely to have been collected. The conventions therefore deem the offences extraditable under existing extradition treaties (including multilateral treaties), and the parties undertake to include the offences in every future extradition treaty. As between parties that do not require a treaty for the purpose of extradition, the conventions provide that, subject to the law of the requested party, the parties shall recognise the offences as extraditable. Data on extraditions pursuant to the conventions are not easy to find, although most States seem to prefer deportation or expulsion, since they can be quicker.

The political exception

The 'political exception' must be clearly distinguished from provisions in the conventions that mutual legal assistance or extradition may be refused if it has been requested for the purpose of prosecuting or persecuting the person for his political opinions. The political exception dates from the nineteenth century and is a provision in extradition treaties or domestic law that prohibits extradition for so-called political offences: those committed for political purposes or motives.[39] Given that many terrorist crimes are committed for some (at least ostensible) political purpose, and the earlier conventions do not prohibit the political exception, this can be an obstacle to extradition for a terrorist offence. However, more recent conventions (Bombings 1997 (Article 11), Financing 1999 (Article 14) and Nuclear Terrorism 2005 (Article 15)) exclude the political exception, as do some extradition treaties in respect of offences under the conventions.[40]

Fiscal offences

Article 13 of the Financing Convention 1999 provides, in effect for the avoidance of doubt, that for the purposes of requests for extradition or mutual legal assistance none of the financing offences shall be regarded as a fiscal offence; and requests cannot be refused on the sole ground that they concern a fiscal offence. In this context, 'fiscal' means relating to money or public revenue. Tax evasion is a typical fiscal offence, although it cannot usually be the subject of mutual legal assistance or extradition.[41]

[39] The matter is complicated: see Oppenheim, pp. 962–72, and p. 248 above.

[40] Article 7 of the European Convention on the Suppression of Terrorism 1977 (n. 31 above) excludes terrorist offences from the political exception. See Lambert, pp. 234–5.

[41] The provision was taken from Art. 1 of the Additional Protocol to the CoE Convention on Mutual Assistance in Criminal Matters, 1496 UNTS 350 (No. 6841); ILM (1978) 801; UKTS (1992) 24.

Armed conflicts

Article 12 of the Hostages Convention 1979 excludes hostage-taking which is a 'grave breach' of the Geneva Conventions and Additional Protocol I, for which the parties to those conventions have an obligation to prosecute or extradite.[42] The tortuous language of Article 12 has led some writers into wrongly believing that the article does not apply to NLMs. It does.[43] All the article means is that a person can be prosecuted for a war crime rather than a terrorist act. Although the Protocol applies to activities of NLMs, that does not legitimise hostage-taking by NLMs, only that it has to be dealt with under the Geneva regime.

Article 19(2) of the Bombings Convention 1997 also contains convoluted language that has the effect of excluding from the scope of the Convention the activities of armed forces during an armed conflict or otherwise on duty (know colloquially by the transatlantic term 'military carve-out'). (Article 2(1)(b) of the Financing Convention 1997 has a similar exclusion.) This is necessary since acts, such as causing explosions, are frequently done during an armed conflict, and any abuse of the law of armed conflict has to be dealt with under that law.

Criminal liability of corporations

Article 5 of the Financing Convention 1999 is new to terrorism conventions. Although under the other conventions a responsible official of a legal person, such as a company, could as part of his duties commit an offence, the company could not. But that would not have been enough for the Financing Convention, since offences under it are most likely to be committed by officers of banks and other financial institutions. When a transfer of money is done with the help of a bank official who knows it is destined for terrorists, it is important that the bank should also be held accountable. The bank does not have to benefit from the offence, although liability is dependent on a person 'responsible for the management or control' of the entity having 'in that capacity' committed a financing offence.[44] Thus, a relatively senior manager, not a clerk (today every bank clerk, however junior, seems to be called a manager), must have committed the offence. If he used the bank's computer system to transfer the money, even though he was not authorised to do so, the bank would commit an offence. This is because the convicted person would have done the act by virtue of his employment with the bank, which gave him access to the system. It could not be said to be a private act.[45]

In many legal systems, when legislation makes it an offence for a 'person' to do an act, this includes a legal person, unless a contrary intention appears. A contrary intention can be inferred where the nature of the act, such as bigamy, could not be committed by a controlling officer in the course of business. The

[42] 75 UNTS 3 (Nos. 970–3); UKTS (1958) 39 and 1125 UNTS 3 (No. 17512); ILM (1977) 1391; UKTS (1999) 29–30.

[43] See Lambert, pp. 263–98.

[44] See pp. 379–81 below on a similar point on State responsibility.

[45] See generally on the Convention: A. Aust, 'Counter-terrorism – A New Approach' (2001) *Max Planck YB of UN Law* 285–306.

concept of the vicarious liability of corporations is developing in both common law and civil law systems, but naturally varies from State to State. The Corporate Manslaughter and Corporate Homicide Act 2007 enabled companies in the United Kingdom to be charged with such crimes. But, some legal systems do not enable legal entities to be made criminally liable at all. Article 5 therefore limits the obligation to legal entities located in the territory of a party or organised under its laws (i.e. carrying on business or incorporated there), and thus makes it clear that making a 'legal entity' liable must be done in accordance with the domestic legal principles of each party. And, each party is given discretion as to the nature of the liability – criminal, civil or administrative.

Punishment

The parties to the conventions must make the defined offences criminal offences in their domestic law and impose penalties that take into account the 'grave nature' of the offences.

'Refugees' and terrorism

Article 1F(c) of the Refugees Convention 1951[46] provides that, if there are 'serious reasons' for considering that a person is 'guilty of acts contrary to the purposes and principles of the United Nations', he is not entitled to refugee status. On 17 December 1996, the UN General Assembly adopted a Declaration that terrorism is contrary to the purposes and principles of the United Nations.[47] The Declaration may also be regarded as a subsequent agreement as to the interpretation of the UN Charter.[48]

Security Council[49]

For over forty years, the United Nations Security Council has been concerned about terrorism. In the Lockerbie resolutions,[50] and repeatedly later, the Council determined that terrorism is a threat to international peace and security. This was most famously done in Resolution 1368 (2001) following the 11 September 2001 attacks in the United States.

The first *Chapter VII* measure[51] on terrorism was directed at Iraq. After its invasion of Kuwait on 2 August 1990, many nationals of Kuwait and other States were held in Kuwait, some later being taken to Baghdad where they were held as 'human shields', that is, as hostages. Resolution 674 (1990) demanded their release. Following the liberation of Kuwait, the ceasefire Resolution 687

[46] 189 UNTS 137 (No. 2545) and 606 UNTS 267 (No. 8791); UKTS (1954) 39 and UKTS (1969) 15.
[47] A/RES/51/210; ILM (1996) 1188. See also p. 175 above. [48] See p. 85 above.
[49] A. Aust, 'The Security Council and International Criminal Law' (2002) NYIL 23–46.
[50] See n. 52 below. [51] On Chapter VII, see pp. 195 et seq. above.

(1990) recalled the Hostages Convention, categorised all acts of hostage-taking as manifestations of international terrorism, and deplored the previous threats by Iraq to make use of terrorism abroad. It required Iraq to confirm that it would not commit or support any act of international terrorism, not allow any terrorist organisation to operate within Iraq, and to condemn and renounce all acts of terrorism.

Lockerbie

When Pan Am flight 103 was sabotaged over Lockerbie in Scotland on 21 December 1988, Libya, the United Kingdom and the United States were (and still are) parties to the Montreal Convention 1971, which now has 187 parties. But, when charges of murder were in 1991 laid against two Libyans, in order to get them for trial the United Kingdom and the United States did not invoke the Convention. Since they had been charged as having acted on behalf of the Libyan intelligence services, the alleged complicity of the Libyan Government (with its long involvement in terrorism) meant that trial in a Libyan court was therefore unthinkable, it being also well known that its courts were not independent of the government. Yet, since Libyan law prohibits extradition of Libyan nationals, if an extradition request had been made to Libya under the Convention, it could have submitted the case to its own prosecuting authorities and then tried (or not) the accused in Libya. Therefore, a demand was made for their 'surrender' for trial in a Scottish or US court. The Security Council adopted a series of resolutions demanding that Libya hand over the two accused for trial in a Scottish or US court, and imposing sanctions.[52] They were mostly ineffective because the main Libyan export (oil) was not subject to sanctions, though the ban on flights to and from Libya was easy to police and very inconvenient. Following Resolution 1192 (1998), the accused were eventually handed over for trial by a Scottish court, albeit sitting in the Netherlands.[53] In 2001, one of the two accused, Megrahi, was convicted and sentenced to life imprisonment in Scotland.[54]

The two proceedings in the International Court of Justice from 1992 (in practice they were the same in substance), were brought by Libya against the United Kingdom and the United States, and should *not* be confused with the criminal case. The Libyan pleadings were a vain attempt to prevent sanctions being imposed. Libya claimed that, by pressing in the UN Security Council for sanctions to be imposed on Libya for the purpose of forcing it to surrender the two accused for prosecution in Scotland or the United States, the respondent

[52] Resolution 731 (1992), 748 (1992), 883 (1993) and 1192 (1998). On the legal effect of Article 103 of the UN Charter, see Aust MTLP, pp. 219–21.

[53] For the long history of how the accused came to be so tried, see A. Aust, 'Lockerbie: The Other Case' (2001) ICLQ 278 et seq.

[54] See ILM (2001) 581–613 (judgment). In 2009, he dropped his second appeal against conviction and, being near death from prostate cancer, was released on compassionate grounds.

States had denied Libya its right under the Montreal Convention to prosecute the accused. The proceedings therefore raised an issue of fundamental importance about the respective powers of the ICJ and the Security Council, both of which are of course principal organs of the United Nations (see p. 424 below on judicial review). After eleven years, in 2003 both proceedings were withdrawn by consent, much to the chagrin of many experts in international law.

Sudan

Following an attempted assassination of the President of Egypt while visiting Ethiopia by persons who then found refuge in Sudan, the Security Council adopted Resolution 1044 (1996) calling upon Sudan to comply with requests by the Organization of African Unity (OAU) – now called the African Union – to extradite the suspects to Ethiopia and to cease support for terrorism. Sudan did not comply. In Resolutions 1054 (1996) and 1070 (1996), the Council, acting under Chapter VII, demanded that Sudan comply, and imposed sanctions. Following requests from Egypt, Ethiopia and the OAU, the sanctions were lifted by Resolution 1372 (2001).

Bin Laden, Al-Qaida and the Taliban[55]

In Resolutions 1267 (1999) and 1333 (2000), the Security Council required the Taliban regime in Afghanistan to surrender Usama bin Laden and, as reiterated and consolidated in Resolution 1390 (2002), imposed sanctions on him, members of the Taliban and Al-Qaida, and individuals, groups, undertakings and entities associated with them. Resolution 1452 (2002) provided for exemptions from the financial sanctions imposed by Resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1540 (2004), 1611 (2005) and 1617 (2005) and later ones. They included payments for food, rent or mortgage, medicines, taxes, insurance premiums, public utility charges and payments exclusively for reasonable professional fees. There is a 48-hour tacit 'no-objection' approval procedure if a relevant State notifies the relevant sanctions committee, the 1267 Committee,[56] of a proposal to make an exempt payment.

For the purpose of implementing the sanctions against individuals, Resolutions 1267 (1999), 1333 (2000), 1390 (2002), and others listed in Resolution 1822 (2008), provide for lists of Al-Qaida members to be maintained and updated by the 1267 Committee. The present guidelines for the conduct of the work of the Committee include a procedure to enable a name to be removed. The individual (or group) petitions his State of residence or citizenship. The State consults the State that originally proposed the listing. A joint or, if necessary, unilateral request for de-listing can then be made by the petitioned State to the Committee, under a 'no-objection' procedure. The Committee takes its decision by consensus, but, if that is not achievable,

[55] The UN spelling of the names in English. [56] See www.un.org/sc/ctc/.

after consultations by the Chairman the matter can be referred to the Security Council. The procedure was expressed to be without prejudice to available procedures – recognition that national legal remedies, such as judicial review, may be available. Resolution 1822(2008) slightly modified the regime set up by the preceding resolution for the 1267 Committee to respond to some of the criticisms made that it did not sufficiently protect the human rights of the persons affected; in particular, that they could not personally challenge their listing. It made the Committee more open and direct. It was also instructed to go through the names listed to ensure that it was still right to list them.[57]

Following the Al-Qaida attacks on the United States on 11 September 2001, the Security Council adopted Resolution 1373 (2001). Drawing on the Financing Convention, it required all States to criminalise the financing of terrorist acts, to freeze the funds of terrorists and to prohibit the supply of funds to terrorists. The resolution does not define terrorism; it just refers to 'terrorist acts'. The resolution does not provide for lists of terrorist groups or individuals to be maintained. In practice, US and other lists circulate among Members but they are not binding in international law, although in some States they may be binding in domestic law and acts based on a listing may be challengeable in a national court. Resolution 1373 (2001) established a separate committee, the Counter-Terrorism Committee, with a broader remit than the 1267 Committee.[58] Resolution 1526 (2004), paragraph 15, emphasised the need for the two committees to cooperate closely.

These days, there is much discussion about whether Security Council resolutions should conform to the human rights obligations of UN Member States. Such rights will of course vary between States since not all of them will be parties to the various human rights treaties or, when they are, they may have made reservations to them. And, whether the rights set out in a human rights treaty are now binding on States in customary international law[59] is unclear. All that seems to be generally accepted is that provisions in Security Council resolutions must not be incompatible with *jus cogens*.[60] However, most human rights are not absolute. They may be qualified or derogated from.[61] In particular, the right to a fair trial (or due process) is not absolute and can be derogated from.[62] For a discussion of the ECJ judgment in *Kadi*,[63] which concerns the right of an individual to challenge the implementation of financial sanctions imposed by the Security Council, see pp. 197–9 above.

[57] But see the subsequent judgment of the ECJ in *Kadi* (see below).
[58] See www.un.org/sc/ctc/. [59] See pp. 6–7 above. [60] See p. 10 above.
[61] See pp. 227 et seq. above. [62] See p. 238 above. [63] See pp. 197–8 above.

15

The law of the sea

… the important International Law called the Rule Britannia, technically known as the Freedom of the Seas.[1]

Churchill and **Lowe**, *The Law of the Sea*, 3rd edn, Manchester, 1999 ('Churchill and Lowe')
Birnie, Boyle and **Redgwell**, *International Law and the Environment*, 3rd edn, Oxford, 2009 ('B, B & R')
Sohn and **Noyes**, *Cases and Materials on the Law of the Sea*, New York, 2004
www.un.org/Depts/los/index.htm
www.imo.org/

Introduction

The sea has been an essential means of transport since ancient times. Even in today's advanced world, merchant shipping still carries over 80 per cent of world trade by volume, and so maritime transport remains its backbone.[2] The rules governing the use of the sea (including its resources and environment) are one of the principal subjects of international law. The law of the sea is a mixture of treaty and established or emerging customary international law, the customary law having developed over centuries. The first successful attempt to codify the law was the four UN Conventions on the Law of the Sea 1958.[3] But, the most important aspects are now set out in a single treaty, the UN Convention on the Law of the Sea 1982 (in this chapter, 'the Convention' or 'UNCLOS').[4] For those parties to the Convention that were parties to the 1958 Conventions, the 1982

[1] Sellar and Yeatman *1066 and All That*, London, Ch 6 (first published in 1930). As a satire on English history, it has nuggets of truth, as here: see Shaw, p. 79, start of the last paragraph; and p. 290 below on freedom of navigation.
[2] *Review of Maritime Transport*, 2008, UNCTAD, p. xiii. Page 5 of the Review indicates that in 2007 (i.e. before the present recession) international seaborne trade was estimated at about 8 billion tons of goods loaded.
[3] 1 Territorial Sea and Contiguous Zone; 2 High Seas; 3 Fishing; 4 Continental Shelf. The four Conventions, the ILC drafts and commentaries, and a short historical introduction, are in A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, vol. I, pp. 23–137.
[4] 1833 UNTS 397 (No. 31363); ILM (1982) 1261; and UKTS (1999) 81.

Convention replaces them. Although between thirty-five and sixty States are still listed as parties to some, or even all, of the four 1958 Conventions, in many cases they are now bound by the rules of the 1982 Convention,[5] which entered into force on 16 November 1994, and now has some 158 parties. As most of the Convention's provisions represent customary international law,[6] even non-parties, such as Iran and the United States,[7] may be bound by those provisions, albeit as customary international law. In considering a particular situation, such as passage through straits, one must thus consider carefully the legal position of the States involved. This requires an investigation into which general treaties on the subject are binding on them (in particular, the relevant 1958 Convention or UNCLOS); if on the specific matter there are any other relevant multilateral or bilateral treaties; and whether customary international law, as represented by a rule in the 1982 Convention, is applicable.[8] The subject is large and there are many exceptions to the rules and special situations. In the space available, it is only possible to sketch in the outlines by explaining the terminology and describing main principles and rules.

(Unless otherwise stated, references to numbered Articles are to those of the Convention (UNCLOS).)

Internal waters

Internal waters are all those on the landward side of the baselines from which the breadth of the territorial sea is measured (Article 8). They therefore include bays,[9] estuaries, ports, rivers, canals[10] and lakes, including inland seas like the Caspian Sea.[11]

Right of access by foreign ships

A coastal State has sovereignty over its internal waters and, unlike the territorial sea, there is no right of innocent passage for foreign ships through internal waters. Although a right of access to internal waters, in particular ports, may be granted to foreign ships by treaty (typically in a treaty of friendship, commerce

[5] On the effect of emerging customary law on prior treaty rights and obligations, see Aust MTLP, pp. 13–14.

[6] For an explanation of the term, see p. 6 above, and, in relation to the Convention, see Churchill and Lowe, pp. 16–22.

[7] Although, given the views of the new Administration, the United States is now likely to become a party.

[8] Even when a treaty has 'entered into force', it is binding only on those States which have consented to be bound by it (e.g. by ratifying it), except in so far as the treaty also represents customary international law. One must also check whether a party has made reservations or interpretative declarations and, if so, whether they affect the matter (see p. 64 above).

[9] See pp. 280 et seq. below.

[10] The law of the sea does not govern rivers and canals. For the special cases of the Panama and Suez Canals, see p. 335 below.

[11] On the Caspian Sea, see R. Wolfrum *et al.* (eds.), *Liber Amicorum Judge Shigera Oda*, The Hague, 2002, vol. 2, pp. 1103–14.

and navigation), there is no general right of access for merchant ships.[12] The only clear right of access is when a ship is in distress and there is a risk to the lives of those on board. Otherwise, States can and do impose many conditions on the entry of ships. It can be refused for, among other things, security reasons or to prevent pollution. A State can designate which of its ports are open for international trade or immigration.[13]

By entering a foreign port, a ship comes under the territorial jurisdiction of the coastal State. This has several implications. The ship is not completely free to leave. It must complete all necessary formalities and may be detained if it is in an unseaworthy condition or otherwise poses a danger to those on board or to the environment.

Of particular importance is the degree to which the criminal and civil laws of the coastal State are enforceable against a foreign ship in port. The basic principle is that the coastal State will not enforce its laws if its interests are not affected and the matter can be dealt with effectively under the laws of the flag State. Thus, crew discipline is normally left to the captain and the authorities of the flag State. But, if a local national or a person who is not a member of the crew is involved in a serious crime, such as murder, or the captain or consul of the flag State requests the help of the coastal State, it may agree to exercise jurisdiction. A foreign ship is liable to be arrested in port in the case of an action *in rem* against the ship itself, such as a claim arising out of an incident involving the ship or as security in a civil action against its owner. This latter aspect is an area of law on which local legal advice is always essential.

Baselines

The breadth of the territorial sea, the contiguous zone, the exclusive economic zone (EEZ) and the continental shelf (in certain cases) is measured from baselines, behind which the waters are internal. Baselines are also important in the delimitation of a maritime boundary.[14] The subject is complex and highly technical (see Articles 3–16) and will therefore be described only in broad terms.

The *normal baseline* is the low watermark along the coast[15] as marked on large-scale charts officially recognised by the coastal State. This will inevitably result in a curving baseline. But if the coastline is deeply indented or cut into, or there is a fringe of islands along the coast in its immediate vicinity (Norway is a prime example), a *straight baseline* can be drawn joining appropriate points. Nevertheless, it must not depart to any appreciable extent from the general direction of the coast. *Deltas* are treated as part of the coastline. A *low-tide*

[12] See p. 296 below on warships. [13] See also Arts. 25(2), 211(3) and 255.
[14] See pp. 288–9 below.
[15] Coast is not defined, but is probably dependent on the facts, e.g. from where is navigation possible?

elevation (a naturally formed area of land which is surrounded by and is above water at low tide, but submerged at high tide) may be used as a baseline if it is wholly or partly within the territorial sea. *Reefs* that are exposed at high tide can also be used as baselines. *Artificial islands* and other offshore installations are disregarded for the purpose of drawing baselines. When there is a *river* that flows directly into the sea, the baseline is a straight line drawn across its mouth. When the river flows indirectly into the sea through an *estuary*, the rules on bays apply. When the distance between the natural entrance points of a *bay*[16] does not exceed 24 nautical miles, a *closing line* can be drawn between those points, the water enclosed by it being internal. If the entrance is wider, a straight line of 24 nautical miles is drawn within the bay so as to enclose the maximum area of water that is possible within a line of that length. Otherwise, no maximum length is prescribed for a straight baseline, and as a result, the right to draw straight baselines has been much abused.

So-called *historic bays* do not meet the criteria in the Convention and are governed by customary international law, not the Convention (Article 10(6)). To claim a historic bay as internal waters, the State has to prove that it has claimed the bay as its internal waters for a considerable time and has effectively, openly and continuously exercised its authority there without objection from other States. Most claims to historic bays have been objected to, such as the 50 nautical mile closing line for Hudson Bay claimed by Canada, to which the United States objects. Most extravagant is the Libyan claim to a 296 nautical mile closing line for the Gulf of Sirte (or Sidra), to which several developed countries have objected.[17]

The concept of so-called vital bays[18] (i.e. vital for the security of the coastal State, and Libya may claim that for the Gulf of Sirte) has been promoted by some developing countries, but is not recognised by the Convention or in customary international law.

Territorial sea

A coastal State's sovereignty extends beyond its land territory and internal waters to an adjacent belt of sea known as the territorial sea, although sometimes referred to as 'territorial waters'. Sovereignty extends also to the bed and subsoil of the territorial sea and the air space above it (Article 2(1)).[19] Unlike sovereignty over land territory (which has to be established),[20] sovereignty over

[16] '[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. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of the indentation' (Art. 10(2)).

[17] Churchill and Lowe, pp. 43–5. [18] Ibid., p. 44.

[19] See also Art. 2 of the Chicago Convention on International Civil Aviation 1944, 15 UNTS 295 (No. 102); UKTS (1953) 8.

[20] See pp. 33 et seq. above.

the territorial sea is incidental to sovereignty over land territory, and so does *not* have to be established. However, each coastal State has to specify the breadth of its territorial sea, which can be up to a maximum of 12 nautical miles measured from the baselines (Article 3). About six States claim between only three and six nautical miles. Some fifteen States, mostly in Africa and Latin America, claim between 20 and 200 nautical miles, but these claims are not recognised by States that claim 12 nautical miles, or less. The laws and regulations of the coastal State apply to the territorial sea, but can be enforced against foreign ships only to the extent indicated below.

Islands

An island is defined as 'a naturally formed area of land, surrounded by water, which is above water at high tide' (Article 121(1)). An island is treated in the same way as other land territory and can therefore have a territorial sea, contiguous zone, EEZ and a continental shelf. Rocks (not defined as such) 'which cannot sustain human habitation or economic life of their own' nevertheless have a territorial sea of their own, but not an EEZ or a continental shelf (Article 121(3)).[21] Artificial islands and other offshore installations have no territorial sea of their own.

Innocent passage

Given the unique character of the sea and its importance for trade, it has long been recognised that ships[22] of all States have the right of 'innocent passage' through the territorial sea (Article 17). By 'passage' is meant navigation through the territorial sea for the purpose of (a) traversing it without entering internal waters or calling at a port or roadstead[23] outside internal waters or (b) proceeding to or from internal waters or a call at such port or roadstead. The passage must be continuous and expeditious (no loitering), except for stopping and anchoring which is incidental to ordinary navigation, or made necessary by *force majeure* or distress or to help persons, ships or aircraft in danger or distress (Article 18).

The inclusion of 'innocent' means that passage must not be prejudicial to the 'peace, good order or security' of the coastal State (Article 19). The article lists twelve activities which are considered prejudicial, including: weapons exercises

[21] For an exhaustive account of 'low-tide elevations', see the ICJ judgment in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), ICJ Reports* (2008), p. 1. UK fishery limits were adjusted before the United Kingdom ratified UNCLOS to take account of the fact that under UNCLOS the limits could not be based on Rockall since it cannot sustain human habitation or an economic life of its own. See further Churchill and Lowe, pp. 49–50. Okinotorishima is a rock which Japan claims is an island. It is not only tiny, but may soon vanish beneath the waves.

[22] See p. 296 on warships. [23] An offshore structure at which ships load, unload or anchor.

or practice; espionage; launching or landing aircraft; loading or unloading of commodities, currencies or persons; wilful and serious pollution; any fishing activities; research or surveying; interference with coastal communications; any threat or use of force in violation of the UN Charter; and 'any activity not having a direct bearing on passage'. If passage is not innocent, the coastal State can take the necessary steps within its territorial sea to prevent it (Article 25(1)), usually by requiring the ship to leave, or arresting it if it has breached its laws. The coastal State may also, without discriminating between foreign ships, temporarily suspend innocent passage when this is essential to protect its security (Article 25(3)).

Article 23 recognises that nuclear-powered ships can exercise the right of innocent passage, as well as ships carrying nuclear or 'other inherently dangerous or noxious substances'; provided they carry appropriate documents and observe special precautionary measures established by international agreements. Although Article 22(2) allows coastal States to require such ships (as well as tankers) to confine their passage to certain sea-lanes, some States go further and assert wrongly the right to require prior authorisation for such passage. Many parties assert the right to regulate or even prohibit passage through the territorial sea (and sometimes archipelagic waters, contiguous zones to EEZs) for security reasons: see the various reservations and declarations made on ratification of the Convention.

Rights of the coastal State over ships in innocent passage

The right of innocent passage has to be balanced with the right of the coastal State to protect its legitimate interests. It can therefore make laws and regulations relating to innocent passage in the following areas: protection of navigational aids and of cables and pipelines; conservation of marine living resources (principally fish); environmental protection; scientific research; the prevention of infringement of customs, fiscal, immigration and sanitary laws; and the safety of navigation (Article 21). Charges cannot be levied on foreign ships by reason only of their innocent passage. Such charges may only be made for specific services rendered to them and levied on a non-discriminatory basis (Article 26).

In applying its laws and regulations, the coastal State must not impose requirements or enforce its laws and regulations in a way which would have the effect of denying or impairing the right of innocent passage, or which are discriminatory (Article 24). Thus, the coastal State should[24] not arrest a person on board a foreign ship, or investigate a crime committed on it, if the crime was committed before the ship entered the territorial sea, unless it entered from the internal waters of the coastal State. Nor should the coastal State exercise criminal jurisdiction if the crime was committed during the passage of the ship through the territorial sea unless the ship has just left the internal waters, the crime has an effect on the coastal State, local help has been requested or

[24] The rule is one of comity (see p. 11 above).

drug trafficking is involved. In such cases, the master of the ship can require the coastal State to inform a diplomatic or consular representative of the flag State of the action to be taken (Article 27). Similarly, the coastal State must not arrest a foreign ship for the purpose of civil proceedings when it is passing through its territorial waters unless the matter relates to obligations undertaken or liabilities incurred by the ship itself or is related to the passage (Article 28(2)).

The coastal State has a duty to warn all shipping of any known danger to navigation within the territorial sea (Article 24(2)).[25] This applies to man-made and natural dangers, such as volcanic eruptions.

For the position of warships and other State ships, see p. 296 below.

Contiguous zone

The term 'contiguous zone' is less well known. It can extend beyond the territorial sea, but not further than 24 nautical miles from the baselines from which the territorial sea is measured (Article 33). Only about one-third of coastal States have established a contiguous zone. Within the zone, the coastal State is entitled to exercise the control necessary to prevent and punish infringements of its customs, fiscal, immigration and sanitary laws and regulations when committed within its territory or territorial sea.

Exclusive economic zone

The exclusive economic zone (EEZ) is an area adjacent to the territorial sea and extending up to 200 nautical miles from the baselines from which the territorial sea is measured (Articles 55 and 57). Previously, most of the area would have been high seas, and so the EEZ, not being under the sovereignty of the coastal State, does not have the same legal character as the territorial sea. Instead, it is a zone in which the coastal State enjoys only *sovereign rights* for certain purposes.

Unlike the continental shelf, the rights to which are inherent, an EEZ has to be formally established by the coastal State, and most have done so. A few States limited themselves to establishing an exclusive fisheries zone (EFZ). Nearly all States which previously claimed a 200 nautical mile territorial sea (especially South American) have now replaced them with EEZs. Because of their breadth, two or more EEZs may well overlap, and so there may well be a need to delimit the boundary between them.

The EEZ is a relatively recent development. It is particularly important for developing countries since it gives them substantial rights over natural resources within the EEZ. The vast majority of fish stocks are found within 200 nautical miles from the coast. Because of this, most overseas territories have had EEZs established for them.

[25] See also *Corfu Channel* (*UK* v. *Albania*) (Merits), *ICJ Reports* (1949), p. 4; 16 ILR 155.

Rights, jurisdiction and duties of the coastal State in the EEZ

In the EEZ the coastal State has sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living (e.g. fish) or non-living (e.g. oil) of the superjacent waters, the seabed and of the seabed and its subsoil (Article 56(1)(a)). Thus, the coastal State has the exclusive right to exploit oil and gas deposits within its EEZ, that right being exercised in accordance with the rules governing the regime of the continental shelf (see below). (Regulation of fishing is discussed at pp. 295 and 297–300 below.)

In addition, the coastal State enjoys limited jurisdiction (i.e. less than sovereign rights) within the EEZ with regard to certain matters (Article 56(1)(b)):

(1) The construction of artificial islands, installations and structures (e.g. oil platforms). The coastal State has the exclusive right to authorise and regulate the construction, operation and use of such structures and to establish safety zones (normally no more than 500 metres in breadth) around them (Article 60).[26]
(2) Marine scientific research. The coastal State should normally give consent for pure science, but can withhold it if the research is of direct significance for the exploration and exploitation of natural resources (Article 246(5)). Consent is normally implied if the application contains all the necessary information and, within four months of its receipt, the coastal State has not indicated otherwise or asked for more details (Article 252).
(3) The protection and preservation of the environment, chiefly from pollution by ships and oil platforms (see pp. 315–17 below).

Rights and duties of other States in the EEZ

Although the EEZ is no longer part of the high seas, certain important high seas freedoms can still be exercised in an EEZ (Article 58), the first being *freedom of navigation* by foreign ships, subject to the coastal State's powers in respect of pollution. However, a number of developing countries have legislated or proposed legislation that purports to restrict this basic freedom for shipping in the EEZ.[27] Second, all foreign aircraft enjoy the *freedom of overflight* of the EEZ, to which the ICAO Rules of the Air apply, not the laws and regulations of the coastal State. Third, States enjoy the *freedom to lay submarine cables and pipelines* in the EEZ, although the course taken by a pipeline is subject to the consent of the coastal State (Article 79(3)).

International straits

An international strait is a passage used for international navigation that connects one part of the high seas or an EEZ with another part of the high

[26] And see p. 288 below. [27] See Churchill and Lowe, pp. 107–3.

seas or an EEZ (Article 37). It has to be wider than 24 nautical miles, or it would consist of territorial sea only. The Convention regime does not apply if: (a) the strait has a high seas or an EEZ route through it of similar convenience; (b) the strait is formed by an island bordering the strait and the mainland; (c) the strait connects part of the high seas or an EEZ with the territorial sea of a third State; or (d) the legal regime of the strait is regulated by a long-standing treaty.[28] In the first three cases, navigation of the strait will be governed by the rules on innocent passage through the territorial sea or freedom of navigation through the EEZ or the high seas, as appropriate.

In all other cases, the regime of the Convention creates a right of *transit passage* through international straits. This right is greater than innocent passage through the territorial sea, but is less than freedom of navigation on the high seas. Transit passage means navigation (and overflight) solely for the purpose of 'continuous and expeditious' transit from one part of the high seas, or an EEZ, to another part of the high seas, or an EEZ, including passage for the purpose of entering, leaving or returning to a State bordering the strait (Article 38(2)). If an activity is not in accordance with these conditions, such as anchoring, the passage will be subject to the regime of the territorial sea or the EEZ, as the case may be, unless it is rendered necessary by distress or *force majeure* (Article 39(1)(c)).

Archipelagos

Articles 46–54 make special provision for archipelagos. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands of the archipelago (Article 47). For this purpose, an archipelagic State is one constituted *wholly* by one or more archipelagos and perhaps other islands. An archipelago is a group of islands, interconnecting waters and other natural features which are so closely interrelated that they form an 'intrinsic geographical, economic and political entity', or which historically have been so regarded (Article 46). Fiji, Indonesia, the Philippines and Tonga are prime examples. The Færoe Islands are probably not an archipelago because Denmark is a State with a mainland (Jutland), and therefore not constituted *wholly* by one or more archipelagos or islands. On the other hand, the Færoe Islands are an overseas territory of Denmark, and it may have been for this reason that the straight baselines (see below) drawn around the Færoe Islands have been recognised by several States. If the archipelagic State is constituted by more than one archipelago, the straight baselines are drawn around each archipelago.[29]

The waters *inside* the baselines, other than internal waters, are archipelagic waters over which the State has sovereignty (Article 49). The territorial sea is

[28] Such as the Montreux Convention 1936 regulating the Bosphorus and the Dardanelles, 173 LNTS 213; UKTS (1937) 30.

[29] See, generally, Churchill and Lowe, pp. 118–31.

measured from those baselines in the usual way. Since the drawing of the baselines will cut off large areas of sea, the archipelagic State must respect the traditional fishing rights of neighbouring States. Although foreign ships have the right of innocent passage through archipelagic waters, they, and foreign aircraft, enjoy the more extensive right of 'archipelagic sea lanes passage', which is similar to transit passage through straits (Articles 52–54).

Continental shelf

The continental shelf took on enormous economic importance in the second half of the twentieth century with the exploitation of offshore oil and gas reserves. It comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea of a coastal State throughout the natural prolongation of the land territory to either (a) the outer edge of the *continental margin* or (b) 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, whichever is the greater (Article 76(1)). The *continental margin* is defined in geophysical terms as comprising: (a) what is more properly called the *continental shelf*, that is, that section of the seabed that gradually slopes from the low watermark to an average depth of 130 metres, from where it descends more steeply; (b) the *slope*, that is, the following section which descends more steeply; and (c) the *rise*, if any, where the seabed falls away more gradually to a depth of about 3,500 to 5,500 metres. Beyond that is the deep ocean floor (see Article 76(3).[30] Article 77(4)–(7) contains an exceptionally complex, technical formula for establishing the outer edge of the continental margin.

A coastal State exercises *sovereign rights* (not sovereignty) over its continental shelf for the purpose of exploring it and exploiting its natural resources. These rights are inherent: unlike an EEZ, they do not have to be proclaimed and do not depend on occupation. They are also exclusive; if the coastal State chooses not to explore or exploit the natural resources, no other State may do so without its express consent. The natural resources are mineral (e.g. oil and gas), or other non-living resources of the seabed and subsoil, as well as living organisms belonging to sedentary species, such as molluscs (Article 77(4)).

A State that wishes to establish an outer limit of its continental shelf beyond the 200 nautical mile limit is required to submit information to the Commission on the Limits of the Continental Shelf (CLCS)[31] within ten years of becoming a party to UNCLOS (see Article 76 and Annex II, Article 4).[32] The CLCS will then make 'recommendations' to coastal States, and limits established by a coastal State on the basis of the recommendations are 'final and binding' (Article 76(8)).

[30] Ibid., p. 30.

[31] See Annex II to the Convention, and the entry for the CLCS at www.un.org/Depts/los/index.htm.

[32] In 2001, a meeting of the States parties decided to extend the ten-year period for those States (mostly developing) for which the Convention entered into force before 13 May 1999. For them the period begins on that date: SPLOS/72.

In October 2004, Denmark announced that it would carry out a hydrographic survey of Greenland's northern continental shelf, which may extend as far as the North Pole. If so, this could lead to difficult delimitation problems with other States with territory in the region.[33]

Construction of artificial islands and other installations in the EEZ or on the continental shelf

The coastal State has the exclusive right to authorise and regulate the construction, operation and use of artificial islands, installations and structures (such as oil drilling rigs) in its EEZ or on its continental shelf (Articles 60 and 80). It also has exclusive jurisdiction over them. Notice must be given of construction, and various safety measures must be taken. Safety zones up to 500 metres in extent may be established. Artificial islands, installations and structures do not possess the status of islands, have no territorial sea and their presence does not affect delimitation.

Delimitation

A delimitation[34] problem arises only when the claims to territorial seas, EEZs or continental shelves of two or more States overlap. The delimitation of maritime boundaries is a fertile ground for disputes between States. Many are resolved by negotiation,[35] others by referring the dispute to an international court or arbitral tribunal.[36] The cases raise complex issues of law and fact, the facts naturally being unique in each case. That being so, this is not the place to attempt a *detailed* survey of the principles. Any State that has a delimitation problem will have to take advice from the legal advisers in its foreign ministry, and they will probably need the help of outside public international lawyers and hydrographers who have expertise in this arcane, but profitable, subject. We will therefore merely outline the main points.

Territorial sea

In the case of *opposite* States (i.e. facing each other), the usual practice is to draw a median line – a line equidistant from the shores of each State. When the States are *adjacent* (next to each other), the land boundary may be extended outwards in the same direction, or, where the land boundary meets the sea, a line may be drawn perpendicular to the general direction of the coast, or the line of latitude

[33] See pp. 333–4 below on the Arctic and its formidable problems.
[34] See p. 34 above as to the meaning.
[35] See the Denmark – UK Agreement on the Maritime Delimitation of the Area between the Færoes and the United Kingdom, UKTS (1999) 76.
[36] See *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, *ICJ Reports* (2009), p. 1.

at that point may be continued outwards. But these are only general indicators of possible solutions; offshore islands and other special features may require special treatment (see Article 15). In practice, States, and international courts and tribunals, seek an equitable solution, the matter typically being complex and with no 'legally correct' answer.

EEZ and continental shelf

Articles 74 and 83 lay down identical rules for the delimitation of the EEZ and the continental shelf between States with opposite or adjacent coasts. First, the States must seek to agree the delimitation, which should represent an equitable solution, and most delimitations have been done this way. Second, pending agreement, the States should enter into provisional arrangements of a practical nature. Sometimes, these are long-lasting and provide for cooperation between States in the exploitation of oil and gas reserves or fish stocks off their coasts in an area that straddles the likely boundary. Such cooperative arrangements (unitisation agreements)[37] can also be made where the boundary has been delimited. Third, if agreement cannot be reached within a reasonable time, the States must resort to the dispute settlement procedure of the Convention.[38] Given that the rules contain only one substantive principle, equity, the way in which this is applied will depend on State practice, judicial and arbitral decisions, and the particular facts of the case. There is a distinct trend for the same boundary line to be drawn for the continental shelf and the EEZ, deviations from a common line being made only to take account of special circumstances.

Delimitation is a lengthy and complex process. One normally starts by drawing a median line. One then considers whether there are (largely geographical) circumstances which suggest that to delimit on the basis of the median line would be inequitable. Such circumstances include a coast with an exceptional configuration (shape) or offshore islands. If an offshore island is small, it will not be taken fully into account in any modification to the median line. However, if the opposite coasts of two States are considerably different in length, a median line drawn between them is likely to produce a substantial disparity between the ratio of the coastlines to each other and the ratio of the continental shelves attaching to each coast. The boundary will then be adjusted so that the ratio between each State's coastline and its continental shelf is not unreasonably disproportionate. But, when a small island is a State in itself, or an overseas territory, it will usually be regarded as generating its own, full continental shelf.

[37] See the Australia – Timor Leste Unitisation Agreement of 6 March 2003, [2007] ATS 11; UNTS (No. 44576).

[38] See pp. 301–2 below.

The Area

Whereas most of UNCLOS is based on the 1958 Geneva Conventions on the Law of the Sea and established or emerging customary international law, Part XI, on the 'Area', created entirely new law. It was effectively amended in 1994 by the Agreement on the Implementation of Part XI of UNCLOS ('Implementation Agreement').[39] The term 'Area' was chosen to describe the seabed and ocean floor and its subsoil that is not part of the continental shelf of any State. In simple terms, the Area is the *deep* seabed. It is important because parts of it (mostly in the Pacific and Indian Oceans) are rich in mineral nodules (lumps), manganese in particular. The Area and its resources are declared by the Convention to be the 'common heritage of mankind'. They are therefore not subject to any claims to, or exercise of, sovereignty or sovereign rights, although that does not affect the status of the waters (or the airspace above them) which lie over the Area. All rights in its mineral resources (including oil and gas) are vested in mankind as a whole, on whose behalf the International Seabed Authority acts. The Authority organises and controls the exploitation of the mineral resources in the Area.

All parties to the Convention are members of the Authority, which is based in Jamaica. The Assembly of the Authority consists of representatives of all the Convention parties, who elect the thirty-six members of the executive organ of the Authority, the Council. Within the general policies established by the Assembly, the Council establishes the specific policies of the Authority. The Enterprise is the organ of the Authority empowered to engage in mining in the Area, but only by means of joint ventures with companies. Since commercial exploitation (also of oil and gas) of the Area is unlikely in the immediate future, such limited functions of the Enterprise that need to be carried out at present are done by the Secretariat of the Authority.[40]

The high seas

The high seas are all parts of the sea that are not within an EEZ, the territorial sea, internal waters or archipelagic waters (Article 86). No State may subject any part of the high seas to its sovereignty (Article 89). All States, including land-locked States, enjoy the freedoms of the high seas, of which six are listed in the Convention. They are not absolute, but must be exercised with due regard for the interests of other States in their exercise of the same freedoms (Article 87).

Freedom of navigation (see pp. 294–5 on other freedoms)

The right for ships flying the flag of a State to sail freely[41] on the high seas (Article 90) is a cardinal principle of international law. The flag State has

[39] 1836 UNTS 42 (No. 31364); ILM (1994) 1309; UKTS (1999) 82.
[40] For details of the regime once commercial exploitation begins, see Churchill and Lowe, pp. 238–53.
[41] See n. 1 above.

exclusive jurisdiction over ships on the high seas flying its flag (Article 92(1)),[42] subject only to some limited exceptions.

Piracy

There is nothing romantic about piracy; it involves armed robbery, hostage-taking and murder. For these reasons, international law has for centuries treated pirates as international outlaws subject to the jurisdiction of any State.[43] Piracy is now defined as any illegal act of violence or detention committed, for *private* ends, by the crew or passengers of a *private* ship or aircraft on the high seas against *another* ship or aircraft, or against persons or property on board it (Article 101).[44] The crew of any warship may board any ship if there are reasonable grounds to suspect that it is engaged in piracy (the so-called right of visit) and, if that proves to be so, the crew may seize the ship and arrest the pirates. The pirates can then be taken to the ship's flag State and tried in its courts (see Articles 105, 107 and 110).

Today piracy is a modern, and growing, phenomenon. Although the area of sea most threatened by pirates is Somalia,[45] pirates have operated for many years (and still operate) in other waters, not just the Caribbean, as Hollywood might like us to believe. The Piracy Reporting Centre of the International Maritime Bureau (IMB) of the International Chamber of Commerce recorded nearly 400 pirate attacks in 2008, although there were many, and high-profile cases, in the seas off the coast of Somalia, the attacks in the Strait of Malacca (through which one-quarter of the world's shipping passes) and other parts of the world continued. Murders increased to more than thirty.[46]

Because of the dangers posed by piracy from Somalia, in addition to the expensive option of rerouting vessels well away from the normal shipping lanes, various other actions have been taken. In 2008, acting under Chapter VII, the UN Security Council adopted Resolutions 1816, 1838, 1846 and 1851. They condemned all acts of piracy off Somalia and called upon States with naval vessels and military aircraft in the area to use the high seas and airspace off the Somali coast, in accordance with international law, to repress the scourge. Because of the problem of not being able to return convicted (or indeed acquitted persons accused) of piracy off Somalia,[47] some States have handed the accused over to other States in the region (especially Kenya) for trial.[48]

[42] As to the nationality of ships, see pp. 295–6 below. [43] See p. 250 above.

[44] These criteria mean that in most cases the act cannot be regarded as, for example, ship-jacking (see p. 268 above (Rome – or SUA – Convention)).

[45] In 2008, there were 111 pirate attacks on ships off Somalia, and 42 ships were captured. Ransom demands varied from $1 million to $8 million. It is estimated that in 2008 about $30 million were paid to Somali pirates. For the MV *Faina*, bound for Mombasa with tanks and armaments, the pirates received $3.2 million in ransom.

[46] Go to www.icc-ccs.org and, under 'Learn More', click on 'IMB Piracy Reporting Centre of International Crime Services'. The IMB should *not* be confused with IMO.

[47] See p. 222 above.

[48] Kenya presently holds over one hundred accused pirates. In *international* law, all States have jurisdiction to try persons accused of piracy: see pp. 44–5 above.

Slave trading

Similarly, the crew of any warship can board any ship if there are reasonable grounds to suspect that it is engaged in the slave trade (Article 110(1)(b)). However, the flag State of the warship can only report its findings to the flag State of the ship; it cannot seize the ship or prosecute the crew.

Unauthorised broadcasting

This consists of radio or television broadcasting to the general public from a ship on the high seas contrary to international regulations. Any person engaged in it may be prosecuted by the flag State of the ship concerned, the State of which the person is a national, any State where the transmissions can be received, or any State where authorised transmissions are being interfered with. In these cases, any such State may seize the ship and its broadcasting apparatus on the high seas and arrest the persons concerned (Articles 109 and 110(1)(c)).

Drug trafficking

Drug trafficking is *not* yet an exception. Although Article 108 requires States to cooperate in the suppression of the illicit carriage of narcotic drugs by ships on the high seas, it does not authorise States to take action against foreign ships. However, it does permit a State which believes that a ship flying its flag is engaged in such traffic to request the help of other States. Such a request naturally signifies the consent of the requesting State to the action requested. The request can be made ad hoc or under a treaty. A UK – US treaty of 2000[49] authorises the reciprocal interdiction (stop and search) in the Caribbean, the Gulf of Mexico and Bermuda of their respective flag vessels suspected of being engaged in drug trafficking, and ultimately their seizure. Other States have concluded similar bilateral treaties.

It is not only drug trafficking for which consent can be given by the flag State for its ships to be interdicted on the high seas; it can consent in respect of any matter, arms smuggling being an obvious example. On 21 December 2001, British forces stopped, boarded and searched a merchant ship, the *Nisha*, registered in St Vincent and the Grenadines, while it was on the high seas between the territorial seas of France and the United Kingdom. Intelligence had indicated that it might have weapons of mass destruction (WMD) on board, although nothing was found. The action had been authorised in advance by the flag State.

Proliferation Security Initiative

In May 2003, in response to the threat from the proliferation of WMD, certain States agreed to participate under US leadership in the Proliferation Security Initiative (PSI). There are now nearly 100 States participating, including Russia,

[49] 2169 UNTS 251 (No. 38031); UKTS (2001) 2.

but not China. The PSI is *not* a treaty-based scheme, but one of cooperation. It builds upon the Statement of the President of the UN Security Council of 31 January 1992,[50] that the proliferation of WMD is a threat to international peace and security. The aim is to impede and stop the trafficking of WMD, their delivery systems and related materials by States or non-State actors engaged in or supporting WMD proliferation programmes. The principal means is the stopping and searching by a participant State or States of shipping suspected of carrying WMD cargoes, but only when this would be consistent with international law, for example, of own flag vessels anywhere and of foreign flag vessels in the participant's ports, territorial sea or contiguous zone (if any), or otherwise with the consent of the flag State. So far Ship Boarding Agreements have been signed by the United States with the Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, the Marshall Islands, Mongolia (which although landlocked has a lot of ships at sea) and Panama.[51]

Special zones

Although the high seas are reserved for peaceful purposes (Article 88), this does not mean that force cannot be used on the high seas, provided it is lawful under rules of general international law.[52] Practice firings or naval exercises may also be conducted on the high seas. For this purpose, the State or States involved may issue warnings to shipping generally not to enter the zone where the activity will be carried out. The Convention does not authorise or prohibit such warnings, but, provided they are not too extensive or prolonged, they are in most cases recognised and complied with.

Hot pursuit

The right of hot pursuit of a foreign ship by a ship or aircraft for the purpose of arresting it is not a real exception to the freedom of navigation. It is rather an extension of the rights of the coastal State, provided it has 'good reason to believe' that the ship has violated its laws or regulations. So long as the pursuit is begun when the ship is still within the internal waters, archipelagic waters, territorial sea or contiguous zone of the coastal State, it can be continued outside if the pursuit has not been interrupted (Article 111). It will probably not be interrupted merely by another ship taking over the pursuit. If when the order to stop is received the suspect ship is within the territorial sea or the contiguous zone, the pursuing ship does not also have to be in that territorial

[50] S/23500. See also UNSC Res. 1540 (2004).

[51] See www.state.gov/t/isn/c10390.htm. Liberia and Panama have numerous ships flying their respective flags. See also, M. Byers, 'Policing the High Seas: The Proliferation Security Initiative' (2004) AJIL 526; D. Guilfoyle, 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force' (2007) ICLQ, 69–82.

[52] See p. 9 above.

sea or the contiguous zone. But if the foreign ship is within the contiguous zone, it may not be pursued unless there has been a violation of the rights for the protection of which the zone was established. The right of hot pursuit applies equally to violations of the laws or regulations of the coastal State in the EEZ or on the continental shelf, including in safety zones around installations on the continental shelf.

The order to stop must be given by a visual or auditory (including radio) signal that can be seen or heard by the foreign ship. Only such force as is necessary and reasonable may be used to effect an arrest. The right of hot pursuit ceases as soon as the ship enters the territorial sea of its own State or a third State. Hot pursuit may only be exercised 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 of hot pursuit is developing to meet the dangers posed by drug trafficking and other modern scourges.[53]

Other Freedoms

The other freedoms of the high seas are listed in Article 87(1). They are discussed in the following sections.

Freedom of overflight

The civil and military aircraft of all States are free to fly in the airspace above the high seas and EEZs (Article 58(1)), subject only to such rules as are imposed by international law. In the case of civil aircraft, the governing treaty is the Chicago Convention 1944 and the rules promulgated under it by the International Civil Aviation Organization (ICAO).[54]

Freedom to lay submarine cables and pipelines

Like the other freedoms, this so-called right of immersion must be exercised 'with due regard for the interests of other States' in their exercise of the freedoms, and also with due regard for rights under the Convention with respect to activities in the Area. Thus, when laying a cable or pipeline, due regard must be had to existing cables and pipelines and to the need for them to be repaired (Article 79 (5)). There are provisions regarding damage to cables or pipelines by ships or submarines, and damage to cables or pipelines by the laying or repairing of other cables and pipelines (Articles 113–114).

Freedom to construct artificial islands and other installations permitted under international law, subject to Part VI (articles on the continental shelf)

(See p. 288 above.)

[53] See Churchill and Lowe, pp. 214–15. [54] See further pp. 319–20 below.

Freedom of fishing

This freedom (Article 116) is now subject to various constraints in the interests of the conservation and management of the marine living resources (see pp. 297–300 below).

Freedom of scientific research

There is a general right to conduct scientific research in the high seas, except that in the Area it must be done in conformity with the rules governing the Area (Articles 256–257). It was reported in the press in March 2009 that a US ship carrying out scientific work near the Spratly Islands (in the South China Sea between Vietnam and the Philippines) was harassed by a Chinese warship. This may have been caused by the long-standing dispute over which State (there are four claimants, although not the United States) has sovereignty over one or more of the islands, and thus certain rights in respect of the surrounding waters.[55]

Nationality of ships

Apart from certain exceptions,[56] on the high seas a State can exercise jurisdiction only over ships of its own nationality; no other State may arrest or detain the ships, even for the purpose of investigation (Article 97). Therefore, if a ship is involved in a collision or other navigational incident on the high seas, only its flag State, or the State of nationality of the master or other person in the service of the ship, may exercise criminal or disciplinary jurisdiction over them.

Most States have a register of ships entitled to fly their flag. A ship has the nationality of the State whose flag it is entitled to fly. There must be a 'genuine link' between the ship and the State (Article 91). Unfortunately, such a link is often tenuous (flags of convenience), and thus the amount of actual control that the State exercises may be slight. A ship must not sail under more than one flag, or change its flag during a voyage or while in a port of call, unless it is the result of a real transfer of ownership or registry. A ship that sails under more than one flag is assimilated to a ship without nationality (Article 92). If there are reasonable grounds for suspecting that a ship on the high seas has no nationality, it may be boarded by *any* warship (Article 110(1)(d)). If the ship is found to be carrying narcotic drugs destined for the State of the warship, it can probably be arrested and persons on board prosecuted in that State. If a ship is flying a foreign flag, or refusing to show its flag, and there are reasonable grounds for suspecting that it is of the same nationality as the warship, the warship may board it (Article 110(1)(e)). If it is found to be wrongly flying the

[55] See Chapter 3. [56] See pp. 290 et seq. above.

same flag as the warship, it may be seized and taken to a port of the flag State for prosecution.

Warships and ships used only on government non-commercial service

The following paragraphs deal only with the law applicable in peacetime. Under Article 29, a warship is:

> a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under 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 forces discipline.

The ship does not have to be owned by the flag State (note 'belonging' in Article 29), provided it fulfils all the criteria; ships chartered for the purpose of transporting troops and under naval command are warships.

In peacetime, a warship may carry out various civil duties in support of the government of the flag State, including enforcing fisheries and anti-pollution laws. On the *high seas*, a warship is comparable to a floating piece of territory of the flag State, since it has complete immunity from the jurisdiction of any other State (Article 95).[57] This applies also in a foreign EEZ, although whether a warship may test weapons or conduct manoeuvres there is disputed.[58] Where there is a right of transit passage through *international straits*,[59] this is enjoyed by all ships, and thus includes warships. In such straits, submarines do *not* have to navigate on the surface. But, when in the *territorial sea* of another State, submarines and other underwater vehicles *must* navigate on the surface and show their flag (Article 20). Whether a warship enjoys the right of innocent passage through the territorial sea is not agreed. Although Russia, the United Kingdom, the United States and other significant naval powers assert that warships do have that right, some forty States require prior authorisation. In such cases, this is generally sought and normally granted. If a warship does not comply with the laws and regulations of the coastal State concerning passage, it can be required to leave the territorial sea immediately (Article 30). If it does not do so, the coastal State can use reasonable force to remove it.

Since a State can refuse entry to its *ports* to a foreign warship, clearance must be sought by the flag State. This is known as 'diplomatic' clearance since it is done through the diplomatic channel (no pun intended). But, once in the port or other internal waters of the foreign State, the warship continues to enjoy *complete* immunity from the jurisdiction of that State. The vessel remains under

[57] State immunity in other cases is not usually absolute: see pp. 145–6 above. State immunity should not be confused with diplomatic immunity, or 'diplomatic' clearance (see below).

[58] See Churchill and Lowe, pp. 426–7.

[59] See pp. 285 et seq. above. Other straits are governed either by the rules applicable to the territorial sea or by special treaty regimes.

the exclusive control of its commander; it may not be entered or persons or property removed from it without his permission. No criminal or civil proceedings may be taken against the vessel or persons on board.[60] Subject to any contrary provisions of an applicable visiting forces agreement,[61] members of the crew who are on shore on *official* business are under the exclusive jurisdiction of the flag State, although they can be forcibly removed to the ship by the local authorities. If ashore on *personal* business, they can be arrested, prosecuted or sued like anyone else.[62]

As with warships, *foreign governmental ships operated for non-commercial* purposes enjoy State immunity, but determining whether the purpose is non-commercial may not be easy. As with any question of State immunity, the position will depend to a large extent on the precise circumstances and the law of the State where the question has arisen.[63]

Landlocked and geographically disadvantaged States

A State with no sea coast is landlocked. There are forty-two such States (forty-three if one includes Kosovo),[64] varying from the small but rich (Switzerland), to the large but poor (Ethiopia). But both have fleets of merchant ships, which enjoy the same rights in the territorial waters, contiguous zones and EEZs, and freedom of navigation on the high seas, as all other States. Landlocked States may also exercise the freedom to fish, conduct scientific research, overfly outside territorial waters, and lay cables and pipelines, but not construct artificial islands or other offshore installations (Article 87). Landlocked States do have freedom of transit through States that lie between them and the sea for the passage of persons, goods and means of transport, unless allowed by agreements with the transit States (Article 125). Special, complex and somewhat limited provisions are made for landlocked States, and geographically disadvantaged States, to have access to marine resources.[65]

Fishing

Fishing is a large and vitally important industry. The rules governing it vary depending on whether the fishing takes place in internal waters or the territorial sea, in an EEZ, an exclusive fishing zone (EFZ) or on the high seas.

In internal waters and the territorial sea

Since both the internal waters and the territorial sea of a State are part of its territory, fishing vessels of other States have no right to fish there without the

[60] Cf. p. 280 above. [61] See p. 159 above. [62] See generally Oppenheim, pp. 1167–70.
[63] See p. 156 above. [64] See p. 17 above. [65] Churchill and Lowe, pp. 435–40.

agreement of the coastal State. Such agreements are rare, the most celebrated being the EU Common Fisheries Policy. Under this scheme, fishing vessels registered in one Member State have, subject to detailed EU rules, the right to fish in the territorial sea or EEZ of the other Member States. This right does *not* extend to the overseas territories of Member States.

In EEZs[66]

Although a coastal State has sovereign rights over the fish stocks within its EEZ, it has an international law duty to conserve those stocks. The coastal State will therefore determine, usually on a seasonal or annual basis, how much of each species may be caught in its EEZ (in fisheries jargon, the total allowable catch, or TAC). When its own fishermen cannot take all the TAC, the coastal State has a duty to allow other States to fish for it in its EEZ. But the coastal State has a large degree of discretion in calculating the TAC and as to who should be given access to any surplus. Many bilateral agreements have been concluded to allow for access, subject to reciprocal treatment, payments or licence conditions. Since the EU Member States, having transferred competence to the European Union for the conservation and management of sea fishing resources, the relevant rules are adopted by the European Union – although enforced by the Member States – and it is the European Union which negotiates (by means of the European Commission) and concludes agreements on fishing in the EEZs of third States or within competent international organisations.[67]

If a foreign fishing vessel is suspected of breaching the regulations of the coastal State governing fishing in its EEZ, the State may enforce them by boarding, inspecting and arresting the vessel and subsequent prosecution (Article 73). The flag State must be promptly notified of an arrest, and the vessel and crew released promptly once a reasonable bond or other security has been lodged. Penalties for breaches of regulations must not include imprisonment. If there is a dispute between the detaining State and the flag State about the detention, it can be submitted to an international court or tribunal (Article 292).[68] Force may be used against a fishing vessel only if in the particular circumstances it is reasonable and proportionate.[69]

[66] If a State does not wish to declare an EEZ as such, it may establish an exclusive fishing zone (EFZ) for the regulation of fishing up to 200 nautical miles from its coast.

[67] Statement by the European Community on signature of UNCLOS: see *UN Multilateral Treaties*, Ch. XXI.6, see Declarations; UKTS (1999) 179.

[68] See Case No. 2, *M/V Saiga (No. 2) (St Vincent and the Grenadines* v. *Guinea)*, decided by the International Tribunal for the Law of the Sea (ITLOS), 110 ILR 736; ILM (1998) 364 and 1202; www.itlos.org; and Case No. 8, *Grand Prince (Belize* v. *France)*, 125 ILR 272. See also Case No. 11, *Volga (Russia* v. *Australia)*, 126 ILR 433.

[69] See the *I'm Alone*, 1935 (7 AD 203), *The Red Crusader*, 1962 (35 ILR 485), *M/V Saiga (No. 2)* (n. 68 above), para. 156, and Article 22(1)(f) of the Fish Stocks Agreement (n. 71 below).

On the high seas

The Convention has little to say about fishing on the high seas. Article 116 states that all States have the right for their nationals to fish on the high seas, subject to (a) treaty obligations, (b) the rights of coastal States in respect of straddling stocks and highly migratory species (see below) and (c) the duty to take measures, either nationally or in cooperation with other States, to conserve fish stocks. This duty is elaborated somewhat by the general principles in Articles 118–119, but cooperation depends on the effectiveness of regional fisheries commissions for the conservation and management of marine living resources.

Shared and straddling stocks and highly migratory species

Fish are notorious for not respecting territorial limits. A species will often migrate between two EEZs ('shared stocks') or between one or more EEZs and the high seas ('straddling stocks'). When two or more EEZs share the same stock or an associated stock, the States have an obligation to seek agreement on measures to ensure the conservation and development of the stock (Article 63 (1)). There are several agreements for this purpose under which total allowable catches (TACs) are agreed annually on a bilateral or a multilateral (regional fisheries commission) basis.[70]

The most important highly migratory species of fish is tuna. Article 64 of the Convention and the Straddling and Highly Migratory Fish Stocks Agreement 1995 (Fish Stocks Agreement)[71] together provide that, where the species is found in an EEZ, the coastal State and other States fishing in the EEZ, or on the high seas beyond it, have a duty to cooperate in the conservation and management of the species.

Other highly migratory species include *anadromous species*, such as salmon, which spawn in fresh water before migrating to the sea (Article 66), and *catadromous species*, such as eels, which do the opposite (Article 67), and *marine mammals*.

Sedentary species

Sedentary species, as defined in Article 77(4), include molluscs, such as oysters, but there is doubt whether lobsters and crabs are included.[72] Sedentary species are part of the natural resources of the continental shelf and the coastal State has *no* duty either to conserve them or to allow foreign fishermen to harvest them.

[70] See pp. 297–300 below.

[71] 2167 UNTS 3 (No. 37924); ILM (1995) 1542; UKTS (2004) 19. Its *full* title is thirty-seven words long. So, it is more usually known as the Fish Stocks Agreement or the Straddling Stocks Agreement (only three words). It entered into force on 11 December 2001.

[72] See Churchill and Lowe, pp. 285 and 320.

Whales and other marine mammals

A coastal State is allowed by Article 65 to prohibit, limit or regulate the exploitation of marine mammals, such as whales and seals, in its EEZ more strictly than the Convention provides for other living resources. The International Whaling Commission (IWC) regulates whaling in all waters, but its measures (such as the moratorium on hunting of whales) apply only to its Member States, who can opt out of them.[73] (For details on fisheries commissions and the IWC, see pp. 309–11 below.)

Wrecks

There is a lack of control over wrecks outside the territorial sea, although a wreck in the contiguous zone is assimilated to one found in the territorial sea, and the coastal State can require its approval to remove the wreck. The rights of the owners of the wreck and the law of salvage[74] are unaffected (Article 303). But the coastal State has no jurisdiction over wrecked ships of foreign States or their nationals in the EEZ or on the continental shelf. The IMO Nairobi Convention on the Removal of Wrecks 2007 has so far not received one ratification, that of Kenya. It will enter into force when ten States are parties, though of, course, only for the parties.

Underwater cultural heritage

Concern has been expressed at the need to protect certain prominent wrecks and their contents lying on the seabed. It is estimated that during the last 1,000 years over one million ships were wrecked around the UK coast. The ferry *Estonia*, which sank in the Baltic Sea in 1994, is the subject of a treaty between Estonia, Finland and Sweden (to which other States can accede)[75] to protect the wreck, in particular victims' remains. On 2 November 2001, UNESCO adopted a Convention on the Protection of the Underwater Cultural Heritage.[76] The Convention was criticised by most major maritime States, particularly over the exercise of jurisdiction, and so was not adopted by consensus, as is now usual.[77]

[73] Norway opted out of the ban on hunting whales, as is its right.

[74] Salvage is payable as compensation for assisting a ship in danger or saving it or its cargo. See now the IMO International Convention on Salvage 1989 (www.imo.org or UKTS (1996) 93), which entered into force in 1996 and now has fifty-seven parties representing 47.16 per cent of world tonnage. It is intended to replace the Brussels Convention 1910 (UKTS (1913) 4; 212 CTS 187). The 1989 Convention goes further in providing that a salvager can be paid for preventing or minimising pollution even if it was unable to save the ship.

[75] 1890 UNTS 176 (No. 32189); with Additional Protocol 1996, UKTS (1999) 74, so enabling the United Kingdom to accede.

[76] ILM (2002) 37 or see www.unesco.org. See Garabello and Scovazzi (eds.), *The Protection of the Underwater Cultural Heritage*, Leiden, 2003.

[77] See p. 58 above.

Instead, the voting was 85 for, 4 against and 15 abstentions, including the United Kingdom. Although, it entered into force in 2009, and so far has twenty-six parties, only one important Western European State (Spain) is a party.

Protection of the marine environment

This topic, including pollution by wrecks, is covered at pp. 315–17 below.

Dispute settlement under the Convention

The International Tribunal for the Law of the Sea

Following the entry into force of the Convention in 1994, the International Tribunal for the Law of the Sea (ITLOS, or 'the Tribunal') was established in 1996 at Hamburg, Germany. The provisions on its composition and procedure are in Annex VI (also referred to as the Statute) to the Convention. It has twenty-one judges serving nine-year, re-electable terms. Disputes may be submitted to the full Tribunal or to one of its chambers. The Tribunal has established chambers for fisheries and marine environmental disputes; a seabed disputes chamber; and a summary procedure chamber. The Tribunal may also form an ad hoc chamber to deal with a particular dispute if the parties so request. The Tribunal generally follows the procedure of the International Court of Justice (ICJ), English and French being its official languages. The Registrar is the best and most accurate source of knowledge on the procedure and practice of the Tribunal. He should be consulted early on by any prospective litigant.

The Tribunal is open to all States parties to the Convention and entities referred to in Article 305(1)(c) to (f). It has jurisdiction over any legal disputes concerning the interpretation or application of the Convention (Article 288(1) and Annex VI, Article 21) and the Implementation Agreement 1994.[78] It also has jurisdiction over any dispute under a treaty related to the purposes of the Convention which is submitted to it in accordance with that treaty (Article 288 (2)). For this purpose, the parties to the dispute do not have to be parties to the Convention. For example, the Fish Stocks Agreement 1995 allows the parties to it to submit their disputes under it to the Tribunal.[79]

Means of dispute settlement

The provisions on the settlement of disputes in Articles 279–299 of the Convention and in Annexes V–VIII are complex and must be read carefully.

The Tribunal can order legally binding provisional measures of protection. When a dispute is submitted to arbitration under Annex VII, any party to the dispute may request the Tribunal to prescribe provisional measures pending the constitution of the arbitral tribunal pursuant to Article 290(5). Some cases

[78] See n. 39 above. [79] See Art. 30, and n. 71 above.

have been submitted to the Tribunal under this provision. There is a special provision under which the Tribunal can order the prompt release of a vessel (Article 292).[80] The Tribunal can also give advisory opinions (Convention, Articles 139(1), 159(10) and 191; Rules, Article 138). In Resolution 55/7 of 2000, the UN General Assembly established a Trust Fund administered by the Secretary-General to help parties to the Convention to settle disputes through the Tribunal. The Fund is like that established for ICJ cases,[81] being financed by voluntary contributions from States. Applications for assistance from the Fund are considered by a panel of independent experts who make recommendations to the Secretary-General.[82]

The Tribunal began work in 1996. It competes with the ICJ and other established means of settlement. In its first fifteen years, it has had a disappointedly low number of cases, nine of which were about prompt release of vessels.[83] Increasingly, Annex VII arbitrations (particularly maritime delimitation cases) are being held under the auspices of the Permanent Court of Arbitration.[84]

[80] Only available when the detaining State has not complied with specific provisions of UNCLOS for prompt release or upon the posting of a bond: see Arts. 73, 220(7) and 226(1)(b) or (c).

[81] See p. 413, and n. 82 below.

[82] Further information should be sought from the Office of the UN Legal Counsel or the Registrar of ITLOS.

[83] See V. Cogliati-Bantz, 'ITLOS, *Hoshinmaru* and *Tomimaru*, Prompt Release Judgments' (2009) ICLQ 241–58.

[84] See p. 408, below.

16

International environmental law

Let it be borne in mind how infinitely complex and close fitting are the mutual relations of all organic beings to each other and to their physical conditions of life.[1]

Birnie, Boyle and **Redgwell**, *International Law and the Environment*, 3rd edn, Oxford, 2009 ('B, B & R')
Birnie and **Boyle**, *Basic Documents on International Law and the Environment*, Oxford, 1995 ('B & B Docs.')
Churchill and **Lowe**, *The Law of the Sea*, 3rd edn, Manchester, 1999 ('Churchill and Lowe')

Introduction

The poet Philip Larkin famously said that sexual intercourse began in 1963.[2] He could have said something similar about the environment and the 1970s. Although the environment has always been with us, only in that decade did protection of it really emerge as an important issue, and international environmental law (IEL) become a specialised area of international law. This chapter is headed '*International* environmental law', as much of domestic environmental law is not necessarily enacted to implement treaties, and indeed it may in some instances be more advanced than IEL, which is almost entirely derived from treaties which are a compromise between differing points of view. The subject matter can be controversial and an area where NGOs, have been very active.[3] But, because of the sometimes widely differing views of States on what should be done to protect the environment, the degree to which NGOs influence policy making at the international level can be exaggerated.

[1] Charles Darwin, *On the Origin of Species*, London, 1859, Ch. IV, p. 80.
[2] Philip Larkin, *High Windows*, 1974, 'Annus Mirabilis'.
[3] The (Economic Commission for Europe) (ECE) Aarhus Convention 1998, 2161 UNTS 450 (No. 37770); ILM (1998) 999, requires parties to provide to individuals and NGOs rights of access to information, participation in decision making and access to justice in environmental matters. It entered into force in 2001 and has forty-two parties, including the European Union and all EU States, but not Russia. It is very Europe centric. See also p. 309 below about the International Whaling Commission.

Environmental protection and the conservation of natural resources necessarily compete with commercial interests, and a commercial element is present in any environmental dispute. The dispute between Ireland and the United Kingdom about the nuclear reprocessing plant at Sellafield in north-west England involved Irish environmental fears and British concern to protect a valuable industrial asset.[4] Neither industry nor commerce is *ipso facto* a threat to the environment. Since we live in an industrialised world, multilateral environmental treaties represent a compromise between the interests of industry and commerce and the protection of the environment, and therefore never entirely satisfy everyone. What is important is that the treaties are properly implemented and enforced, not only in law but also in fact. As with human rights treaties, on this domestic law and practice can vary greatly.

The development of the subject has produced certain new concepts, such as the 'precautionary principle', 'polluter pays' and 'sustainable development'. Some of these phrases have even entered everyday speech. In particular, 'sustainability' has become a favourite mantra of the politician, and not only in connection with the environment. One must be careful to distinguish such concepts from basic principles of international law, such as the binding nature of treaties. Whether the concepts represent legal obligations depends on the extent to which they have been translated into treaty rules or applied by international courts and tribunals. At the moment, they are for the most part no more than 'soft law'.[5] They are discussed below.

Like other specialised areas of international law, IEL is not self-contained. To understand IEL properly, one needs to see it as the application of international law to environmental problems. This requires a basic knowledge of international law, and the law of treaties in particular. Although there are many treaties whose subject matter is clearly environmental, unlike several areas of international law there is no one multilateral treaty that forms either the basis of the subject, like the Chicago Convention on International Civil Aviation 1944, or which contains the basic rules, like the UN Convention on the Law of the Sea 1982. To find IEL on any particular area one may have to examine several treaties, including some that may not immediately seem relevant to the environment. A treaty on any subject may include provisions that are concerned with the environment or are relevant to environmental issues. The parameters of the subject are not well defined.

A particular feature of IEL is the use of 'framework' treaties: multilateral treaties that provide a structure of principles that are elaborated by the adoption later of detailed annexes, schedules or protocols or by national action. The Conventions on Climate Change and Biological Diversity of 1992 are prime examples (see below). Should the WHO Framework Treaty on Tobacco Control 2003[6] be regarded as an environmental or a health treaty?

[4] See Churchill and Scott, 'The MOX Plant Litigation: The First Half-Life' (2004) ICLQ 643–76.
[5] See p. 11 above. [6] 2302 UNTS 166 (No. 41032); ILM (2003) 518.

International organisations, in particular the United Nations and the UN specialised agencies, have played a major part in developing IEL and in promoting the use of consensus[7] as the basis for reaching agreement in multilateral treaty negotiations. Given the need when negotiating an environmental treaty to balance competing interests to achieve a text that has a chance of being widely ratified, reaching consensus is vital to the effectiveness of the treaty. International organisations also play an important role in monitoring the implementation of the treaties.

Given that there are now over 200 multilateral treaties on, or touching on, the environment, only the most significant can be mentioned.

What is the environment?

We all have our own concept of the environment, which can range from the weather to our next-door neighbours, and on which we have but little influence. Since IEL has developed quickly and without a coherent structure, there is no one definition. In each case, what is meant by 'the environment' must be gathered from the treaty concerned. Sometimes, a definition raises more questions than it answers. In the Protocol to the Antarctic Treaty on Environmental Protection 1991[8] the environment is defined to include 'the intrinsic value of Antarctica, including its wilderness and aesthetic values'– whatever that may mean in *legal* terms.[9]

There now follows a brief outline of the development of IEL, some of its more important concepts, and certain environmental treaties.

The development of international environmental law

IEL could be said to have begun in a small way with the *Trail Smelter* arbitral award in 1938.[10] Although there were a few environmental treaties in the 1940s and 1950s, mostly about fauna (whales, fish, birds and seals) and oil pollution, the start of the era of IEL proper began with the Stockholm Declaration of Principles 1972, adopted by the UN Conference on the Human Environment (UNCHE).[11] Principle 21 largely reflects the *Trail Smelter* arbitration in confirming the sovereign right of a State to exploit its own resources pursuant to its environmental policies, but subject to its responsibility not to cause damage to other States.

Following UNCHE, the UN General Assembly established in 1972 the UN Environment Programme (UNEP), with its headquarters in

[7] See p. 58 above on consensus.

[8] ILM (1991) 1460; UKTS (1999) 6; ATS (1998) 6; B & B Docs. 468. The title is rather clumsy: it is the Protocol that deals with the environment, not the Antarctic Treaty.

[9] An ILC draft shows the problem in defining the environment as including 'the characteristics of landscape' (ILC Report 2004, A/59/10, p. 148, or www.un.org/law/ilc/).

[10] 9 AD 315; (1939) AJIL 182 and (1941) AJIL 684. And see p. 317 below.

[11] B & B Docs. 1.

Nairobi.[12] Although not a UN specialised agency (as a UN agency, UNEP is part of the United Nations: see page 189 above), it has been effective in the adoption of environmental treaties and the development of IEL generally. The role of the Environmental Management Group (EMG), chaired by the UNEP Executive Director, is the difficult one of trying to enhance cooperation in environmental matters both within and beyond the UN system, including the UN specialised agencies and the secretariats of multilateral environmental treaties. The EMG Secretariat is in Geneva.[13]

The Stockholm Declaration is not a treaty, and its other Principles are no more than general objectives to be followed up by the negotiation of treaties, several of which were concluded in the 1970s. Principle 11 states that environmental policies should not adversely affect the development potential of developing countries, so reflecting the fact that the developed world had become so only by despoiling its own environment. This was followed by UN declarations emphasising the freedom of developing countries to decide how to develop their economies. Only with the 'Brundtland Report' in 1987 did 'sustainable development' become a well-known concept.[14]

The UN Conference on Environment and Development (UNCED) produced the Rio Declaration on Environment and Development 1992 (Rio Declaration).[15] Its twenty-seven principles on sustainable development attempt to balance the interests of developed and developing countries. Agenda 21 (a forty-chapter programme of action), and the Convention on Climate Change and on Biological Diversity (see below) were then adopted.

Concepts

The precautionary approach

Principle 15 of the Rio Declaration states:

> In order to protect the environment, the precautionary approach shall be applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

It is also described as the 'precautionary *principle*'. Despite the use of mandatory language (such as 'shall'), Principle 15 does not represent a principle of customary international law, its scope and application being unclear. It can be seen as an application of the principle of State responsibility in the context of *potential* environmental harm, and not only in the case of transboundary activities. But there are still many uncertainties. The possibility of harm must be foreseeable:

[12] See www.unep.org.
[13] See www.unep.org (go to 'about UNEP', then 'United Nations Inter-Agency Cooperation').
[14] WCED, *Our Common Future*, Oxford, 1987. See also, pp. 304 above and 307 below.
[15] ILM (1992) 876; B & B Docs. 9.

but how foreseeable? And what is the degree of harm and how should a State respond? Nevertheless, it may be seen as a general principle that is relevant to interpreting and applying the customary law on State responsibility and risk prevention.[16] The precautionary approach has been followed in certain treaties. The Vienna Convention for the Protection of the Ozone Layer 1985, and its Montreal Protocol 1987, require the parties to limit the use of chlorofluorocarbons (CFCs) even before it had been proved conclusively that they cause damage to the ozone layer.[17] This approach is also included in the Fish Stocks Agreement 1995, Article 6 and Annex II,[18] and the Cartagena Protocol.[19]

The polluter pays

One constantly hears this principle misrepresented and referred to as if it were a widely accepted customary rule applicable in all circumstances. Principle 16 of the Rio Declaration is even weaker in stating:

> National authorities *should* endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter *should*, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment. [emphasis added]

'Internalization' is an economic term, defined by the Organization for Cooperation and Development (OECD) as the incorporation of costs as part of the internal economic structure, especially social costs resulting from the manufacture or use of a product. The qualified wording of Principle 16 shows that it is only a suggestion as to the economic policy that a State may follow when apportioning the cost of remedying pollution or other environmental damage so that the State does not have to bear an unfair share. Generally, each State has been left to decide what policy to follow.[20] A fundamental problem is deciding who caused the pollution. When maritime pollution is caused by the escape of a cargo of oil, it could be the shipowner, the owner of the oil, a pilot or a navigation authority. There are therefore treaties where the costs of marine pollution have been allocated in advance.[21] The *Rhine Arbitration (Netherlands/France)* (2004) held that the principle that the polluter pays is *not* part of international law.[22] But, it may still be influential in the development of environmental treaties.

Sustainable development

Sustainable development is at present a leading concept of IEL, yet its nature is such that it cannot be usefully defined.[23] It is like 'reasonable': only meaningful

[16] See pp. 378–9 below. [17] See further B, B & R, pp. 152–64 and p. 313 below.
[18] 2167 UNTS 3 (No. 37924); ILM (1995) 1542; UKTS (2004) 19. See also Churchill and Lowe, p. 309.
[19] See p. 313, n. 45 below. [20] See B, B & R, pp. 322–6. [21] See pp. 315 et seq. below.
[22] See www.pca-cpa.org (click on 'Cases). [23] B, B & R, pp. 53–8 and 115–27.

when applied to the facts of a particular case. The basic concept is that development (industrial, agricultural, communications, etc.) is not inherently bad, but that one should take account of its effect on the environment. Industry should exploit (using the word non-pejoratively) a natural resource in a way that allows the resource to regenerate, not be destroyed. Fish are a good example. Overfishing has become so bad that in some areas what was once a common fish has now become a scarce delicacy. This has various implications for consumers, human health, and the fishing industry and communities which rely upon it. The dangers were appreciated long ago in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas,[24] which defined fish conservation as 'the aggregate of the measures rendering possible the *optimum* sustainable yield'. Later, with decolonisation and the acknowledgement that developing countries also need to be able to exploit their natural resources and develop industry, there came a tension between developed and developing countries as to what is sustainable. The UN Convention on the Law of the Sea 1982 speaks of '*maximum* sustainable yield'.[25] ECOSOC established the Commission on Sustainable Development in 1993, but it is largely ineffective.[26]

Environmental impact assessment (EIA)

EIA began in 1969 as a requirement of US federal law, and has been followed in the laws of many States. Its purpose is to discover at an early stage whether a proposed activity may have an adverse effect on the environment and, if so, whether it should be authorised. Principle 17 of the Rio Declaration states:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Thus, EIA is a *national* procedure. There is no general obligation in international law to undertake EIA, except, possibly, when there may be a risk to the environment of other States or to the marine environment. Internationally, EIA is required (although as a national process) mainly in treaties dealing with pollution of the marine environment from sea – or land-based sources.[27] Perhaps the broadest and most comprehensive provisions are in the Protocol to the Antarctic Treaty on Environmental Protection 1991.[28] Although the wording varies from treaty to treaty, generally the two main requirements are that there must be a proposed 'activity' (or 'project'), not merely general plans, and it must be foreseeable that the activity could have a 'significant' impact (not a minor or transitory impact). There is obviously much scope for a State to argue that a significant impact was not foreseeable; and it may be difficult to prove that a State has acted in bad faith. In 1991, the UN Economic

[24] 559 UNTS 285 (No. 8164). See Art. 2. [25] Article 61(3).
[26] See B, B & R, pp. 59–62 and 97. [27] B, B & R, pp. 164–84. [28] See n. 8 above.

Commission for Europe (ECE) adopted the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention).[29]

Whaling

The International Convention for the Regulation of Whaling (IWC) was adopted in 1946 and amended by a protocol in 1956.[30] Its purpose was *not* to ban the hunting of whales (which of course are mammals, not fish). It aimed to reverse the process of the depletion of whale stocks by the establishment of a regime that would, in the words of the preamble to the IWC, 'provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'. The IWC applies worldwide, and has eighty-five parties. The IWC Commission, whose members represent all the IWC parties, has its small secretariat in Cambridge, England. The Commission meets at least once a year. It can by a three-quarters vote of the members (excluding abstentions and absences), adopt regulations for the conservation and utilisation of whale resources. A regulation becomes binding on all parties after ninety days. If a party objects to a regulation within that period, another period, of up to ninety days, is allowed for any other party also to object. Thereafter, the regulation becomes binding on all parties, except those that objected to it.

The IWC allows for whaling for scientific research, although the scale of such whaling by Japan has been criticised by certain parties and with some justification. In 1986, a so-called moratorium on commercial whaling came into effect, although this was not a principle on which the IWC was founded. Norway, an original party to the IWC, opted (as was its right) not to be bound by the moratorium, and this of course also applies to any other State which is not a party to the IWC. (It is a mistake to think that the moratorium means that whaling has been banned in all States.) At present, the Commission is split between those who support the continuation of the moratorium and those who do not. This may change as many more small States become IWC parties, thus possibly making it easier to obtain a three-quarters majority to lift or modify the moratorium. Iceland, also an original party to the IWC, left the treaty soon after the moratorium was established. In 2002, Iceland again became a party to the IWC, but with a modified reservation about whaling to which objections were lodged. The future of the Commission is under consideration.

Other fishing

These days the hunting of whales (which for some are an important source of food) raises emotion. It is not so for fish or, for that matter, cattle. The several regional regimes for the conservation of other marine living resources have the

[29] 1989 UNTS 309 (No. 34028); ILM (1991) 802; B & B Docs. 31. It entered into force in 1997 and now has forty-two parties.

[30] See the consolidated text on the IWC Secretariat website, www.iwcoffice.org.

objective of preventing overfishing so that commercial fishing can continue for the benefit of both the fisherman and the consumer. They include the Northwest Atlantic Fisheries Organization (NAFO),[31] the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR),[32] and, more recently, the South East Atlantic Fisheries Organization.[33] Each attempts to manage and conserve stocks by adopting various measures that are legally binding on the member States, but has to rely upon them for their enforcement. They set annual total allowable catches (TACs) and close the fishing seasons or areas when the TACs have been reached, or allocate quotas; close the fisheries or areas for a whole season; specify minimum fishing net sizes; prohibit or regulate certain fishing methods, such as driftnets or long lines; and coordinate scientific research. A member State can opt out of a particular measure. Despite enforcement being essentially national, it is helped by schemes for international observation and inspection under which fishing vessels of member States can carry an observer, or be boarded by an inspector, of another member State. Observers also have the ancillary function of collecting information, but do not usually have regulatory powers.

The main weakness of the commissions is that some member States do not take their obligations seriously enough or simply do not act in good faith.[34] The commissions have no legal power over *non*-member States and their fishermen; and decisions are often taken on political, rather than scientific, grounds. Fishing in the EEZs of EU States is subject to the EU Common Fisheries Policy, but some fish stocks are near to collapse due to serious overfishing caused mainly by decisions taken for political reasons.

A particularly damaging development is for members to ignore the practice of their nationals who avoid the measures by operating vessels flying the flag of *non*-members.[35] Measures to combat such problems include member States agreeing to prevent the landing or import of certain species, or species caught by prohibited methods (whether or not the fishing vessel flew the flag of a member State) and economic sanctions against non-members (retorsion).[36] In 1993, the FAO adopted the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (usually referred to as the Compliance Agreement).[37] Article III places responsibility on the parties to ensure that their flag vessels do not do anything that undermines international conservation and management

[31] See the NAFO Convention 1978 at www.nafo.int/.
[32] See p. 332 below.
[33] ILM (2002) 257 or www.seafo.org/.
[34] For example, see E. Molenaar, 'CCAMLR and Southern Ocean Fisheries' (2001) *International Journal of Marine and Coastal Law* 465–99.
[35] See p. 295 above on flags of convenience.
[36] For an explanation of retorsion, see p. 391 below.
[37] 2221 UNTS 91 (No. 39486); ILM (1994) 968; B & B Docs. 645. It entered into force on 24 April 2003. The thirty-eight parties include Argentina, Chile, the European Union, Japan, South Korea and the United States.

measures. In particular, the parties must not allow their flag vessels to fish on the high seas without their authorisation, and before granting it the flag State must be satisfied that, given the links between it and the vessel, it is able to exercise effective control over the vessel. The latter may, for example, be done by tracking the vessel by a satellite vessel-monitoring system (VMS) and by robust enforcement methods such as speedy prosecution of violations of fishing licences and the confiscation of catches and gear. The effectiveness of the Agreement will depend largely on whether flags-of-convenience States (of which Liberia and Panama are prominent) now become parties, and whether they then take their obligations seriously. The problems are still very much with us.

The North-East Atlantic Fisheries Commission (NEAFC) and NAFO have become largely redundant due to the declaration of EEZs in their areas, their regulatory powers now being limited to high seas fisheries. Effective cooperation between the coastal States in respect of stocks that straddle their EEZs is poor.

The Fish Stocks Agreement (or Straddling Stocks Agreement) 1995[38] has detailed provisions designed to deal with the problem of straddling stocks. It came into force on 11 December 2001, and now has seventy-five parties, including some important fishing States, such as Japan and South Korea. The two most effective regional fisheries commissions are the relatively new Commissions for the Conservation of Southern Bluefin Tuna (CCSBT)[39] and for the Indian Ocean Tuna (IOTC).[40]

Wildlife

Other treaties have as their aim the protection of nature (including other wildlife which is a source of food) for other reasons, including aesthetic.

The (Ramsar) Convention on Wetlands of International Importance 1971[41] is concerned with the preservation of wetlands. Parties designate wetlands within their territory for inclusion in a 'List of Wetlands of International Importance' on account of their international significance in terms of ecology, botany, zoology, limnology (study of freshwater phenomena) or hydrology. Each party is required to promote the conservation of wetlands and waterfowl by establishing nature reserves. The nearly 160 parties meet regularly to consult.

[38] Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (Fish Stocks Agreement), 2167 UNTS 3 (No. 37924); ILM (1995) 1542; UKTS (2004) 19.

[39] See www.ccsbt.org. The CCSBT was adopted by Australia, Japan and New Zealand on 10 May 1993 and entered into force in 1994, 1819 UNTS 359 (No. 31155). South Korea (2001) and Indonesia (2008), and the Fishing Entity of Taiwan (2002) are now also members.

[40] See www.iotc.org.

[41] 996 UNTS 245 (No. 14583); ILM (1972) 963; UKTS (1976) 34; TIAS 11084; B & B Docs. 447. For the currently amended text, see www.ramsar.org. See, Aust MTLP, pp. 239–40 and 271 about its amendment problems.

The Convention on International Trade in Endangered Species of Wild Flora and Fauna 1973 (CITES)[42] is much better known from media reports on the seizure of illegal imports of elephant tusks, etc. It prohibits or regulates trade in endangered species (or parts of them) and, to a certain extent, trade with non-parties. For this purpose, the Convention lists the endangered species in three appendices, which are amended from time to time: Appendix I lists species threatened with extinction, trade in which can be authorised only in exceptional circumstances; Appendix II lists species which, although not necessarily now threatened with extinction, may become so unless trade in them is subjected to strict regulation; and Appendix III lists all species that any party identifies as being subject to its regulation to prevent or restrict exploitation, but for which it needs the cooperation of other parties in the control of trade. Permits are required for any trade in any species included in Appendices I, II or III, although the terms vary according to the Appendix. Trade sanctions imposed by CITES parties have proved effective in enforcing the Convention against parties and non-parties. It has been widely ratified and now has 175 parties.

Biological diversity

Echoing the words of Darwin at the start of this chapter, albeit in less elegant language, the UN Convention on Biological Diversity 1992,[43] defined 'biodiversity' as:

> the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

'Ecosystem' is defined as:

> a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

Previously, treaties had adopted a piecemeal approach, dealing with endangered species that are valuable for their own sake. The basic principle underlying the Convention is the recognition that, although conserving biodiversity is important for the survival of humankind, sustainable use of biological resources is permissible.

The Convention entered into force after eighteen months and, only two and a half years after it was adopted, it already had 100 parties. By July 2009 it had no less that 191, though Iraq, Somalia and the United States are not among them. Nevertheless, this remarkable achievement (on a par with the Rights of the Child Convention 1989)[44] was possible only because, like childhood, politically

[42] 993 UNTS 243 (No. 14537); ILM (1973) 1085; UKTS (1976) 101; 27 UST 1087; TIAS 82249. For the currently amended text, see www.cites.org.

[43] 1760 UNTS 9 (No. 30619); ILM (1992) 818; UKTS (1995) 51; B & B Docs. 390. See www.cbd.int/.

[44] See p. 218, n. 23, above.

today most States cannot be seen to be against biodiversity and, anyway, the Convention needed no (or only minimal) legislation. The Convention itself may therefore not be such a success. It does not place onerous legal obligations on the parties. The numerous compromises that had to be made resulted in requirements that are broad and vague, or carefully qualified. The Convention stresses that States remain in control of their biological resources and, where it calls for domestic action, a party's obligations are qualified at least eight times by the formula 'as far as possible and as appropriate'. The hard work of devising specific binding rules on all parties is left to the negotiation of protocols. The only protocol so far agreed, the Cartagena Protocol on Biosafety 2000, entered into force in 2003 and so far has 156 parties.[45] It is concerned with the possible damage that genetically modified organisms might do to biological diversity, particularly in transboundary movements. The United States considers that WTO rules prevail over the Protocol and thus is not a party.[46]

The ozone layer, climate change and the Kyoto Protocol

By the 1980s, States had become acutely aware of the damage that had been done to the ozone layer in the stratosphere by, in particular, the CFCs in aerosols and coolants. The Vienna Convention for the Protection of the Ozone Layer 1985[47] has few specific obligations, and was followed by the more substantial Montreal Protocol on Substances that Deplete the Ozone Layer 1987,[48] which entered into force two years later and is now practically universally ratified, including as it does Brazil, China, the European Union, India, Russia and the United States. It requires the parties to reduce, and ultimately to eliminate, the production and consumption of certain ozone-depleting substances according to a timetable. Since developing States have so far not contributed much to ozone depletion, they are given more time to comply. The Protocol (not to be confused with the Kyoto Protocol, see below) also bans the import from, or export to, non-parties of such substances. The terms of the Protocol, and its annexes, are extremely detailed and have been amended several times.[49] The Protocol has so far been largely successful, and, if it continues to make progress, in only about thirty-five years from now the hole in the ozone layer over Antarctica could have closed.

The UN Framework Convention on Climate Change 1992[50] has 192 parties, including the United States. It deals with the much more intractable problem of the warming of the atmosphere (global warming) caused by 'greenhouse gases', being gases, such as carbon dioxide (CO_2), produced by the use of fossil fuels

[45] 1760 UNTS 79 (No. 30619); ILM (2000) 1027; UKTS (2004) 17. See also www.cbd.int/.
[46] See B, B & R, pp. 629–30.
[47] 1531 UNTS 324 (No. 26164); ILM (1987) 1529; UKTS (1990) 1.
[48] 1522 UNTS 3 (No. 26369); ILM (1987) 1541 and (1989) 1301; UKTS (1990) 19.
[49] See www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf.
[50] 1771 UNTS 1907 (No. 30822); ILM (1992) 849; UKTS (1995) 28. See unfccc.int/2860.php.

released into the atmosphere, for example by motor vehicle exhausts. The 'ultimate objective' of the Convention is the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic (of human origin) interference with the climate'. Unlike the Montreal Protocol, it does not seek to reverse a process that is intimately bound up with modern industrial and commercial development (particularly important for developing countries), but to stop it causing further unacceptable warming of the climate. The Convention, rather like the Ozone Layer Convention 1985, lays down broad principles on which future measures should be based, in particular that developed States should take the lead.

So far, the only specific measure that has been adopted is the Kyoto Protocol 1997,[51] which sets individual emission limits and timetables for certain developed parties in respect of six greenhouse gases. A State can set off against its emissions those changes in land use or forestry activities that result in the removal of greenhouse gases (a forest can amount to a 'sink' by removing a greenhouse gas from the atmosphere). Furthermore, the Protocol enables two or more parties, by joint action, to fulfil their obligations by innovative means: aggregation of combined emissions; credit against emissions for supporting projects to reduce emissions by another party; trade in emissions permits; and credits for funding projects of another party. The Protocol had been ratified by 186 States and the European Union, but not by the United States. To enter into force, it needed fifty-five ratifications, including at least 55 per cent of the States whose aggregate carbon dioxide emissions for 1990 amount to 55 per cent of total emissions. Since emissions from Russia and the United States are such a large proportion of the total, in practice this needed at least one of them to ratify, which Russia did in 2004. The Protocol then entered into force on 16 February 2005. Without the United States, the Protocol's effectiveness will be that much less, although the Protocol's approach remains controversial. In any case, it will expire in 2012. There are currently difficult negotiations about a replacement for it.

Nuclear material

The International Atomic Energy Agency (IAEA),[52] with headquarters in Vienna, is *not* a UN specialised agency, although it is part of the 'UN family' and has close links with the United Nations.

The use of nuclear power was an early candidate for international action. The OECD Convention on Third Party Liability in the Field of Nuclear Energy 1960 (Paris Convention) is limited to the metropolitan territory of OECD members, or associate countries, which have always had the biggest concentration of nuclear installations. Its purpose is to harmonise the parties' legislation on

[51] UNTS (No. 30822); ILM (1998) 22. See the last website as well.
[52] www.iaea.org.

liability for nuclear accidents, placing on the operator of a nuclear installation (reactor, factory, storage plant) absolute (but limited) liability, and established a common scheme for compensation. The 1960 Brussels Agreement Supplementary to the Paris Convention provides for State-funded compensation for a loss that exceeds the limited liability of the operator under the Paris Convention. Both Conventions have been extensively amended.[53]

The (Vienna) Convention on Civil Liability for Nuclear Damage 1963, concluded within the IAEA, closely follows the Paris Convention but was replaced by the (Vienna) Protocol on Civil Liability for Nuclear Damage 1997.[54] The Convention on Early Notification of a Nuclear Accident 1986[55] was adopted following the Chernobyl disaster. It requires a party to notify immediately any State (not necessarily a party) which is or might be physically affected by a nuclear accident in its territory, or on a ship or aircraft on its register, from which a release of radioactive material occurs, or is likely to occur, if the material has entered, or may enter, the territory of another State and cause significant radiological safety concern. The Convention on Nuclear Safety 1994[56] does not materially add to the powers of the IAEA.

The marine environment

The forty-six Articles of UNCLOS devoted to this subject demonstrate the importance of preventing pollution of the marine environment. As with other environmental matters, the rules are detailed and complex, and here one can only sketch in the principal points.[57] Most of the law is to be found in the general provisions of UNCLOS and detailed provisions in numerous general, regional and bilateral treaties dating from the 1960s onwards. The most important general treaty is the International Convention for the Prevention of Pollution from Ships (MARPOL) adopted by International Maritime Organization (IMO) in 1973. Its parties represent most of the world's tonnage of merchant shipping, and covers all types of intentional pollution of the sea by such ships, except dumping of waste. The all-important annexes to it are frequently amended.[58] Regional treaties follow MARPOL.

UNCLOS lays down the rules under which such international standards can be enforced. Flag States have a duty to enact laws applicable to their ships for the prevention, reduction and control of pollution. These must embody at least generally accepted international rules and standards, such as those laid down by

[53] See www.nea.fr/html/law/legal-documents.html for a consolidated text.
[54] ILM (1997) 1462.
[55] 1457 UNTS 133 (No. 24643); ILM (1986) 1377; UKTS (1998) 1; B & B Docs. 300.
[56] ILM (1994) 1518; UKTS (1999) 49; B&B Docs. 307. See B, B & R, pp. 500–3.
[57] For a detailed, but not exhaustive, account, see Churchill and Lowe, pp. 328–99. See also B, B & R, pp. 379–442.
[58] ILM (1973) 1319; UKTS (1983) 27; B & B Docs. 189. Given the frequent amendments to MARPOL, particularly its annexes, the best source is the regularly reprinted text of the treaty published by the IMO, and is available on its website, www.imo.org.

MARPOL Annexes I and II. Flag States have a duty to enforce the legislation wherever the infringement occurs (Article 217). A coastal State has certain powers to legislate for foreign ships in its territorial sea or EEZ. A coastal State has the right to arrest foreign ships for certain breaches of its anti-pollution laws in its territorial sea and EEZ (Article 220); otherwise the flag State can effect the arrest. A port State has wider powers over a foreign ship: when it is in one of its ports, the State can arrest and prosecute the ship for violation of its anti-pollution laws committed while in its territorial sea or EEZ (Article 220). It can also do so in respect of pollution of the high seas (Article 218). Moreover, if it is unseaworthy and therefore a threat to the marine environment, the port State can prevent it sailing (Article 219).

None of the above applies to warships or other State vessels on government, non-commercial service (Article 236): see page 296 et seq. above.

Emergencies

If as the result of an incident at sea (collision, stranding, etc.) a foreign ship is causing or is threatening to cause major pollution, a coastal State may in its territorial sea or EEZ, or even on the high seas, take such direct measures as may be necessary to prevent, mitigate or eliminate an imminent danger to its coastline.[59] In 1967, the oil tanker *Torrey Canyon* was stranded on the high seas off the United Kingdom spilling 120,000 tons of crude oil. To prevent a worse catastrophe, the Royal Air Force bombed it to set the remaining oil alight. The International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 provides for cooperation to deal with oil pollution incidents, including the sharing of costs.[60]

Liability

The International Convention on Civil Liability for Oil Pollution Damage 1969[61] was replaced in 1992 by a Convention bearing the same title.[62] It imposes liability on a shipowner if oil from his ship damages the territory, territorial sea or EEZ of a party. The liability is generally limited. The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971[63] supplemented the 1969 Convention, but was replaced in 1992 by a Convention, again of the same name.[64] If the shipowner is not liable or is unable to pay in full, or the limit of liability is exceeded, compensation may be payable by the Fund. There are also

[59] See Art. 221 and the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution 1969, 970 UNTS 212 (No. 14049); ILM (1970) 25; UKTS (1975) 77, which also applies to the EEZ.

[60] 1891 UNTS 78 (No. 32194).

[61] 973 UNTS 3 (No. 14097); ILM (1970) 45; UKTS (1975) 106

[62] B & B Docs. 91 but, see www.imo.org for the up-to-date text.

[63] 1110 UNTS 57 (No. 17146); ILM (1972) 284; UKTS (1978) 95.

[64] UKTS (1996) 87; B & B Docs. 107 but, see www.imo.org for the up-to-date text.

treaties imposing strict liability for damage to the marine environment by hazardous and noxious substances and by radioactive material.[65]

Dumping

The Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter 1972 (previously known as the 'London Dumping Convention', and now, as amended by a 1996 Protocol, known as the 'London Convention')[66] prohibits the dumping of waste at sea. The main exceptions are dredged materials, sewage sludge, fish-processing wastes, ships, and continental shelf oil and gas installations. Incineration of waste at sea is also prohibited.

Hazardous wastes

The (Basel) Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989[67] is particularly successful. It now has 172 parties, although not yet the United States. It covers most waste, with the exception of radioactive waste. If a party prohibits the import of hazardous waste, another party must not permit its export to that party. Even if a party has not prohibited the import, other parties must not permit export of the waste to that party if the latter has not given written consent to the specific import or if it does not have the capacity to dispose of the waste in an environmentally friendly manner. Illegal traffic in hazardous waste is made a criminal offence. If waste is illegally exported, the State of export must ensure that the waste is taken back. If this is impracticable, the State of *export* must ensure that the waste is disposed of properly.

Liability for environmental damage

In the *Trail Smelter* case, Canada was held liable for damage in the United States caused by the fumes from a Canadian smelter.[68] This was only an application of the long-established international law principle of state responsibility.[69] Most treaties do not include anything about liability, the general principle being enough. However, as we have seen, in the case of international environmental damage, some treaties have attempted to set out expressly what constitutes damage and how it is to be assessed, what sort of liability should apply (absolute, strict or fault) and what remedy should be available (compensation, remedial work or restoration). The issues are highly charged, not least because a lot of money may be at stake. Success has been limited because damage to the

[65] See Churchill and Lowe, pp. 361–3.
[66] ILM (1972) 1294 and ILM (1997) 7 but, see www.imo.org for the up-to-date text.
[67] 1673 UNTS 126 (No. 28911); ILM (1989) 657; UKTS (1995) 100; B&B Docs. 322 or www.basel.int.
[68] See p. 305, n. 10 above. [69] See Chapter 21 below.

environment is a much more complex matter than, say, loss of business or personal injury. Attempts to agree general principles of liability have met with only limited success (for example, with respect to Antarctica in 2005)[70] or have led to treaties that will never enter into force or will have few parties. Although the treaties on liability for maritime pollution and nuclear accidents (see above) are quite successful, devising and agreeing on liability regimes for other environmental damage has been much more difficult.[71] The Council of Europe's Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993[72] needed only three ratifications to bring it into force, but has not been ratified by anyone. In view of developments since 1993, it is most unlikely ever to enter into force. By the end of 2008, the 1999 Protocol to the Basel Convention on Liability and Compensation for Damage Resulting from the Transboundary Movement of Hazardous Wastes[73] had been signed by thirteen States, and nine (all developing countries) had ratified it, even though only twenty are needed to bring it into force. The 2001 ILC draft Articles on the Prevention of Transboundary Harm from Hazardous Activities are controversial and have not become a treaty.[74]

Enforcement

In addition to any enforcement mechanism in an environmental treaty, it *may* be possible to use certain human rights treaties to protect environmental rights. Such treaties do not protect the environment as such, and so there may be no *locus standi* if a person's health, private life, property, etc., are affected. In 2003, in reaching its decision in *Hatton*,[75] about whether the noise from aircraft at Heathrow airport breached the applicant's human rights under Article 8 of the ECHR (which guarantees protection of family life), the European Court of Human Rights left a large margin of appreciation. In *Taşkin and Others* v. *Turkey*,[76] the Court felt it could take into account whether the process for objecting to the approval of a mine was consistent with Article 8.

[70] Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty (ILM (2006) 5). See also pp. 330–1 below.
[71] See generally B, B & R, pp. 316–22. [72] Ibid., 132; ILM (1993) 1228.
[73] See www.basel.int/ratif/protocol.htm. [74] B, B & R, pp. 141–3.
[75] (2003) 37 EHRR 28, p. 611. See p. 224 above. [76] App. 46117/99; [2006] 42 EHRR 50.

17

International civil aviation

… we always fly away on the first of August.[1]

Gardiner, *International Law*, London, 2003, Ch. 10
Dempsey, *Air Law*, Montreal, 2008
Shawcross and **Beaumont**, *Air Law*, London, 1977 (loose-leaf and includes the texts of treaties and legislation) ('Shawcross and Beaumont') www.icao.int (includes the current status of multilateral civil aviation treaties)

Introduction

International civil aviation is not regulated in the same way as shipping. As well as being quite different in character, air travel is a much newer form of transport and has been regulated by treaty almost from the beginning. The Chicago Convention on International Civil Aviation 1944 (in *this* chapter, 'the Convention')[2] provides the essential framework and established the International Civil Aviation Organization (ICAO). The Convention has been widely ratified and now has 190 parties. English has long replaced French as the language of international civil aviation.

(Unless otherwise indicated, references to numbered articles and annexes are to those of the Chicago Convention.)

International Civil Aviation Organization

The International Civil Aviation Organization (ICAO) is a UN specialised agency with headquarters in Montreal, Canada. Its general purpose is the planning and development of international air navigation. It has wide and comprehensive regulatory functions, especially with regard to the safety of aircraft, although their implementation is for national aviation authorities.

[1] Miss Demolines, *The Last Chronicle of Barset*, A. Trollope, London, 1867, Ch. 24. Prophetic for the English?

[2] 15 UNTS (1948) 295 (No. 102); UKTS (1953) 8. The Convention has been amended several times: see Shawcross and Beaumont, vol. 2, or the (now much-improved) ICAO website: www.icao.int.

The ICAO Council adopts, by a two-thirds majority, International Standards and Recommended Practices and Procedures. These are contained in detailed Annexes to the Convention, which take effect unless a simple majority of States reject them within three months (Article 90). The Standards are regarded as legally binding on the parties to the Convention, although a party can depart from a Standard by notifying ICAO.[3]

Meaning of aircraft

An 'aircraft' is defined in Annex 7 to the Convention as

> any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface.

It therefore includes balloons, dirigibles (airships) and gliders, but not hovercraft, rockets, missiles or orbiting satellites.

Civil and State aircraft, including military aircraft

The Convention governs only civil aircraft, that is, all aircraft other than 'State aircraft'. '[A]ircraft used in military, customs and police services', are deemed to be State aircraft (Article 3). It is reasonable to believe that aircraft owned or leased by agencies of the State are also State aircraft. State aircraft need special authorisation (known as 'diplomatic clearance') to fly in the airspace over, or land in, the territory of another State.

National airspace

The Convention recognises that 'every State has complete and exclusive sovereignty over the airspace above its territory',[4] and that the territory of a State is the land and territorial sea (but not the contiguous or exclusive economic zones) under the sovereignty, suzerainty, protection or mandate of the State (Articles 1 and 2). Article 6 thus provides that no scheduled international air service may be operated over or into the territory of another State except with its permission or authorisation, although there is a right of transit over archipelagic waters and some straits.[5] These provisions are fundamental to the regulation of international air services. Permission can be given in three ways:

(1) If the States concerned are parties to the International Air Services Transit Agreement 1944 (IASTA).[6] (IASTA must not be confused with IATA (the International Air Transport Association), which is an association of airlines, and which itself must not be confused with ICAO.) Under IASTA, the 121 parties grant to each others' airlines operating scheduled international

[3] Published by the ICAO. See its website for a list of Depositary Libraries.
[4] As to the distinction with outer space, see p. 339 below. [5] See pp. 285–7 above.
[6] 171 UNTS 387 (No. 502); UKTS (1953) 8.

services the 'First and Second Freedoms' of the air: that is, the right to fly across their respective territories without landing, and to land there for 'non-traffic purposes', such as refuelling or repairs (known also as 'technical stops'), but *not* to set down or take on board passengers or cargo. Although these provisions are habitually repeated in bilateral air services agreements, IASTA can be valuable when there is no such agreement.

(2) By a bilateral air services agreement under which traffic rights are granted (see below).

(3) *Ad hoc*.

Domestic air services

Article 7 reserves to each State the right to operate air services within its territory (including between it and any of its overseas territories). This is known as 'cabotage'. A State can also grant cabotage rights to foreign airlines, but usually only in return for similar or other valuable rights. Thus, although services between within cities in different States of the European Union are not usually that long in distance, they are international, whereas internal flights within, for example, Russia and the United States, can be long, but are still domestic and so are cabotage (see also p. 324 below).

International air services, scheduled and non-scheduled

It is important to distinguish between 'scheduled' and 'non-scheduled' international air services, since they are governed by different rules. Scheduled services are commercial services open to the public and operating to a published schedule (timetable). Non-scheduled services are all the rest, predominantly charter flights. Both types of services can carry passengers and/or freight, including mail. Although, Article 5 provides a more liberal regime for charter flights, because of the enormous growth in them, especially for tourism, for many years States have, in practice, required prior permission for them.

International airspace

The airspace that is *not* above a State's territory, including its territorial sea, (i.e. international airspace) is open to the aircraft of all States. Nevertheless, for reasons of safety, Article 12 and the annexes have detailed provisions to promote safety in international airspace. For this purpose, it is divided into flight information regions (FIRs) for which a State is responsible and with whose aeronautical authorities all foreign civil aircraft are required to cooperate. However, on occasion a State will purport to close part of the international airspace adjacent to its territory. The legal justification may be self-defence,[7] as

[7] See p. 211 above.

was the case with the 200-mile Total Exclusion Zone around the Falkland Islands declared by the United Kingdom, for the purpose of protecting British armed forces, during the 1982 conflict with Argentina. States also declare safety zones when carrying out practice firings or naval exercises outside the territorial sea, and issue general warnings to shipping and aircraft not to enter such zones when the activity is being carried out. If anything, international law requires such warnings,[8] and, provided they are not too extensive or prolonged, they are in most cases complied with without complaint.[9] For many years, the United States and Canada have had air defence identification zones (ADIZ and CADIZ respectively) which reach halfway across both the Atlantic and Pacific Oceans (and thus over the high seas), and require all aircraft when entering them *and* intending to land in their territory to identify themselves and conform to the directions of ground control. This requirement is loosely based on Article 11, and has apparently been acquiesced in by other States.

Civil aircraft and airlines

An aircraft has the nationality of the State where it is registered. Registration can be changed, but dual registration is not allowed (Articles 17 and 18). Although the Convention does not require any connection between the State of registration and the owners of the aircraft, domestic law normally does. An international air service therefore usually operates on the basis of the 'nationality' of each airline, *not* on the nationality of the aircraft. With the exception of the liberalised regime within the European Union, a State will normally grant rights to another State only in respect of airlines over which nationals of that State have 'substantial ownership or control', the criterion normally found in air services agreements. ICAO has recommended that designation clauses should be liberalised. This has happened to some extent.

It is common practice for airlines to charter (lease) foreign-registered aircraft. A so-called wet-lease is of the aircraft *and* its crew; a dry-lease is only of the aircraft.

Air services agreements

Because an airline needs prior permission to put down or take on board passengers or cargo in another State and, unless IASTA applies, even to overfly or make a technical stop, there has developed an extensive network of bilateral treaties known as air services agreements (ASAs). Under them, the airlines of the parties are granted rights to operate scheduled services (charter services are usually not included) between, and sometimes beyond, the territory of the two

[8] See *Corfu Channel*, *ICJ Reports* (1949), p. 4, at p. 22; 16 ILR 155.
[9] See also special zones at p. 293 above.

States.[10] They may have separate provision for scheduled freight services, although freight carried in the hold of a passenger aircraft ('bellyhold cargo') is not usually subject to special provisions. Although today many airlines are no longer State owned, it is the governments which negotiate ASAs. But, since it is very much a commercial negotiation, in effect the governments act for their respective airlines, whose representatives take part in the negotiations as advisers.

Although each ASA is unique, most follow the basic formula set by the UK – US ASA of 1946, known as 'Bermuda 1'.[11] Among other things, a typical ASA[12] provides for IASTA rights ('First and Second Freedoms'); permits airlines of each party to operate services (the 'agreed services') on a route or routes between the two States and to pick up and set down traffic ('Third and Fourth Freedoms'), and often to pick up and set down traffic to and from third States on a route, or at 'points beyond' the end of a route (although exercise of such 'Fifth Freedom' rights will also require the consent of the third State(s)); designation of the airlines to operate the agreed services, provided the designating party or its nationals have 'substantial ownership and effective control' of them; 'fair and equal opportunity' for the designated airlines to compete; the capacity that can be operated (size and type of aircraft and frequency of flights); a mechanism for approval of tariffs (fares); exemption from customs and other duties and taxes on aircraft fuel and certain equipment introduced by the airlines into the other State; freedom to convert and remit each airline's net earnings to its home State;[13] the right to bring in airline staff and establish sales offices; and an arbitration procedure. Disputes arise frequently under ASAs and some have gone to arbitration.[14] It is usual to provide for termination of an ASA on twelve months' notice.

Most ASAs – except those with the United States – are supplemented by MOUs.[15] Typically, an MOU will specify the names of the airlines that can be designated; elaborate the route rights and capacity; and may go into more detail about tariffs. Since an MOU contains commercially sensitive information, it is generally regarded by the two States as confidential to them and those of their airlines involved. Given the great changes in international air services in recent decades, an MOU often has to be modified or replaced, and is often renegotiated annually, or even seasonally.

[10] See A. Aust, 'Air Services Agreements: Current United Kingdom Procedures and Policy' (1985) *Air Law* 189–202, which is still largely relevant.

[11] 3 UNTS 253 (No. 36); UKTS (1946) 3. It was replaced on 23 July 1977 by 'Bermuda 2' (1079 UNTS 21 (No. 16509); UKTS (1977) 76), which has been amended several times and has caused numerous disputes. A much more liberal replacement was under negotiation for many years, but this has now has been overtaken by the EU–US 'Open Skies' Agreement 2007 (see text to n. 16 below).

[12] See the Grenada–UK ASA 2002, UKTS (2002) 52.

[13] Reciprocal exemption from direct taxes is usually provided either in a double-taxation convention or in a specific exchange of notes.

[14] See *US* v. *France* (1963) 38 ILR 182; *US* v. *Italy* (1965) 45 ILR 393; *US* v. *France* (1978) 54 ILR 303; *US* v. *UK* (1993) 102 ILR 215.

[15] For an explanation of these rather shy, but ubiquitous, creatures, see pp. 51 and 53 et seq. above.

In addition to the liberalised regime for air services within the European Union under which EU airlines can carry traffic anywhere within the Union, including (since 1997) cabotage within another EU State, since 1992 the United States has concluded over numerous liberal (so-called Open Skies) ASAs. In 2007, the European Union concluded one with the United States.[16] One problem for the negotiators was the European Union's demand that EU airlines should enjoy cabotage rights within the United States to match US airlines' valuable Fifth Freedom rights within the European Union, which if the European Union ever became a federal State (although it will not) would amount to cabotage. Cabotage rights were not conceded by the United States.[17]

Warsaw and Rome Conventions

Passengers' luggage gets damaged or lost, and aircraft even crash. The purpose of the Warsaw Convention for the Unification of Certain Rules relating to Carriage by Air 1929[18] was to create one liability regime, the key elements being uniform documentation, liability without proof of negligence, limits on compensation (but breakable if wilful misconduct is proved), and specified jurisdictions at the choice of the claimant. It has no amendment clause.[19] Further treaties amending or supplementing the Convention were concluded in 1955, 1961, 1971 and 1975. The parties to the original Convention and to each of the further treaties all differ, resulting in a lack of uniformity in the scheme.[20] This was only partly alleviated by airlines adopting special contracts offering higher compensation and the unilateral imposition by EU Regulation 2027/97, as amended by EU Regulation 889/2002, and by the United States, of higher compensation limits for airlines operating to and from their territory.

The Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999[21] was intended to replace the whole Warsaw regime. Under Article 17, compensation of up to 100,000 SDRs (about US$120,000) for death or injury resulting from an 'accident' while on the aircraft or on embarkation or disembarkation, is payable without proof of negligence.[22] Above that limit, the carrier is not liable if *it* can prove that the

[16] ILM (2007) 467. It entered into force in March 2008.
[17] For the position in EU law, see Denza, ICLQ (2005) 1000–1.
[18] 137 LNTS 11; UKTS (1933) 11.
[19] See pp. 91 et seq. above on the problem of amending treaties.
[20] For more detail and references, see Aust MTLP, pp. 262–3.
[21] See Shawcross and Beaumont, or 2242 UNTS 350 (No. 39917); UKTS (2004) 44; B. Cheng, 'A New Era in the Law of International Carriage by Air' (2004) ICLQ 833–59; and Dempsey and Milde *International Air Carrier Liability: the Montreal Convention of 1999*, Montreal, 2005. For a review of the book, see ICLQ (2007) 465.
[22] The question whether contracting deep vein thrombosis (DVT) from flying was an 'accident' was decided in the negative in *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72; [2006] 1 AC 49 and *Povey* v. *Quantas* [2005] HCA 33. In *Barclay* v. *British Airways* ([2008] EWCA Civ 1419) the Court of Appeal held that a passenger slipping on a plastic strip embedded in the floor of an aircraft was not an accident since there had been no distinct event which was

damage was *not* caused by its negligence or wrongful act or omission, or was solely due to a third party. Compensation for loss or damage to luggage is mostly limited to 1,000 SDRs (about US$1,200) for each passenger. The Convention entered into force in 2003 and now has ninety-one parties, including China, the European Union and the United States, but not Russia.

The Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface 1952, as amended by a 1978 Protocol,[23] provides for the absolute liability of operators of foreign-registered aircraft for damage caused by them to persons on the ground, which sometimes happens.

Jurisdiction over civil aircraft

Since a State has sovereignty over the airspace above its territory, aircraft on an international route may pass through the airspace of several foreign States as well as international airspace. The Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft 1963 lays down jurisdictional rules for criminal offences committed on board during flight, and for acts that jeopardise the safety of the aircraft or persons or discipline on board.[24] It has 184 parties. The State of registration of the aircraft has the right to exercise jurisdiction over such offences and acts (Article 3), although the jurisdiction of other States is not excluded. If a serious assault were to take place, the State of nationality of the attacker or victim, or a State where the aircraft lands, may, depending on its legislation, choose to exercise jurisdiction (such options being important given the increase in 'air rage' incidents). But, if it is not the State of registration, the State must not interfere with an aircraft in flight, except in the cases set out in Article 4. But at the 33rd (2001) Session of the ICAO Assembly, Resolution A33 – four encouraged prosecution by the State of first landing for offences on board foreign aircraft if they disturbed public order.[25] (See pp. 267–8 above on aviation terrorism.)

Use of force against aircraft

Article 3*bis* of the Chicago Convention recognises the right of a State to require a civil aircraft to land if it is overflying its territory without permission. The Article was an amendment to the Convention prompted by the shooting down on 1 September 1983 by the Soviet Union of Korean Airlines flight KAL007. The Protocol containing Article 3*bis* entered into force in 1998, when it had acquired

not part of the usual and expected operation of the aircraft and which had happened independently of anything done or omitted by the passenger.

[23] Both are in force, but the Convention has only forty-nine parties and the Protocol twelve parties.

[24] 704 UNTS 219 (No. 10106); UKTS (1969) 126.

[25] See the ICAO website. This had already been done by the United Kingdom: see the Civil Aviation (Amendment) Act 1996, s. 1.

the 102 ratifications necessary for entry into force. Now it has some 140 parties.[26] Nevertheless, the preamble stated that the amendment reaffirmed

> the principle of non-use of weapons against civilian aircraft in flight.

It also recognised that weapons must not be used 'against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered'. Since it is very difficult to force an uncooperative pilot to land without putting the aircraft or its occupants in danger, in practice any landing would have to be voluntary.[27]

However, the prohibition on using force is expressed to be without prejudice to the rights and obligations of States set out in the UN Charter. This is an oblique reference to the inherent right of a State to use force in self-defence, as acknowledged by Article 51 of the Charter.[28] Thus, in truly exceptional circumstances, a State would be entitled to shoot down a civil aircraft if that is the only way to avoid an anticipated greater loss of life. So, if at the time the United States knew, or had good grounds for believing that it knew, the real intentions of the hijackers of the four US civil aircraft on 11 September 2001, it could have authorised their shooting down over less populated areas. During the negotiation of Article 3*bis*, certain Central American States argued that they should be entitled to shoot down civil aircraft suspected of drug-trafficking. This was rejected. Yet, on 20 April 2001, as part of an anti-drug-smuggling campaign assisted by the United States (not a party), Peru (also not a party) shot down a light aircraft, killing two. It was found to be carrying not drugs, but only Christian missionaries.[29] In October 2004, Brazil (a party) announced that a domestic law had now come into effect to enable it to shoot down suspected drug-trafficking aircraft.[30]

[26] 2122 UNTS 337 (No. 36983); ILM (1984) 705; UKTS (1999) 68. Or, see www.icao.int. China and Russia are parties.

[27] See Annex 2 to the Convention for the standard interception rules.

[28] See p. 208 above.

[29] See *The Times*, 21 April 2001.

[30] The decision of the Bundesverfassungsgericht (German Federal Constitutional Court) of 15 February 2006 (1 BvR 357/05; 115 BverfGE 118), that in no circumstances is it lawful to shoot down a civil aircraft, was misguided. The decision does not mention Art 3*bis* and was brought by a pilot, a patent agent and four private lawyers. The Federal German Government (which is bound by Art. 3*bis*) was *not* a party to the proceedings, and may not even have been aware of them even though Germany ratified the amendment in 1996. See also article by Naske in AJIL, April 2007.

18

Special regimes

The Pole … Great God! This is an awful place.[1]

Introduction

Parts of our globe (the polar regions), and particularly important resources, such as international waterways and outer space, have required special treatment to preserve their unique features, to deal with their unusual characteristics or to protect the interests of States generally. Such special areas are often declared to be demilitarised. In some cases, a regime created by a treaty between only certain States is regarded as an 'objective regime', created not just for the benefit of those States, but also for the benefit of all (*erga omnes*).[2]

Antarctica

Watts, *International Law and the Antarctic Treaty System*, Cambridge, 1992 ('Watts')

Birnie and **Boyle**, *Basic Documents on International Law and the Environment*, Oxford, 1995 ('B & B Docs.')

Antarctic Treaty Secretariat website (www.ats.aq/)

Antarctica has been primarily a theatre for exploration and science; from the beginning expeditions to explore the continent included scientists. Over the years, many bases have been established in Antarctica for the purpose of conducting scientific research, both the better to understand the continent itself and, more recently, to monitor changes in the global environment. The Antarctic continent is vast and empty, and one should not think that Antarctic tourism has now taken over. But, the danger which tourist parties pose to the safety of Antarctic navigation have increased. It is a great mistake to think that if a ship gets into difficulties there will be help near at hand. Even in the Peninsular area, which is popular with most tour parties, research stations are scattered and generally are not able to help *any* ship in distress. So far, ships have been lucky,

[1] Captain Scott's diary, 1 January 1912, writing about the South Pole.

[2] See p. 10 above, and Aust MTLP, pp. 257–60.

but as the incidents in the last few years demonstrate, one day one will sink drowning everyone on board, including even innocent tourists.

The Antarctic Treaty 1959 ('the Treaty')[3] applies to an even larger area: all land, ice shelves[4] and water south of latitude 60° South (latitude 60° *North* runs through the Shetland Islands, the most northerly islands of the United Kingdom). The Treaty area is even larger than the area within the Antarctic Circle, an imaginary line drawn at latitude 66° 33′ South. There is no permanent population in the Treaty area.

The legal status of Antarctica is unique. Seven States claim sovereignty over parts of it (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom). The claims are for sectors (colloquially termed 'pie slices'), consisting of areas bounded by lines of longitude converging at the South Pole, although Norway has not clearly made a claim going as far as the Pole. Russia and the United States have not made claims, but each asserts that it has a 'basis of claim'. There is also a large sector (90° to 150° West) that is unclaimed.[5] However, most States, including other parties to the Treaty, do not accept the existence of any territorial sovereignty in Antarctica. Although sovereignty questions have been, in effect, put on ice (i.e. put on one side: see below), the problems of jurisdiction they raise are only partially resolved by the Treaty. For example, the Treaty provides for the parties to designate observers to carry out inspections in Antarctica to ensure observance of the Treaty, but the observers remain under the jurisdiction of the party of which they are nationals.

The Antarctic Treaty System (ATS)

The governance of Antarctica is provided, albeit imperfectly, by a system of treaties – the Treaty and its Environmental Protocol 1991,[6] the Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR),[7] the Convention for the Conservation of Antarctic Seals 1972,[8] and measures adopted under them. Although there have been attempts in the UN General Assembly to make Antarctica a UN responsibility, these have not come to anything. There is an argument that the ATS is an objective regime.[9]

The Antarctic Treaty

The preamble to the Treaty recognises the need for Antarctica to be used exclusively for peaceful purposes and not to become the scene or object of

[3] 402 UNTS 71 (No. 5778); UKTS (1961) 97. Another useful site is that of the Australian Antarctic Division (www.aad.gov.au/) which also has the very useful *Antarctic Treaty Handbook*.
[4] For a pictorial description, see Watts, p. 116.
[5] For a map showing this and the claims, see Watts, p. 117.
[6] ILM (1991) 1460; UKTS (1999) 6; ATS (1998) 6; B & B Docs. 468.
[7] 402 UNTS 71 (No. 22301); ILM (1980) 837; UKTS (1982) 48; TIAS 10240; B & B Docs. 628.
[8] 1080 UNTS 175 (No. 16529); ILM (1972) 837; UKTS (1978) 45.
[9] Watts, pp. 295–8.

international discord. Accordingly, the Treaty provides for Antarctica's demilitarisation and prohibits any nuclear explosions or the disposal of nuclear waste. The Treaty acknowledges Antarctica's substantial contribution to scientific knowledge resulting from international cooperation in scientific investigation, and provides for freedom of scientific investigation in Antarctica and for cooperation to that end, including the exchange of scientific personnel in Antarctica.

Sovereignty clause

Article IV of the Treaty is worth quoting in full, not only for its importance to the operation of the Treaty, but because it has proved a useful precedent for other difficult situations.[10]

1. Nothing contained in the present Treaty shall be interpreted as:
   (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
   (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
   (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's rights of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Article IV thus preserves the differing legal positions of the parties.[11]

Measures

The provisions of the Treaty are contained in eight quite short articles. Because of their brevity and generality, there was a need for the Treaty to include a dynamic element. Accordingly, Article IX provides for two classes: (a) the twenty-eight Antarctic Treaty Consultative Parties (ATCPs), being the twelve original parties as well as those which later became parties *and* established, to

[10] See, for example, the Argentina – United Kingdom Joint Declarations 1989 and 1996 (ILM (1990) 129 and (1996) ILM 304) regarding cooperation over the Falkland Islands since the 1982 conflict.

[11] In *Humane Society* v. *Kyodo* [2008] FCA 3, the Federal Court of Australia held that Australia had by its actions established sovereignty over its Antarctic Territory (as well as its rights over the EEZ attaching to it) by the exercise of effective occupation in accordance with customary international law, and therefore could regulate whaling in those waters.

the satisfaction of the then ATCPs, that they conduct substantial scientific research activity in Antarctica; and (b) the nineteen who are parties but are effectively only observers. The ATCPs are so described because Article IX(1) provides that they shall meet from time to time for the purpose of, among other things, *consulting* together and *recommending* to their governments *measures* in furtherance of the principles and objectives of the Treaty. They now meet annually at an Antarctic Treaty Consultative Meeting (ATCM) hosted each year by a different ATCP. Between 1961 and 1995, ATCMs recommended to the governments of the ATCPs 209 measures on a variety of subjects, including the exchange of scientific personnel and data, the protection of fauna and flora and historic sites, specially protected areas, air safety, telecommunications, tourism, minerals exploration and the disposal of nuclear waste. Article IX(4) provides that measures adopted at an ATCM become 'effective' when they have been approved by *all* the ATCPs, which then regard them as legally binding.

However, there had been a long-standing misunderstanding, and consequent misapplication, of Article IX. From the very beginning, all texts adopted by ATCMs were mistakenly called 'Recommendations' and subjected to the unanimous approval procedure of Article IX(4). Yet, a great number of the Recommendations were merely *exhortations* to do or not to do something, with no intention of creating any legal obligations. Many others were ephemeral or of a procedural nature, for example requests to other bodies. This resulted in many Recommendations not becoming 'effective' until many years after their adoption, if at all, even though they created no legal obligations, had been overtaken by events, or were ephemeral. This unsatisfactory situation was corrected at the 1995 ATCM which agreed, in Decision 1 (1995),[12] to adopt three basic categories of instrument for embodying decisions taken by an ATCM: (a) a *Measure* adopted expressly under Article IX(1), if it is intended to be legally binding; (b) a *Decision*, if it concerns only internal organisational matters; and (c) a *Resolution*, if the text is no more than recommendatory. Decisions and Resolutions are therefore not adopted under a specific provision of the Treaty.

The Environmental Protocol

In 1991, the ATCPs adopted the Protocol on Environmental Protection to the Antarctic Treaty (the 'Protocol').[13] Since the entry into force of the Protocol in 1998, a party to the Treaty cannot become an ATCP unless it first becomes a party to the Protocol (Article 22(4)). The purpose of the Protocol is to create a comprehensive regime for the protection of the Antarctic environment. It established a new body, the Committee for Environmental Protection (CEP)

[12] ILM (1996) 1165, or www.ats.aq/. It is an example of a *de facto* amendment of a treaty by a subsequent agreement: see Aust MTLP, pp. 238–41.

[13] See n. 6 above.

(see below). Although Article 3 sets out general principles governing the protection of the Antarctic environment, the key provisions are:

- *Prohibition on the mining for minerals*, except for scientific research (Article 7). Article 25(2) and (5) provides that the prohibition shall continue for at least fifty years, unless before then a binding legal regime on mining is in force. A Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) had been concluded in 1988,[14] but later opposition to it by Australia and France on environmental or national interest grounds, meant that it could not enter into force.
- *Environmental impact assessment (EIA)*[15] of proposed activities in Antarctica. This is elaborated in Annex I to the Protocol. In addition to preliminary and initial EIAs, a comprehensive EIA must be prepared for any activity which is likely to have 'more than a minor or transitory' impact on the environment. This has to be publicised and later discussed by the CEP. However, the decision whether to proceed with the activity rests with the ATCP concerned.
- *The scheme of Annexes to the Protocol.* In addition to Annex I on EIA, there are currently five others: Annex II on the Conservation of Antarctic Fauna and Flora; Annex III on Waste Control and Management; Annex IV on the Prevention of Marine Pollution; V on Area Protection and Management; and VI on Liability Arising from Environmental Emergencies. The last one was adopted by Measure 1 (2005),[16] but will not be in force until all Consultative Parties have approved the Measure. Additional Annexes may be adopted by a further Measure. Amendments to an Annex can also be made by a Measure, but an Annex may provide for amendments to it to become effective on an accelerated basis; and each of the Annexes provides that an *amending* Measure shall be deemed to have been approved, and shall become effective, one year after the ATCM at which it was adopted, unless an ATCP requires an extension of the period or says that it does not approve of the Measure.
- *The CEP*. Its function is to advise the ATCM on the implementation of the Protocol and to formulate draft Measures for consideration by the ATCM. Each party to the Protocol is a member. It adopts by consensus its report to the ATCM.
- *Settlement of disputes*. There is quite complex procedure with a choice between the International Court of Justice or arbitration according to the Schedule to the Protocol.

Amendment of the Treaty and the Protocol and its Annexes

Article XII(1) of the Treaty provides that it may be modified or amended by the *unanimous* agreement of the ATCPs, the instrument entering into force when

[14] ILM (1988) 859. The text is also annexed to Watts, which has a detailed analysis of the abortive Convention.

[15] See p. 308 above. [16] ILM (2006) 5.

all the ATCPs have ratified. This is not the simple amendment mechanism found in many later treaties: a further treaty is required, and there is no provision that it should enter into force for all ATCPs once a certain number of them have ratified it.[17] In short, the procedure is cumbersome and has not been used except for the Environmental Protocol. In practice, extensive use of Article IX measures has allowed the ATCPs to develop the Treaty without amending it.

Secretariat

The 2001 ATCM agreed that, instead of the host State of each ATCM providing a temporary secretariat, the Treaty should have a permanent secretariat located in Buenos Aires, Argentina. Measure 1 (2003) provides for the Secretariat to be an organ of the ATCM. Under a headquarters agreement with Argentina, the Secretariat will has legal capacity,[18] although only in Argentina, and the Secretariat and its staff the usual privileges and immunities.[19] The Secretariat began work in September 2004. Because it may be a year or two before the Measure (and the headquarters agreement, which is dependent on the Measure) will enter into force, it is being applied provisionally, and contributions of the ATCPs to the budget of the Secretariat will be voluntary. Although they are specified according to a scale established by the ATCM, they will not be legally obligatory during the period of provisional application, although now most are being paid in full and in a timely fashion.[20]

CCAMLR

The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) 1980[21] was established to deal with the problem of conserving fish stocks in the (cold and therefore rich) fishing grounds of the Southern Ocean by promoting rational harvesting from an ecosystem and precautionary perspective,[22] so distinguishing CCAMLR somewhat from other fisheries agreements concluded before UNCLOS 1982 or the Fish Stocks Agreement 1995.[23] The Southern Ocean is the sea around Antarctica up as far as the Antarctic Convergence (now termed the Antarctic Polar Front) where the cold Antarctic waters meet the warmer northern waters. Since the Convergence is not a geographic limit, and its position changes with the seasons, the area to

[17] See p. 91 above on amendment problems.
[18] This is exceptional. Normally, it would be the organisation (a new Antarctic Treaty Organisation or even the ATCM) on which legal capacity would be conferred: see p. 180 above.
[19] See p. 181 above. [20] See the ATS website.
[21] 402 UNTS 71 (No. 22301); ILM (1980) 837; UKTS (1982) 48; TIAS 10240; B & B Docs. 628. See www.ccamlr.org for the text and other documentation.
[22] See p. 306 above. [23] See p. 299 above.

which the CCAMLR applies is defined in it by a fixed line that ranges between 45° and 60° South, and so roughly corresponds to the Convergence.

The CCAMLR has thirty-four parties. Of these, twenty-five are members of the governing Commission, and include Argentina, Australia, Chile, China, the European Union, Japan, New Zealand, Russia, South Africa, South Korea, the United States and Western European States (including Spain and the United Kingdom). Most are concerned with fishing or fish conservation, or both. The other nine parties are observers. The CCAMLR Secretariat has a smallish, but expert, staff of twenty-five based in Hobart, Tasmania, where each (Southern) spring the Commission meets to discuss the need for, and adopt, conservation measures.

In common with other commissions regulating fishing, the work of the CCAMLR Commission is bedevilled by illegal, unregulated and unreported fishing (IUU). The Commission has taken a leading role in tackling these problems.[24] Since 2000, it has operated a Catch Documentation Scheme for *Dissostichus spp* (a high-value fish known also as toothfish, or sea bass as it often appears on menus) by which landing and trade in the species can be tracked. Since 2004, there has been a CCAMLR centralised vessel-monitoring (i.e. tracking) system (VMS) to help deal with the problem of IUU fishing. And there have been successful US federal prosecutions under the so-called Lacey Act over IUU fishing in the South Atlantic.

The area covered by CCAMLR is vast and mostly high sea. So far, action by Australia, France and the United Kingdom, in exercise of their coastal State jurisdiction in the EEZs or fishing zones around their sub-Antarctic territories, has been the most effective in ensuring compliance with the conservation measures. Islands within the CCAMLR area 'over which the existence of State sovereignty is recognised by all Contracting Parties' can be taken out of the normal application of CCAMLR, so enabling coastal State jurisdiction – rather than only that of the flag State of the vessel – to be used to enforce CCAMLR conservation measures.[25]

The Arctic

The North Polar Region, known more usually as the Arctic, is a region physically and legally quite different from Antarctica. The Arctic is *not* a continent: nuclear-powered submarines have travelled under the ice at the North Pole. Nor is the Arctic defined. The Arctic Council deals with the 'Arctic region', and it is reasonable to regard the Arctic as at least the region lying within the Arctic Circle: an imaginary line drawn at latitude 66° 33′ North. This represents over one-sixth of the surface of the earth. But, unlike Antarctica, the region has a population of some four million, including many Inuit and other indigenous

[24] See pp. 332 et seq. above on the general problems and how they are being tackled.
[25] See Aust MTLP, pp. 236–7 and 244. On enforcement problems generally, see pp. 297–300 above.

peoples. The Arctic Council is a relatively recent body, being established by the Ottawa Declaration of 19 September 1996.[26] It is not an international organisation, but rather a forum where the States with territory in the region can discuss matters of mutual concern and supervise projects, mostly to do with environmental protection and the interests of the indigenous peoples. The representatives of these peoples are 'permanent participants' in the Council. So far, the Council has not adopted any treaties, the Ottawa Declaration and subsequent declarations being no more than MOUs.[27]

Within the region are parts of the territory – or territorial claims – of the members of the Council (Canada, Denmark (for the Farœ Islands and Greenland), Finland, Iceland, Norway, Russia, Sweden and the United States (Alaska)). Canada and Russia have potentially the largest territorial claims. Their claims to sovereignty of uninhabited territory up until now have relied on the sector principle, rather than actual occupation.[28] Not being an accepted basis for establishing sovereignty, sectoral claims have not been made by other members.[29] Any claim to sovereignty over the ice covering the high seas could in any event not be sustained.[30] Even where territorial sovereignty could be established, there would be difficult delimitation issues concerning continental shelves and EEZs.[31] The planting of a Russian flag by a Russian ship on the seabed at the North Pole was just pure theatre. The ship was a research vessel collecting data for a further, and improved, submission to the Commission on the Limits of the Continental Shelf (CLCS) about the Arctic continental shelf which Russia claims.[32] How much of a continental shelf in the Arctic is owned by a State will assume great importance given the potentially rich natural resources and the continuing strategic importance of the Arctic. In recent years, the Arctic has been affected by global warming/climate change, the ice having melted earlier, and more extensively, than previously. However, if this trend continues, it should make it easier to explore for and extract oil and gas. It has been estimated that the Arctic has some 90 billion barrels of oil (as much as the known reserves of the United Arab Emirates), and has as much undiscovered gas as all the reserves of gas which are known to exist in Russia.[33] So, a new Cold War may break out in the Arctic.

Svalbard

This is the name by which Spitsbergen is now officially known. It is an archipelago of islands lying roughly between latitudes 74° and 81° North and

[26] The Secretariat is currently located in Tromsø, Norway: see www.arctic-council.org.
[27] On which, see pp. 51 and 53 above.
[28] See p. 328 above on sector claims for Antarctica.
[29] See Oppenheim, pp. 692–3, and p. 37 above on occupation.
[30] See p. 290 above on the high seas.
[31] See p. 33 above about competing Canadian and Danish claims.
[32] See pp. 287–8 above about the continental shelf and the CLCS.
[33] *Financial Times*, 24 July 2008.

longitudes 10° to 35° East. In the early years of the twentieth century, it was regarded as *terra nullius*,[34] but the Treaty of Spitsbergen 1920[35] recognised Norwegian sovereignty over it. The Soviet Union recognised Norway's sovereignty in February 1924 and became a party to the treaty in 1935, although Russia disputes fishing rights with Norway. The treaty now has about forty parties. Article 9 states that neither naval bases nor fortifications may be established on Svalbard and that the islands may not be used for 'warlike purposes'. Subject to Norwegian conservation measures, the parties' nationals are entitled to own property, to hunt and fish on an equal basis, and have free access to Svalbard's waters and ports.[36] But, polar bears are dangerous.

Canals

Baxter, *The Law of International Waterways*, Cambridge, MA, 1964

International straits have already been discussed.[37] We are here concerned with waterways, typically canals, that have been dug in the territory of a *single* State, but because they join two parts of the high seas they are sometimes subject to a special legal regime for the benefit of all States.

Suez Canal[38]

Opened in 1869, the Suez Canal joins the Mediterranean and Red Seas. Its status was defined by the Convention of Constantinople 1888.[39] Although the Canal lies entirely within Egypt, Article 1 provides that it 'shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag'. Other articles provide in detail for its neutralisation. The original parties to the Convention were the then leading European Powers: Austria – Hungary, France, Germany, Italy, the Netherlands, Russia, Spain, Turkey and Great Britain.[40] In 1956, Egypt nationalised the Anglo-French Suez Canal Company that had operated the Canal. Following the withdrawal of British, French and Israeli forces which had illegally invaded Egypt in 1956, the following year Egypt made a unilateral declaration reaffirming that it would apply the provisions of the Convention.[41] Given its clearly expressed

[34] See p. 37 above.
[35] 2 LNTS 8; UKTS (1924) 18; ATS (1925) 10; or http://en.wikipedia.org/wiki/Svalbard (also includes general information). See also G. Ulfstein, *The Svalbard Treaty*, Oslo, 1995.
[36] In 1998, the annual *Antarctic* meeting was held at Tromsø, in northern Norway, much to the puzzlement of many local people, and, for one fascinating, but sleepless, night, in *Svalbard*.
[37] See p. 285 above.
[38] For a detailed account and numerous references, see Oppenheim, pp. 592–5.
[39] On the misuse of the term, 'Great Britain', see Aust MTLP, p. 207, n. 33.
[40] 171 CTS 241; 79 BSP 18. See also Whiteman, vol. 3, pp. 1076–130 (the text of the Convention is at p. 1081).
[41] 265 UNTS 299 (No. 3821).

purpose, the Convention has for long been regarded as having created an objective regime, according to the vessels (including warships) of every State freedom of navigation through the Canal at *any* time. In 1923, in *The Wimbledon*, the Permanent Court of International Justice (the ICJ's predecessor), in upholding the provision granting at the time (see below) freedom of navigation through the Kiel Canal, saw the Suez and Panama Canal treaties as illustrations of the permanent dedication of an artificial waterway connecting two open seas to the use of the whole world.[42] In Article V(1) of the Egypt – Israel Peace Treaty of 1979, Egypt confirmed that Israeli flag vessels, as well as cargoes destined for or coming from Israel, would enjoy the same rights of freedom of navigation through the Canal as other States.[43] Despite a few minor hiccups, those rights have been respected ever since.[44]

Panama Canal[45]

The Panama Canal runs between Colón and the city of Panama, joining the Atlantic and Pacific Oceans. Under a 1903 treaty between the newly independent Panama and the United States, the latter was granted land for the construction and operation of the Canal in perpetuity. Article 18 provided, in similar terms to that for the Suez Canal, for the Canal to be neutralised and open at all times to the vessels of all States, as had previously been provided in a UK – US treaty of 1901.[46] The Canal opened in 1914. The Panama – US Panama Canal Treaties 1977[47] revised the arrangements pending the Canal coming under the sole control of Panama on 1 January 2000, and confirmed the neutralised status of the Canal and freedom of navigation through it.

Kiel Canal[48]

The Kiel Canal (Nord-Ostsee Kanal) was opened in 1895 and extends for 96 km through Germany from Kiel to Brunsbüttel, connecting the Baltic Sea with the North Sea. No treaty or unilateral declaration by Germany had accorded it any international status, but Article 380 of the (Versailles) Treaty of Peace with Germany 1919[49] provided for freedom of navigation for all vessels of all States not at war with Germany. Germany's denunciation of this provision in 1936 appears to have been acquiesced in by the other parties to the Treaty of Peace.

[42] PCIJ, Ser. A, No. 1; 2 AD 99. See Brownlie, pp. 264–7, on the various possible bases for international status.
[43] 1136 UNTS 116 (No. 17813) and 1138 UNTS 72 (No. 17855); ILM (1979) 362.
[44] Information from the Israeli Foreign Ministry. See the cover photo of Aust MTLP, 2nd edn, 2007.
[45] For details and references, see Oppenheim, pp. 595–9. [46] UKTS (1902) 6.
[47] ILM (1977) 1021. See also ILM (1975) 1285 and ILM (1978) 817.
[48] See Oppenheim, p. 595. [49] 225 CTS 188; UKTS (1919) 4.

International rivers[50]

Freedom of navigation

We have dealt with sovereignty over rivers that are the boundary of two or more States.[51] International rivers that are navigable from the sea are usually an important means of international transport. Although the principle of freedom of navigation on them was declared by the Final Act of the Congress of Vienna 1815, this is still not customary international law,[52] and the Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concern of 1921 has failed to obtain wide adherence.[53] But, over the years, various treaties granting freedom of navigation for particular international rivers have been concluded.[54]

The Rhine

The Rhine is the most important Western European river, passing as it does from the North Sea through the Netherlands to Switzerland. Since 1815, it has been recognised as an international river with freedom of navigation, and is currently managed by the Central Commission for Navigation on the Rhine (CCNR), established by the Mannheim Convention, as revised on 17 October 1963,[55] the parties are now Belgium, France, Germany, the Netherlands and Switzerland.

The Danube

The previous regime for freedom of navigation on the Danube and its administration by an international commission[56] was replaced by the so-called Belgrade Convention of 18 August 1948[57] to which only communist States of Eastern Europe were original parties, although (fittingly) Austria acceded in 1960. It repeats the provisions of earlier treaties that guaranteed freedom of navigation on the Danube on a basis of equality for the commercial vessels and the goods of all States. The Danube River Protection Convention of 29 June 1994 (DRPC) aims to achieve sustainable and equitable water management in the Danube Basin, in particular to deal with pollution. The parties are eleven of the Danube's riparian States and the European Union. The International Commission for the Protection of the Danube River (ICPDR) administers the Convention.[58]

[50] A detailed account of international watercourses, albeit more from an environmental perspective, is in B, B & R, pp. 535–82.
[51] See p. 39 above. [52] Oppenheim, p. 582, text to n. 7.
[53] 7 LNTS 35; UKTS (1923) 28. Oppenheim, pp. 580–2.
[54] For references to such treaties for non-European rivers, see Oppenheim, p. 576, n. 6.
[55] For the text and the subsequent Protocols, see www.ccr-zkr.org.
[56] See Oppenheim, pp. 575–80. [57] 33 UNTS 181 (No. 518). [58] www.icpdr.org/danubis/.

Other uses of watercourses

In the past, treaties about the use of international rivers (or more correctly 'watercourses', since 'river' may imply that all of it is navigable) were mainly concerned with navigation. In more recent years, concern about other uses of their waters, that are often vital to the States through which the watercourses or their tributaries flow, have led to various treaties dealing with the way water is extracted, and other important economic and environmental matters. The problems of balancing the opposing interests of upstream and downstream States, including issues raised by human intervention, such as building dams, have been especially acute.

Convention on the Law of the Non-Navigational Uses of International Watercourses (the Convention)[59]

Based on a draft prepared by the ILC, the Convention was adopted by the UN General Assembly in 1997.[60] It covers non-navigational uses of, and measures of protection, preservation and management related to, international watercourses and their waters. The Convention defines 'watercourse' as 'a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus' (so including rivers, lakes, aquifers, glaciers, reservoirs and canals that are interrelated with one another), and an 'international watercourse' as 'a watercourse, parts of which are situated in different States'. Since the problems are specific to each watercourse, the Convention does not affect existing treaties.[61] The parties can conclude treaties which apply or adjust the provisions of the Convention to the characteristics and uses of a particular watercourse, provided it does not adversely affect to a significant extent the use by another party without its express consent (Article 3). An international watercourse must be used in an equitable and reasonable manner. The aim is to attain optimal and sustainable utilisation, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse (Article 5). The Convention is therefore a framework of general and residual principles within which the parties can work to produce a regime suited to a particular watercourse. The ICJ has already endorsed the basic principles of the Convention.[62]

[59] See S. McCaffrey, *The Law of International Watercourses*, Oxford, 2001.

[60] ILM (1997) 719. For the text, the ILC final draft Articles and commentary, and a useful introduction, see A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, vol. II, pp. 1331–446.

[61] As to which, see B, B & R, pp. 572–80.

[62] *Case concerning the Gabčíkovo – Nagymaros Project (Hungary/Slovakia)*, *ICJ Reports* (1997), p. 3, para. 85; ILM (1998) 162; 116 ILR 1.

So far, only seventeen States have ratified the Convention. Since it will enter into force only when thirty-five States have ratified, it is not likely to do so for some years. But, whether or not it is a party to the Convention, a State concerned with a particular watercourse may wish to draw on it when devising or amending a regime. A recent treaty was the Revised Protocol on Shared Watercourses in the Southern African Development Community 2000.[63]

In 2008, the ILC adopted draft articles on ground water resources: a Transboundary Aquifers Convention.[64] Its fate will in due course be decided by the UN General Assembly.

Outer space

Cheng, *Studies in International Space Law*, Oxford, 1997
Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 826–45 ('Oppenheim')
Gardiner, *International Law*, London, 2003, pp. 394, 400–1 and 406 ('Gardiner')

Outer space begins where airspace ends, although where that is has never been determined. But a common-sense definition might be: anywhere above the earth where aircraft cannot fly because they cannot 'derive support in the atmosphere from the reactions of the air',[65] although that may now be too simple given that the space shuttle depends at different times of its journey on rocket propulsion and aerodynamic lift.

Outer space treaties[66]

The Treaty on Principles Governing the Activities of State in the Exploration and Use of Outer Space 1967 (Outer Space Treaty),[67] represented a deal between the then major space actors, the Soviet Union and the United States. It now has ninety-nine parties, including those States which are directly involved in a significant way in outer space activities. The Treaty's basic principles repeat the terms of earlier UN General Assembly resolutions,[68] which can now be regarded as representing customary international law.[69]

The principles, which draw in part from principles relating to the freedom of navigation and the provisions of the Antarctic Treaty, are:

[63] ILM (2001) 317. [64] Go to www.un.org/law/ilc/.
[65] See p. 320 above on the definition of national airspace.
[66] See also the website of the UN Committee on the Peaceful Uses of Outer Space (COPUOS) and its Legal Sub-committee: www.oosa.unvienna.org/oosa/COPUOS/copuos.html.
[67] 610 UNTS 205 (No. 8843); ILM (1967) 386; UKTS (1968) 10; TIAS 6347. Russia, the United Kingdom and the United States are joint depositaries (see p. 101 above) of this Cold War treaty, as well as of the Astronauts Agreement and the Liability Convention.
[68] 1721 (XVI), 1884 (XVIII) and 1962 (XVIII). [69] See p. 6 above.

(1) outer space (defined as including the moon and other celestial bodies – except of course the earth) is the province of all mankind, and its exploration must be carried out for the benefit of all States in accordance with international law;
(2) outer space cannot be appropriated by claim of sovereignty, means of use or occupation, or any other means;
(3) outer space is free for scientific investigation;
(4) no weapons of mass destruction may be put in orbit around the earth or installed on celestial bodies or stationed in outer space;
(5) the moon and other celestial bodies must be used exclusively for peaceful purposes, and military equipment or activities of any kind are prohibited, although military personnel may be used for peaceful purposes;[70]
(6) when in outer space astronauts must help other astronauts in distress, and States must help astronauts of other States who land in their territory or on the high seas (elaborated in the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968 (Astronauts Agreement);[71]
(7) a State is internationally responsible for all activities in outer space carried out by it or its nationals, public or private, and the State which launches or procures the launching of a space object, or from whose territory or facility a space object is launched, is liable for any damage caused whether on earth, in the air or in outer space (elaborated in the Convention on International Liability for Damage caused by Space Objects 1972 (Liability Convention) with provisions for absolute and fault liability);[72] and
(8) a State retains jurisdiction and control over any object on its registry which is launched into outer space, registration with the UN Secretary-General being required by the Convention on Registration of Objects Launched into Outer Space 1975 (Registration Convention).[73]

The Moon Treaty 1979[74] declares the moon and its natural resources to be the 'common heritage of mankind', and that the parties will establish an international regime to govern exploitation of the moon once this 'is about to become feasible' (Article 11(5)). The Treaty, which also covers all other celestial bodies (except the earth), was controversial from the start, and those States that have invested heavily in space exploration have been wary of it. Consequently, although the Treaty entered into force in 1984, it has only thirteen parties, none of which are significant actors in space. When exploitation does become

[70] The Nuclear Test-Ban Treaty 1963, 480 UNTS 43 (No. 6964); UKTS (1964) 3; TIAS 544, prohibits tests also in outer space.
[71] 672 UNTS 119 (No. 9574); ILM (1968) 149. It has been widely ratified.
[72] 961 UNTS 187 (No. 13810); ILM (1971) 965; UKTS (194) 16; TIAS 7762. It has also been widely ratified.
[73] 1023 UNTS 15 (No. 15020); ILM (1975) 43. It has fifty-two parties.
[74] 1363 UNTS 3 (No. 23002); ILM (1979) 1434.

feasible, one can expect the major space players to promote another treaty better suited to the needs of the time.

The geostationary orbit

The main use of space is for satellites used for navigation, meteorology, broadcasting and remote sensing (the observation of the earth for civil or military purposes). UNGA Resolution 41/65 of 1986 affirmed that outer space can be used for remote sensing by all, no prior permission being needed.[75] Most satellites need to move in an orbit at about 35,900 km above the earth, and at a speed that will allow them to remain above the same point on the earth's surface (geostationary orbit). For maximum effectiveness, that point needs to be over the equator so that the satellite can receive from, and transmit to, most populated areas. The geostationary orbit can accommodate only a limited number of satellites, so it is a valuable resource. Yet, eight equatorial States have asserted that the geostationary orbit is a natural resource belonging to them. Their argument is that the geostationary orbit is an exclusively gravitational phenomena generated by *their* part of the earth which lies beneath the orbit. This wildly unscientific argument has not been successful: the gravitational pull depends on the *whole* earth, and the geostationary orbit depends also on the speed of the satellite. Moreover, since the orbit is clearly part of outer space, it cannot be appropriated by any State.[76]

The International Space Station

The International Space Station is governed by an Agreement of 1998 between Canada, Japan, Russia, the United States and ten of the eighteen States that are members of the European Space Agency.[77] It provides a framework for long-term international collaboration in the design, development, operation and utilisation of the space station under the leadership of the United States. The provisions of Articles 21 and 22 on intellectual property and criminal jurisdiction are particularly interesting.

International space organisations

The five universal outer space treaties all take account of the fact that space activities are often carried out in collaboration with other States or within the framework of an international organisation. In particular, Article XXII of the Liability Convention provides that, if an international organisation is liable for damage, those States parties to the Convention which are members of the organisation are jointly and severally liable with the organisation for the

[75] See Oppenheim, pp. 844–5. [76] See further Gardiner, pp. 424–5.
[77] See www.esa.int/esaHS/index.html and search for International Space Station.

damage, and, if the organisation does not pay compensation as agreed or determined, those States parties are then liable to pay. This is contrary to the usual legal position, but justified by the high costs involved.[78]

Intelsat

UNGA Resolution 41/65 of 1986 adopted the principle that global satellite communications should be made available on a non-discriminatory basis. The purpose of the International Telecommunications Satellite Organization (INTELSAT) is to establish and operate such a system. INTELSAT grew out of a consortium and, in 1964, was established as an international organisation by a treaty and related Operating Agreement, to which the Member States or their public or private telecommunications entities are parties. Membership is open to all International Telecommunications Union (ITU) members. INTELSAT has its headquarters in Washington.[79]

Inmarsat

The International Maritime Satellite Organization (INMARSAT) was established by treaty in 1976[80] to provide mobile satellite communications, initially for shipping. As with INTELSAT, there was a related Operating Agreement, to which the Member States or their public or private telecommunications entities are parties. Since 1999, INMARSAT has been a limited company operating geostationary satellites. Its headquarters are in London.[81]

European Space Agency

The European Space Agency is the main regional organisation devoted to the launch of satellites, space science and other space activities.[82] It is *not* an EU body; and nor is Eurocontrol.[83]

International Telecommunications Union[84]

The International Telecommunications Union (ITU), with its headquarters in Geneva, has been a UN specialised agency since 1947, but dates from 1932 and is the direct successor to the nineteenth-century International Telegraph Union, which grew out of the International Telegraph Convention 1865.[85] Despite the enormous advances in technology, its basic aims have not changed.

[78] See p. 376 below. [79] www.intelsat.com.
[80] 1143 UNTS 105 (No. 17948); ILM (1976) 1051; UKTS (1979) 94; TIAS 9605. See ILM (1988) 691 for the 1988 amendment.
[81] www.inmarsat.org. (Do *not* confuse it with IMO.)
[82] For the ESA Convention, see 1297 UNTS 161 (No. 21524); ILM (1975) 864; UKTS (1981) 30. Its website is www.esa.int.
[83] See www.eurocontrol.int/ [84] See its excellent website: www.itu.int.
[85] 130 CTS 123, 198 and 148 CTS 416.

Its purpose is to maintain and extend international cooperation for the improvement and rational use of global telecommunications of all kinds, involving both governments and the private sector. Since it is 'a good thing', almost all States are members. It allocates radio frequencies, and is thus intimately involved in regulating satellite communications. Since it registers frequencies in relation to particular locations, in effect it assigns locations of satellites in the geostationary orbit.

19

International economic law

The forgotten man at the bottom of the economic pyramid.[1]

Lowenfeld, *International Economic Law*, 2nd edn, Oxford, 2008
Sornarajah, *The International Law of Foreign Investment*, 2nd edn, Cambridge, 2004
Collier and **Lowe**, *The Settlement of Disputes in International Law*, Oxford, 1999 ('Collier and Lowe')
Schreuer, *The ICSID Convention: A Commentary*, Cambridge, 2001 ('Schreuer')

Introduction

International economic law is a convenient term to cover the multitude of bilateral and multilateral treaties made since the Second World War on trade, commerce and investment. That does not mean that it is a new subject. There are numerous bilateral treaties on trade from earlier centuries: an Anglo-Portuguese treaty of 1353 provides for mercantile intercourse.[2] In the nineteenth and twentieth centuries, there were many treaties on trade, customs, establishment and navigation. But the last sixty years has seen important multilateral treaty making in these areas and the conclusion of numerous bilateral investment treaties (BITs). A detailed description of the various new international and regional economic organisations is beyond the scope of this chapter. One can give only a brief overview of the subject, principally BITs and the WTO and similar organisations, and concentrating more on the settlement of trade disputes.

(International dispute settlement in general is dealt with in Chapter 22 below.)

Most countries that achieved their independence after the Second World War were developing, and most remain so. During the colonial era, the imperial powers controlled trade and investment between their colonies and themselves and third States. With independence, the new States could have more control

[1] Franklin D. Roosevelt, broadcast, 7 April 1932. [2] 1(2) Dumont 286.

over trade and the activities of foreign investors, but they also needed to encourage foreign investment. Initially, the considerable problems caused by the expropriation of foreign businesses had sometimes discouraged investors.

Most businesspeople are not that aware of treaties, which they may see as the concern only of governments. Even when a treaty is seen as relevant to business, it may appear too difficult to enforce. Many treaties have dispute settlement clauses, but such clauses usually require diplomatic negotiations and, if that fails, international arbitration or recourse to the International Court of Justice (ICJ). Formal settlement procedures may also depend on a further agreement between both parties. Even on the relatively rare occasions that a dispute goes to international arbitration or the ICJ, it can take many years, and action may remain largely in the hands of ministers, diplomats and other State officials. Some businesses may therefore regard treaties as largely irrelevant to finding quick, practical solutions to commercial problems. They are wrong.

Bilateral investment treaties

One of the answers to a problem of lack of foreign investment was for a developing State to enter into a bilateral investment treaty (BIT). By guaranteeing protection of foreign investments, a BIT also promotes foreign investment.[3] The Federal Republic of Germany and Pakistan concluded the first BIT in 1959. In the 1970s, concern by foreign investors for the need to establish and maintain a stable climate for investment grew. Expropriation and nationalisation by countries as diverse as Chile, Iran, Jamaica and Libya demonstrated the need for more effective protection and led to a growing number of BITs. Capital-exporting nations like France, Japan, the Netherlands, the United Kingdom and the United States have entered into many BITs. There are now over 3,000, compared with around 300 in 1990. More recently, the ICSID arm of the World Bank (see page 350 below) organised fresh rounds of BIT-making, so bringing into being what is rapidly becoming a more homogeneous set of rules to govern the global investment market.

A BIT has at least *eight* distinct advantages for the foreign investor. The *first*, and most obvious, is that it avoids interminable and often inconclusive disputes as to what rules of customary international law govern investment, how the rules should be applied, and how a dispute between an investor and the host State can be resolved. (For this purpose, 'host State' includes the various executive, legislative and judicial organs of the State, right down to local authorities and local courts.) Without a BIT, an investor in a dispute with a host State would normally first have to exhaust his local remedies – using local law and going through the local courts up to the final court of appeal – before

[3] Hence the name by which such treaties are called by the United Kingdom, for example the Turkmenistan–UK Investment Promotion and Protection Agreement (IPPA) 1995, 2269 UNTS (No. 40409); UKTS (2003) 47.

his own State could pursue his rights in international law, such as they may be.[4] Without a BIT, there are no relatively easy (or indeed any) means of resolving the dispute.

The *second advantage* of a BIT is that, if the host State is alleged to be in breach of the BIT, the investor does not have to ask his own government to take up the claim. Although investors are not parties to BITs, nevertheless BITs give them the right to take host States to international arbitration, and they do not have first to exhaust any local remedies. In fact, the investor does not have to involve his own government at all. Nor does the host State have to agree to the arbitration; the process is compulsory once the investor invokes it. This means that it is reasonably quicker and surer, the disgruntled investor keeping much more direct control of the procedure. Nor is there any risk of the dispute becoming just one on the list of bilateral disputes (including other commercial issues) between his and the other State. If it were otherwise, the dispute might have to take its turn, or might not be pursued at all by the investor's State.

If the dispute is decided in favour of the investor, the BIT requires the award to be enforceable in the courts of the host State. If a host State were not to legislate for this, or if it were to interfere in the enforcement process, not only would this give rise to a separate claim by the investor's State,[5] but it would badly affect the host State's standing in the eyes of other States and their investors. The fact that BITs have such an effective dispute settlement mechanism means that the initiation, or mere threat, of the arbitration process may persuade the host State to resolve the dispute without the need for it to go to trial.

A typical BIT[6]

Most investor States have model BITs which they follow to varying degrees, depending on the negotiating strength of the host State. Although the obligations are expressed as reciprocal, in practice the two parties are a developed State and a developing State, the first representing the investor, the other the State hosting the investment. No two BITs are identical, but they normally have fairly similar definitions of 'investor' and 'territory' and provisions on fair and equitable treatment; national or most-favoured-nation treatment (MFN) with regard to taxes, repatriation of investments, payments, income, profits etc; expropriation; national or MFN treatment for losses due to war, revolution, insurrection, etc.; the settlement of disputes; and the duration of the BIT and its continued application to investments made before termination.

[4] See pp. 401 et seq. below. [5] See Chapter 21 on state responsibility.

[6] See Dolzer and Stevens, *Bilateral Investment Treaties*, The Hague, 1995; Newcombe and Paradell, *Law and Practice of Investment Treaties*, Kluwer, 2008.

The entities protected

BITs protect investments made by nationals of one State in the territory of the host State. Nationals are defined as natural persons having the nationality of the investor's State, and legal persons as corporations, partnerships, firms or associations incorporated or established under its laws.[7] A *third advantage* of a BIT is that it often provides that investor companies include also those incorporated under the law of the *host* State, but controlled, directly or indirectly, by a company incorporated under the law of the *investor's* State. For example, an investment made in the Philippines by a local company controlled by a company incorporated in the Netherlands would be protected under the Netherlands–Philippines BIT 1985.[8]

Investments are often made through companies incorporated in the most favourable jurisdiction for protection ('strategic incorporation'), although other important factors must also be considered, including tax advantages. Thus, investments can be made abroad through companies incorporated in *third* States. Protection will be increased when the State of incorporation of the investor company and the host State are parties to a BIT. So, a German investment made in a host State but through a Luxembourg company would be protected if the host State has a BIT with Luxembourg. Companies also make investments through subsidiary companies incorporated in the overseas territories of their own or another State. It is therefore important that the relevant BIT also protects investments made by companies incorporated in such territories.

Types of investment protected

BITs define investment in broad terms. For example, the UK–Venezuela BIT 1995[9] defines 'investment' as 'every kind of asset held and in particular, though not exclusively, includes' movable and immovable property, shares, contractual rights, intellectual property rights, and business concessions, including 'concessions to search for, cultivate, extract or exploit natural resources' (the latter being commonly included).

Two approaches are used to determine which investments will be protected. The more usual is to protect all aspects of an activity that meet the definition of 'investment'. The other, although much less often found, is to add a requirement that the investment must be approved in writing by the other State in order to qualify for protection.

Contractual disputes, whether with a company in the host State or with the host State itself, are not covered by the BIT, except in so far as the host State has done something that goes beyond a mere breach of contract, such as operating

[7] See p. 166 above on the customary international law problems of determining the nationality of corporations.

[8] 1488 UNTS 304 (No. 25565). [9] UKTS (1996) 83.

the contract in a way that benefits local company rivals to the detriment of the foreign investor.

Treatment of investments

Since BITs have two basic purposes – to encourage investments and to protect them – they require the host State to accord 'fair and equitable treatment' to inward investment. This is a basic and general standard recognised in customary international law and is not related to the domestic law of the host State. To give substance to the concept of fair and equitable treatment, certain BITs list the activities that are to be protected against injurious measures. This could be said to be the *fourth advantage* of a BIT.

In addition, investments enjoy most-favoured-nation (MFN) or national treatment. MFN treatment gives the foreign investor the same rights as those granted by the host State to investors from the most-favoured third State. Under national treatment, the investor is granted treatment equal to that accorded to local nationals. Often, a BIT provides for the standard to be whatever is most favourable to the investor, which is not necessarily national treatment.

BITs also encourage investment by providing for the free transfer abroad of earnings and capital: this is the *fifth advantage* of BITs.

Expropriation and compensation[10]

There are still controversial issues in customary international law relating to the expropriation of foreign investments. These include even such basic questions as: to what extent does international law, rather than the legislation of the host State, govern expropriation? Do the rules of international law prohibit expropriation which is discriminatory or which is not done for a public purpose? How is compensation to be determined? A BIT resolves these issues as between the parties by regulating the conditions under which expropriation may be carried out and compensation awarded (the *sixth advantage*). Expropriation is prohibited if it is done in a discriminatory way or is not done for a public purpose. Some BITs specify that the purpose must be related to internal needs. But payment of compensation for expropriation is required in any event. Because BITs are quite tightly drafted, some host States have tried to get around the restrictions on expropriation by indirect means. Naked expropriation is now unusual: physically taking over an oil field is just too crude. But discriminatory treatment, or expropriation by indirect means, is still a problem, even in some developed economies.[11] Onerous environmental requirements or discriminatory or penal tax regimes can also amount to expropriation. Some

[10] Ripinsky and Williams, *Damages in International Investment Law*, BIICL, London, 2008.

[11] See Reisman and Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation' (2003) BYIL 115.

governments have imposed new taxes which, in practice, apply only to foreign investments, or which bear more heavily on foreign investors than on local businesses and which significantly affect the value of the foreign investment. Arbitral awards have found such methods amount to expropriation.[12]

But the tables have been turned. Originally, BITs were seen as protecting investors from the developed world from the governments of the third world. Now some developed countries are being challenged by developing country investors over the imposition of taxes or other unfair treatment of their investments. And they are using long-existing BITs to do this.

BITs establish in broad terms the basis on which compensation is assessed. The UK–Venezuela BIT 1995 (Article 5(1))[13] requires that compensation be 'prompt, adequate and effective', and amount to the 'genuine value' of the investment 'immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier.' It also provides that interest shall be at 'a normal commercial rate'. The reference to the value immediately before the expropriation became public knowledge is most important since the very fact of expropriation may well affect the value of an investment. There may be no formal announcement of expropriation, or there may be 'creeping' expropriation. This will also complicate the determination of the value of the investment.

The date when compensation must be paid is another issue. BITs also provide that payment must be made without delay, and be effectively realisable and freely transferable. Some BITs permit transfer payments by instalment if the compensation is large.

Civil disturbance, etc.

BITs also prescribe a standard of treatment if investments are harmed by war, revolution, a state of national emergency, revolt, insurgency or riot. If compensation has to be paid, the investor will be treated in accordance with the standard laid down in the BIT. In some BITs, this will be MFN or national treatment, or whichever is more favourable.

Dispute settlement[14]

However well drafted, the interpretation and application of the provisions of a BIT may not be easy. With so much at stake, it is vital that the investor has a sure and effective way of resolving any dispute. A valuable aspect of BITs is that

[12] See, for example, *Metalclad* v. *Mexico*, ILM (2001) 35; 119 ILR 615. But, corruption might well invalidate a contract and ICSID (see next page) would not enforce it: see *World Duty Free* v. *Kenya*, ICSID case ARB/00/7 (http://icsid.worldbank.org/ICSID/Index.jsp).

[13] See n. 9 above.

[14] See also P. Gallus, 'Recent BIT decisions and composite acts straddling the date of a treaty comes into force' (2007) ICLQ 491–513.

they provide that, if a dispute between the investor and the host State cannot be settled within a specified period, the foreign investor has the *right* to submit the dispute to international mixed arbitration:[15] the *seventh advantage* of a BIT. A number of arbitral fora may be available, the BIT sometimes specifying two or more. The International Centre for the Settlement of Investment Disputes (ICSID)[16] is the obvious choice if both States are parties to the ICSID Convention. Other fora include the Stockholm Chamber of Commerce, ad hoc tribunals operating under the UN Commission on International Trade Law (UNCITRAL)[17] or the International Chamber of Commerce.[18] Where a BIT gives the investor a choice of forum, in selecting it the investor will consider the expertise of the administering institution and, among other factors, the independence, impartiality and confidentiality of the forum. However, many BITs specify only one forum.

Duration of BITs

The initial term of a BIT tends to be ten to fifteen years. When that expires, the BIT either continues in force indefinitely until terminated by notice (usually twelve months), or is renewed tacitly for specified periods unless notice is given before the end of each (usually ten-year) period. But, even when a BIT has been terminated, it will continue in force, for a period that can range from ten to twenty years, with respect to investments made before the actual date of termination: the *eighth advantage*.

ICSID

C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge, 2001 ('Schreuer')

Collier and **Lowe**, *The Settlement of Disputes in International Law*, Oxford, 1999 ('Collier and Lowe')

The International Centre for the Settlement of Investment Disputes (ICSID) was established by the (Washington) Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965,[19] which entered into force in 1966. It now has 143 parties. Although a separate international organisation, ICSID has close links to the World Bank, collaborating with it in meeting requests by States for advice on investment and arbitration law. The ICSID Secretary-General also acts as the appointing

[15] See p. 409 below on mixed arbitrations.
[16] See below. See the decision of 2006 in *LG&E Energy* v. *Argentina* (www.worldbank.org/icsid/).
[17] www.uncitral.org. [18] www.iccwbo.org.
[19] The best source of basic documents and of up-to-date information is at www.worldbank.org/icsid/. Both Schreuer and Collier and Lowe have the text of the ICSID Convention, which is also to be found in 575 UNTS 159 (No. 8359); ILM (1965) 524; UKTS (1967) 25.

authority of arbitrators for ad hoc arbitrations. ICSID's publications include a multi-volume and periodically updated collection *Investment Laws of the World*, *Investment Treaties*, the biannual *ICSID Review – Foreign Investment Law Journal* (which has the full texts of ICSID awards)[20] and the *ICSID Annual Report*. The expenses of the ICSID Secretariat are financed out of the World Bank budget, although the costs of individual proceedings are borne by the parties to them. (The articles mentioned below are of the ICSID Convention.)

ICSID was specially designed to facilitate the settlement of certain investment disputes but, like the Permanent Court of Arbitration,[21] it is *not* a standing tribunal. ICSID merely provides facilities and procedures for arbitration between a member State and an investor who is a national of another member State. The Convention does not define an individual's nationality, which is, in principle, determined by the law of the State of nationality, and a person who is also a national of the host State (dual national) cannot therefore invoke the ICSID procedure.[22] Nor does the Convention define the nationality of an investor that is a legal person, although this will often be determined by the agreement under which the two States have consented to ICSID jurisdiction. But, where the investor is a legal person with the nationality of the host State, but controlled by nationals of another member State (typically shareholders), the investor is *not* regarded as a national of the host State (Article 25(2)(b)).[23]

Recourse to ICSID arbitration is entirely voluntary, but once a member State and a foreign investor have given their written consent to ICSID arbitration, neither can unilaterally withdraw it (Article 25(1)). Consent to ICSID arbitration is commonly found in investment *contracts* between member States and foreign investors, and ICSID has produced *Model Clauses* for this purpose.[24] Member States can also give prior consent in their own investment laws (only some twenty have done so) or, most importantly, in BITs. Consent excludes resort to any other remedies, including domestic, unless otherwise agreed by the parties to the dispute.[25] Consent may be made subject to the investor exhausting local remedies, but this is unusual for BITs.[26] When adhering to the Convention, or afterwards, a State may inform ICSID that it would not consider submitting certain classes of disputes (Article 25(4)). China has accepted only disputes about compensation for expropriation or nationalisation. Saudi Arabia excludes disputes about oil or acts of sovereignty, and Turkey excludes disputes about land. But such exclusions should not have the effect of taking disputes on

[20] The text of awards from 1991 onwards are also available on the ICSID website, www.worldbank.org/icsid/. See also the ongoing comprehensive collection in *International Convention on the Settlement of Investment Disputes Reports*, Cambridge, 1993–.

[21] See p. 408 below. [22] On dual nationality, see p. 163 above.

[23] This reflects a common provision in BITs: see p. 347 above; and Collier and Lowe, pp. 65–8.

[24] See www.worldbank.org/icsid/.

[25] Such international arbitration process is not subject to domestic law and so that law cannot be invoked pending the outcome of the arbitration: see *ETI v Republic of Bolivia* [2008] EWCA Civ 880. As to the problems this can cause, see Schreuer, pp. 345–96.

[26] See pp. 345–6 above.

those matters out of ICSID jurisdiction if they are otherwise clearly within the scope of the dispute settlement clause of a contract or a BIT.[27]

Where an investor and a member State have consented to a dispute being submitted to ICSID, the State of nationality of the investor is prohibited from giving diplomatic protection to, or bringing an international claim in respect of, the investor unless the other member State fails to comply with the ICSID award (Article 27). ICSID arbitration is also one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties: NAFTA, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Protocol of MERCOSUR (see pp. 358 et seq. below).

Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ('Institution Rules') govern the early stages of the proceedings. After that, the Rules of Procedure for Conciliation or for Arbitration take over and apply, subject to any changes agreed by the parties to the dispute.[28] Either party to a dispute can invoke the procedure, although it is usually the investor. An ICSID arbitration can be held anywhere the parties agree, not just at ICSID's headquarters. ICSID arbitral tribunals usually have three arbitrators (see the complex provisions of Articles 37–40). A tribunal applies either such law as is agreed by the parties or, in the absence of agreement, the law of the member State party (including its conflict of law rules) and the applicable rules of international law (Article 42). Failure of a party to appear or present his case is not regarded as an admission of liability, so the tribunal may proceed with the case and make an award (Article 45).

There is no appeal against an award, but the tribunal may be asked to interpret or revise it (Articles 50–51). But, under Article 52, an application to annul an award on the ground of procedural irregularities is heard by an ad hoc committee of three. Two awards have been annulled on the ground that the tribunal had manifestly exceeded its powers, although in both cases the committee was criticised for going beyond procedural matters and deciding points of law.[29] But, an international arbitration process is not subject to domestic law and so that law cannot be invoked pending the outcome of the arbitration.[30]

All ICSID member States, even if they are not parties to the dispute, are required by the Convention to recognise and enforce an ICSID award as if it were a final judgment of their own courts, but State immunity from *execution* is not affected.[31] So, if it were to be invoked, the matter would have to be dealt with under the law of State responsibility. ICSID arbitration has been a success, the number of ICSID cases have increased significantly in recent years. By the end of 2008, 161 had been concluded, with 125 pending. Argentina was particularly hit by many BIT claims arising out of its financial crisis in 2001–2. In 2007, Bolivia became the first State to withdraw from ICSID.

[27] Collier and Lowe, p. 62. [28] For both sets of rules, see www.worldbank.org/icsid/.
[29] Collier and Lowe, pp. 70–3; Schreuer, pp. 881–1075.
[30] *ETI* v. *Republic of Bolivia* [2008] EWCA Civ 880. [31] See p. 158 above.

In 1978, ICSID promulgated the Additional Facility Rules authorising the Secretariat to administer certain types of proceedings between States and foreign nationals that fall outside the scope of the Convention. The Facility is also available for cases where the dispute is not about investment, provided it relates to a transaction which has 'features that distinguish it from an ordinary commercial transaction'. The Facility has rarely been used.

Energy Charter Treaty

T. Walde (ed.), *The Energy Charter Treaty*, London, 1996.
www.encharter.org

The Energy Charter Treaty 1994[32] entered into force in 1998 and now has forty-seven parties, including developing States such as Kazakhstan, Mongolia and Uzbekistan. Belarus and Russia apply the Charter provisionally, that is subject to their laws. Although Japan is a party, the Charter is Eurocentric. It applies to investments that are associated with an 'economic activity in the energy sector'. This covers exploitation, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of energy materials and products. It also includes such services as the construction of energy facilities, management and design, and activities aimed at economic efficiency.

The Charter's provisions on investment promotion and protection and the settlement of disputes provide a legally binding framework for cooperation between the parties in the field of energy. Although multilateral, the Charter is equivalent to a network of BITs. Article 16 gives energy investors the best of both worlds: in so far as a previous or future BIT gives better protection than the Charter, the BIT will apply, and vice versa. The other investment protection clauses are on similar lines to contemporary BITs, although they go into much more detail and generally give better protection. An aggrieved investor has the right, but not the duty, to pursue local remedies, but even if he does he can still invoke compulsory international arbitration (under ICSID, ad hoc under UNCITRAL rules or under the Stockholm Chamber of Commerce), and he does not have to wait until local remedies have been exhausted.

World Trade Organization

Matsushita, **Schoenbaum** and **Mavroidis**, *The World Trade Organization: Law, Practice and Policy*, 2nd edn, Oxford, 2006
www.wto.org

[32] 2080 UNTS 100 (No. 36116); ILM (1995) 373; UKTS (2000) 78.

The 1994 Marrakesh Agreement established the World Trade Organization (WTO), as from 1 January 1995.[33] The Agreement incorporates several existing multilateral trade agreements, and four important new agreements: (a) the General Agreement on Tariffs and Trade 1994 (GATT 1994), which effectively replaced GATT 1947; (b) the General Agreement on Trade in Services (GATS); (c) the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and (d) the (vital) Understanding on Rules and Procedures Governing the Settlement of Disputes. The purpose of the WTO is to eliminate or reduce barriers to trade. This required bringing existing and new multilateral trade agreements into a comprehensive system with an effective dispute settlement mechanism, although the WTO is better known to the general public as a forum for the negotiation of further reductions in trade barriers. WTO decisions are taken as far as possible by consensus. If this is not possible, it is taken by a simple majority, unless otherwise provided in the WTO Agreement or another agreement (Article IX).

In contrast to GATT 1947, to become a WTO member one has to accept all the agreements and understandings that make up the WTO Agreement. Any State, or separate customs territory,[34] can apply to be a member, the terms of accession being agreed with the existing members. At the end of 2008, there were 153 members, each with one vote. They include all the significant economies, except Iran and Russia (which first applied sixteen years ago) which are among the observers that are mainly not important for world trade. From the start, membership of the WTO by the United States is a reason why the Organization has been a success. Wisely, the WTO distances itself from the United Nations, of which it was never part.

Dispute Settlement[35]

A means of dealing effectively with disputes between WTO members was essential for the credibility of the WTO. The Understanding on Settlement of Disputes (DSU) is in Annex 2 to the WTO Agreement.[36] Despite its grossly misleading name, the Understanding is an integral part of the WTO Agreement and so binding in international law on all parties to WTO Agreement. It applies to most WTO disputes. A Dispute Settlement Body (DSB), on which all WTO members sit, administers the system, establishing panels and adopting panel

[33] ILM (1994) 1144. The Agreement, including all the agreements making up the WTO, and all other relevant documents are on the WTO website.

[34] The European Union, Hong Kong (China) (1995), Macao (China) (1995), and Chinese Taipei (Taiwan) (2002), as well as China itself (2001), are each full WTO members.

[35] See the WTO's own *A Handbook on the WTO Dispute Settlement System*, Cambridge, 2004; Palmeter and Mavroidis, *Dispute Settlement in the World Trade Organization*, 2nd edn, Cambridge, 2004; and *The WTO Dispute Settlement Reports*, Cambridge, 1996–2005, and 2006 onwards.

[36] ILM (1994) 1226.

and Appellate Body reports, monitoring implementation of rulings and recommendations, and authorising countermeasures. The most acrimonious disputes have – not surprisingly – been between the European Union and the United States.

The purpose of the DSB is to provide security and predictability to the multilateral trading system. It therefore seeks settlement of disputes as they arise, not years later, although in practice the process is complex and slow. Members seeking redress for a violation of obligations or other nullification or impairment of benefits under the '*covered agreements*'[37] must have recourse to the Understanding, not to other means.[38] At all stages of any dispute settlement procedure involving a least-developed country member, particular consideration must be given to the latter's special situation.

The DSB began operations in 1995 and since then has been busy. For example, in 2007, the DSB received thirteen notifications from members formally requesting consultations under the Understanding. During that year, the DSB established eleven panels to deal with fourteen new cases and adopted panel and/or Appellate Body reports in six cases. Mutually agreed solutions or withdrawals were notified in three cases.

The Understanding system is complex, and only a brief overview can be given. Although the DSB applies the 'customary rules of interpretation of public international law', instead of considering breaches of rights the DSB looks more at whether the 'benefits' that a member expects to derive from a covered agreement have been 'impaired' by measures taken by another member. By its recommendations and rulings, the DSB seeks to produce positive, workable and mutually acceptable solutions.

The object of the system is, first, to secure the withdrawal of any unlawful measures. Compensation is to be resorted to only if immediate withdrawal is impracticable. The system therefore more resembles conciliation, although it is not left just to economists; lawyers are also intimately involved. But, as a last resort, the member invoking the dispute settlement procedure has, subject to authorisation by the DSB, the option of 'suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member' (a long-winded way of referring to the imposition of countermeasures).[39] The Understanding sets strict time limits, although the DSB can extend them, and the parties are always encouraged to reach a solution by any means they can agree on. There is no need for nationals of the complainant Member who are affected by measures taken by another Member first to exhaust local remedies.[40]

[37] Those agreements listed in Appendix 1 to the Understanding: the WTO Agreement: the Understanding, the Multilateral Trade Agreements (Multilateral Agreements on Trade in Goods, GATS and TRIPS) and the Plurilateral Trade Agreements (the Agreements on Trade in Civil Aircraft and on Government Procurement, the International Dairy Agreement and the International Bovine Meat Agreement). Appendix 2 lists special or additional rules and procedures for covered agreements.

[38] Article 23. [39] See p. 391 below on countermeasures in general. [40] See p. 406 below.

Panels

If the parties to a dispute have not resolved it by consultations, the complaining party may ask that a panel be established. The panel's role is to make findings to help the DSB in formulating recommendations or giving rulings provided for under the covered agreements. A panel has three members unless the parties agree to have five. The Secretariat maintains a list of possible members and proposes nominations. A party can oppose a nomination only for compelling reasons. Should there be no agreement on the appointment of members, the WTO Director-General will at the request of either party make the appointments. Third parties that have notified the DSB of a substantial interest in the matter may make written submissions to, and be heard by, the panel. The panel's deliberations are confidential. It consults regularly with the parties, giving them adequate opportunity to develop a mutually satisfactory solution. But if they fail, the panel submits a report to the DSB, which is circulated to all WTO Members. The report is then adopted by the DSB within sixty days, unless a party notifies the DSB that it will appeal, or the DSB decides, by consensus, not to adopt the report (so-called negative consensus).[41]

Appellate Body

The DSB appoints seven persons to serve on the Appellate Body for four-year terms, renewable only once. Three of them sit on any one case. Appeals from panel cases are limited to issues of law dealt with in the panel report. The power to adopt interpretations of the WTO Agreement and other covered agreements is vested exclusively in the WTO Ministerial Conference and General Council (Article IX(2)). But this does prevent the panels or the Appellate Body interpreting any of the agreements, subject always to such adopted interpretations, which may themselves have to be interpreted. The Appellate Body has been criticised by the United States for going further than interpretation and instead making up rules. This is not an unfamiliar complaint made by the losing party. When one sets up a court, one has to expect the unexpected.[42]

Only the parties to the dispute may appeal, although third parties which have notified the DSB of a substantial interest in the matter may make written submissions to, and be heard by, the Appellate Body. The proceedings are confidential, and continue for no more than ninety days. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. The DSB then adopts the report of the Appellate Body (which is binding on the parties) unless the DSB decides, by consensus, not to adopt the report.

[41] On the application of international law by the panels, see M. Young, (2007) ICLQ 907–30.

[42] See the celebrated case of *Marbury* v. *Madison*. In 1803, the US Supreme Court ruled that it could declare legislation to be unconstitutional. Although such a power is not in the US Constitution, the judgment has always been accepted: see 5 US 137 (Cranch), and Aust MTLP, p. 124.

Recommendations

When a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it 'recommends' that the member bring the measure into conformity with the agreement, and may 'suggest' ways in which the member could implement the recommendation. The findings and recommendation of the panel or Appellate Body cannot add to or diminish rights and obligations under the covered agreements. Within thirty days of the adoption of a panel or Appellate Body report, the member must tell the DSB of its intentions as regards the implementation of the recommendation.

Compensation and countermeasures

Compensation is voluntary. But, if the member fails to comply with recommendations and rulings within the reasonable period it must, if so requested, enter into negotiations with the other party with a view to agreeing compensation. If that cannot be agreed, any complaining party may ask the DSB to authorise it to take countermeasures (Articles 3(7) and 22). Countermeasures (coyly referred to in the DSU as 'retaliatory action' or 'suspension of concessions') are temporary measures available in the event that recommendations or rulings are not implemented. (On countermeasures, see also pp. 391–4 below).

In considering what countermeasures to seek, Article 22(3) requires the complaining party to follow certain general principles: (a) countermeasures should be with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment; (b) if that is not practicable or effective, countermeasures may be sought in other sectors of the same agreement; (c) and if that is not practicable or effective, and the circumstances are serious enough, the complaining party may seek countermeasures in respect of another covered agreement. In applying these principles, account should be taken of (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to the *complaining* party and (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of countermeasures.

The DSB authorises countermeasures unless it decides, by consensus, to reject the request. The level of the authorised countermeasures must be proportionate to the nullification or impairment, and the DSB cannot authorise countermeasures if they are prohibited by a relevant covered agreement. However, the question of countermeasures is referred to arbitration if the respondent party (a) objects that the authorised countermeasures are disproportionate or (b) claims that the principles and procedures set forth in Article 22(3) were not followed when the complaining party had requested authorisation for countermeasures pursuant to subparagraphs (b) or (c) above. The arbitration is carried out by the original panel or by one or more arbitrators appointed by

the Director-General. Meanwhile, countermeasures must *not* be taken. But, if countermeasures are approved, the DSB must then, upon request, authorise them, unless it decides, by consensus, to reject the request.

In September 2000, the DSB adopted an Appellate Body report in favour of the European Union that the United States had not brought its Antidumping Act 1916 into conformity with its WTO obligations. In January 2002, the European Union asked the DSB to authorise countermeasures. The United States objected to their proposed level, and the matter went to arbitration. In February 2004, the arbitration award decided that the European Union could impose countermeasures (suspension of its obligations under GATT 1994 and the Anti-Dumping Agreement) within certain parameters.[43] That same year the 1916 Act was repealed. On 21 December 2007, Antigua and Barbuda won the right to impose countermeasures (trade sanctions) on the United States in retaliation for being shut out of the online gambling market, but limited the trade sanctions to $US 21 million.

Rather than going through the panel/Appellate Body procedure, an alternative means of dispute settlement for issues that have been clearly defined by both parties is simple binding and expeditious arbitration within the WTO, and this is encouraged, but it is of course subject to the agreement of the parties.

NAFTA

The North American Free Trade Agreement 1992 between Canada, Mexico and the United States entered into force in 1994.[44] NAFTA aims to remove trade barriers and promote fair competition and investment. A Free Trade Commission oversees its implementation and can also give interpretations of the Agreement to domestic courts, though these are not binding in domestic law.

Chapter 20 of NAFTA provides that when there is a dispute between two Member States about a trade measure that comes also within the scope of the WTO, the complainant has discretion as to which forum to use. Under NAFTA, the dispute is subject to consultations and, ultimately, a report by a five-person arbitral panel. If a third NAFTA member has a substantial interest in the subject matter, it may join in as a complaint. If the panel reports that a measure is inconsistent with NAFTA obligations, yet the Member State responsible does not remedy this inconsistency, the complainant can take countermeasures similar to those under the WTO Agreement. But a Member State may not provide in its domestic law for any right of action based on a claim that a measure taken by another Member State is inconsistent with NAFTA.

[43] WT/DS136; ILM (2004) 931.

[44] ILM (1993) 289. The website is the best primary source of texts and other information: www.nafta-sec-alena.org. Collier and Lowe, pp. 111–15, has a useful summary of the dispute mechanism.

Chapter 11 of NAFTA has detailed provisions for the protection of investments similar to those commonly found in BITs, and for investment disputes to be decided by international arbitration under ICSID, the ICSID Additional Facility Rules or the UNCITRAL Rules.[45] Recourse to arbitration bars the investor from pursuing domestic remedies. Arbitrations that have a question of fact or law in common may be consolidated. An award may be enforced under ICSID, the New York Convention[46] or the Inter-American Convention on International Commercial Arbitration 1975 (Panama Convention).[47] NAFTA has not been a roaring success, and so may be terminated.

MERCOSUR

The Mercado Común del Sur (MERCOSUR) was established in 1991 by the Treaty of Asunción,[48] and the Ouro Preto Protocol 1994.[49] Its purpose is to develop a common market and customs union. Based in Uruguay, its members are Argentina, Brazil, Paraguay and Uruguay. Bolivia, Chile, Colombia, Ecuador and Peru are associate members. The Protocol of Brasilia 1991 (replaced by the Protocol of Olivos 1992) has a system for dealing with disputes between the Member States, including on behalf of their nationals. First, there are direct negotiations, then internal MERCOSUR mechanisms and ultimately an ad hoc arbitration panel. The Protocol of Colonia 1993 provides for NAFTA-type mixed arbitration of investment disputes. In 1995, MERCOSUR concluded a framework cooperation agreement with the EU.[50]

MERCOSUR has not been effective. It may be replaced with a larger and more comprehensive regional body.

International commercial arbitration

It is beyond the scope of this book to go into detail about international commercial arbitration. It is enough to say that there are sets of rules, quite similar in content, for the conduct of commercial arbitrations between (mainly) corporations or, to a much smaller extent, between corporations and States.

[45] For examples of recent cases, see *Feldman* v. *United Mexican States*, 126 ILR 1 and 536; *Myers* v. *Canada*, ILM (2001) 1408; 126 ILR 161; and *Pope & Talbot Inc.* v. *Canada*, ILM (2002) 1347; 126 ILR 127.

[46] 330 UNTS 3 (No. 4739); UKTS (1976) 26; TIAS 6997. See Collier and Lowe, pp. 266–70.

[47] 1438 UNTS 249 (No. 24384); ILM (1975) 336.

[48] ILM (1991) 1041. For this and the other Mercosur treaties and information generally, see www.mercosur.org.uy (Spanish and Brazilian Portuguese only). See also M. Haines-Ferrari, *The MERCOSUR Codes*, London, 2000; Haines-Ferrari, 'Mercosur: Individual Access and the Dispute Settlement Mechanism', in Cameron and Campbell (eds.), *Dispute Resolution in WTO*, London, 1999, p. 270; and Haines-Ferrari, 'Mercosur: A New Model of Latin American Economic Integration?' (1993) *Case Western Journal of International Law* 413.

[49] ILM (1995) 1244. See also (1998) ICLQ 149.

[50] See ec.europa.eu/external_relations/mercosur/index_en.htm.

Unless the parties to a dispute are bound by contract or treaty to accept particular rules, they can agree to use any of the rules. If the latter, they will almost certainly use one of the ready-made rules as a basis, there being no point in reinventing the wheel. Those rules which are most used are the arbitration rules of the International Chamber of Commerce (ICC)[51] and of the UN Commission on International Trade Law (UNCITRAL).[52] Although the parties can agree changes to the rules, if one of the institutions is asked to conduct the arbitration it generally does not look with favour on any messing about with its tried-and-tested rules. The ICC, based in Paris, was established in 1919. But arbitrations under its rules, or the UNCITRAL rules, can be held anywhere, although they are often held in London or Geneva.

[51] See www.iccwbo.org/policy/arbitration/id2882/index.html. [52] See www.uncitral.org/.

20

Succession of States

Kingdoms are clay.[1]

Shaw, *International Law*, 5th edn, Cambridge, 2006, pp. 956–1009 ('Shaw')
Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2008, pp. 649–68 ('Brownlie')
Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 204–44 ('Oppenheim')
Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007, pp. 367–391 ('Aust MTLP')

Introduction

A State may change its name, constitution or government constitutionally or by a revolution, but will retain its international legal personality[2] and so remain bound by its international obligations. If some of its territory becomes a new State, it has to be determined which rights and obligations of the (predecessor) State are inherited by the new (successor) State. Succession to treaties, to State property, archives and debts, and to membership of international organisations, are the main topics discussed below. The value of State practice before the Second World War is questionable as a guide to today's problems of succession. The post-war era of decolonisation and the end of the Cold War led to the total number of States increasing some threefold and has given us a more useful body of State practice.

The law is complex, and is especially dependent on the particular circumstances of each case. The two Vienna Conventions on succession (see below) are of some help, but must be approached with caution. One has entered into force, but has very few parties; the other is not in force and is unlikely ever to do so. Neither applies to a succession that occurs before their entry into force. International courts and bodies have endorsed some of their provisions, yet there are substantial doubts as to the extent to which the two Vienna Conventions reflect customary international law. In considering any succession

[1] W. Shakespeare, *Antony and Cleopatra*, 1.i.12. [2] See p. 15 above.

question, one must therefore examine the relevant Vienna Convention and the leading general and specialist works and precedents, always having regard to the particular facts of the case.

Succession can happen in many ways.

Independence of an overseas territory

Those States in existence at the end of the Second World War stayed mostly unchanged, at least until the end of the Cold War. But, during that period, over 100 overseas territories[3] gained their independence, mostly during the main era of decolonisation from 1945 to 1980. This produced a valuable body of State practice and influenced, although not necessarily helpfully, attempts to codify the law on succession.

Secession

This mainly concerns the metropolitan territory of a State: Singapore seceded from Malaysia (1965), Bangladesh from Pakistan (1971), Eritrea from Ethiopia (1993) and Timor Leste (East Timor) from Indonesia (2002). The most dramatic example was the secession of fourteen republics of the Soviet Union.[4] It was done with the agreement of the predecessor State, which continued in existence under the name of the Russian Federation.[5]

Dissolution

At the end of the First World War, the Hapsburg Empire was dismembered, producing several new States, including Yugoslavia. After the Second World War, Yugoslavia became the Socialist Federal Republic of Yugoslavia (SFRY). The end of the Cold War led to the break-up of the SFRY. By 1992 or 1993, the constituent republics of the SFRY (Bosnia and Herzegovina, Croatia, Macedonia, Serbia and Montenegro, and Slovenia) had become independent States. But Serbia and Montenegro, which had relabelled itself the Federal Republic of Yugoslavia (FRY), wrongly claimed that it was the continuation of the SFRY, and this delayed its recognition.[6]

Czechoslovakia was a product of the dissolution of the Hapsburg Empire at the end of the Second World War. It then emerged from the Second World War as a communist State, but the end of the Cold War, and the political ambitions of Slovak leaders, led to the so-called velvet divorce. By agreement, at midnight on 31 December 1992, the State of Czechoslovakia was dissolved and succeeded by two States, the Czech Republic and Slovakia.

[3] See p. 29 above.
[4] Now it is perhaps Kosovo (see pp. 17 and 21 above).
[5] See also p. 364 below on continuity of statehood.
[6] See p. 21 above.

At the end of the Second World War, Germany was occupied by France, the Soviet Union, the United Kingdom and the United States, who together assumed 'supreme authority' over it. They did not annex Germany, its international personality being suspended. In due course, two German States, the Federal Republic of Germany (FRG or West Germany) and the German Democratic Republic (GDR or East Germany), were established.[7] Until the reunification of Germany (see below), Berlin had a very special and complex legal status.[8]

Merger

On 2 July 1976, the States of Vietnam – the Democratic Republic of Vietnam (North Vietnam) and the Republic of Vietnam (South Vietnam) – joined together as one State, the Socialist Republic of Vietnam.[9] On 22 May 1990, the People's Democratic Republic of Yemen (South Yemen) and the Republic of Yemen (North Yemen) merged into a single State, the Republic of Yemen. In 1964, Tanganyika and Zanzibar joined to form one State, the United Republic of Tanzania.

There has been at least one, short-lived merger of two States to form a single State. In 1958, Egypt and Syria joined together as one State, the United Arab Republic (UAR). It was dissolved in 1961, but Egypt retained the name UAR until 1971. In 1982, Gambia and Senegal established the Senegambia Confederation, each State retaining its sovereignty and independence. It was therefore not a union, but a true confederation, and was dissolved in 1989. (The Swiss Confederation is a federal State.)[10]

Absorption and extinction

The Germany that emerged on 3 October 1990 resulted from the Unification Treaty by which the GDR willingly agreed to be absorbed into the FRG, the GDR *Länder* (states of the GDR) becoming *Länder* of the FRG. The name of the reunified Germany remained the Federal Republic of Germany.[11]

Recovery of sovereignty

The most recent example is the three Baltic States of Estonia, Latvia and Lithuania. Having gained their independence from Russia after the First World War, in 1940 they were occupied by the Soviet Union, then for three years by Nazi Germany, and then unlawfully annexed by the Soviet Union in

[7] Oppenheim, pp. 135–9 and 699–700.
[8] Ibid., pp. 139–41; and Hendry and Wood, *The Legal Status of Berlin*, Cambridge, 1987.
[9] Oppenheim, pp. 141–3. [10] See p. 55 above.
[11] Oppenheim, pp. 138–9; Shaw, pp. 964–6. And see (1997) BYIL 520–9.

1944. They regained their sovereignty in 1991, all three joining the European Union in 2004.

Transfer of territory

The transfer of part of the metropolitan territory of a State to another State will not usually involve succession, the 'moving boundary' principle applying,[12] as when Alsace-Lorraine (made part of the German Reich after 1870) was returned to France at the end of the First World War, and again in 1945 after the Second World War. Although it is a question of degree, the boundary between the two States is simply moved so that the territory transferred becomes part of the transferee's territory, usually with no succession issues arising.

Continuity of statehood

In 1947, on the partition of India into India and Pakistan, India was regarded by the UN General Assembly as the continuation of the previous State, and Pakistan as a new State. The dramatic changes to the Union of Soviet Socialist Republics in 1991 led fourteen of its republics breaking away to become new States, yet the State which had exercised sovereignty over them continued despite the large loss of territory and population, and a change of name to that of the principal constituent part of the Soviet Union, the Russian Federation.

Succession to treaties

The Vienna Convention on the Law of Treaties does not cover succession (Article 73). One would therefore be forgiven for thinking that the Vienna Convention on Succession of States in respect of Treaties 1978 (the '1978 Convention')[13] provides the answers to all treaty succession problems, but it does not. The Convention entered into force only in 1996 when it achieved the necessary fifteen ratifications. This was made possible only by the adherence of the new States of Bosnia and Herzegovina, Croatia, Estonia, Macedonia, Slovakia, Slovenia and Ukraine. Unless a successor State agrees otherwise, the Convention does not apply to a succession that occurs before entry into force of the Convention for the States concerned. The Convention now has only twenty-two parties.

[12] See p. 366, second bullet below.

[13] 1946 UNTS 3 (No. 33356); ILM (1978) 1488. For the treaty, the ILC draft and commentary, and an introduction, see A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, vol. II, pp. 987–1208. See also A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243, at 252–3. Oppenheim has a summary of the Convention, at pp. 237–40.

The International Law Commission (ILC) had prepared the draft of the 1978 Convention. The ILC noted that State practice indicated no general doctrine which resolved the various problems of succession to treaties, and that the number of different theories of succession certainly did not make its task any easier. The Convention therefore contains much that is a progressive development of international law, and therefore much of it cannot be regarded as reflecting customary international law, the most recent State practice relating to former overseas territories not being consistent. The rules of the Convention concerned with such new States are also excessively complex. They give undue prominence to the so-called clean-slate principle, and insufficient weight to the abundant State practice of concluding devolution agreements or, more importantly, of making declarations of succession. Moreover, the Convention rules about the break-up of metropolitan States did not reflect modern State practice, there then being little practice to draw on. Although parts of the Convention may have been relied upon in drafting certain bilateral succession agreements,[14] its influence and practical value is much less than that of the Vienna Convention on the Law of Treaties 1969. Overall, the 1978 Convention is not a reliable guide to such rules of customary law on treaty succession as there may be.

Customary law principles[15]

The rules of customary international law on the subject are not easy to state, the circumstances varying widely and the subject being politically charged. The interests and perception of a successor State may differ significantly from those of the predecessor State (assuming it still exists) and of third States. As far as *bilateral* treaties are concerned, in practice much depends on what can be agreed, expressly or tacitly, between the successor State and *third* States. When it is possible for the successor State and its predecessor to reach agreement on treaty succession this will be important to third States, even though they will not be bound by the agreement. It is therefore a particularly uncertain and controversial area. Although recent State practice may prove to be valuable, for the moment it is safer to say that there are only certain customary law principles; for the rest, there is evolving State practice. Indeed, almost all problems (particularly with bilateral treaties) are resolved on the basis of agreement between the successor State and third States. Such residual rules of customary international law as exist play a relatively minor role.

But, certain general principles can be deduced with reasonable confidence. They apply whether a treaty is bilateral or multilateral:

- A new State does not succeed automatically to a treaty if the subject matter is closely linked to the relations of the predecessor State with the other party or parties. Examples include 'political treaties' such as treaties of alliance or defence.

[14] See, for example (1995) AJIL 761–2. [15] For more details, see Aust MTLP, pp. 369–86.

- Without any action by it, a new State will succeed to treaties (or rather to the legal situation created by them) relating to matters such as the status of territory, boundaries or navigation of rivers.[16] Although this principle is well established, its exact extent is not.[17]
- When a State has been absorbed by another (for example, the GDR by the FRG), almost all treaties entered into by the absorbed State will either simply lapse or their fate will need to be discussed with the other parties. Under the 'moving-boundary principle', treaties of the absorbing State will extend to the absorbed State, those of the predecessor State ceasing to apply. But when there is a true union of States (for example, Yemen), most existing treaties will continue to bind the successor State, at least as regards that part of its territory for which the treaties were in force before the union.[18] This is also the approach of Article 31 of the 1978 Convention.
- Normally, a new State will not succeed automatically to multilateral treaties. Some writers consider that treaties which embody or reflect generally accepted rules of international law (in particular, those concerned with human rights or international humanitarian law) bind a successor State by virtue of the concept of the acquired rights of the inhabitants of the State.[19] There is little authority for this view. But, in so far as a human rights treaty represents rules of customary international law, a successor State will be bound, but by those customary rules, not necessarily by the treaty.[20]
- A new State does not succeed automatically to bilateral treaties, other than to territorial treaties and suchlike (as above).

These general principles do not take one very far, but may be better understood by an examination of some of the more recent State practice.

Former colonies and other dependent territories

Although over 100 overseas territories have attained independence since the end of the Second World War, their practice has not been consistent. It is therefore not possible to promulgate a set of rules of customary law applicable to such situations. The most one can do is to summarise the main approaches which have been taken.

[16] See *Gabčíkovo–Nagymaros* case, see p. 401 below, and the text to n. 40 below.

[17] See Arts. 11 and 12 of the 1978 Convention; Oppenheim, p. 213; Shaw, pp. 966–84. See Aust MTLP, p. 370, para. (2), on the succession by former Yugoslav republics to the Austrian State Treaty.

[18] And see the entry for Yemen in *UN Multilateral Treaties* (http://treaties.un.org/Pages/HistoricalInfo.aspx).

[19] See R. Mullerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (1993) ICLQ 473, at 490–2; M. Shaw, 'State Succession Revisited' (1994) *Finnish Yearbook of International Law* 34; and M. Kamminga, 'State Succession in Respect of Human Rights Treaties' (1995) EJIL 469–84.

[20] See p. 6 above; and Aust MTLP, pp. 371–2.

There are two basic starting points. The first is the nineteenth-century theory of universal succession, which persisted up to the 1960s. According to this, a new State inherited all the treaty rights and obligations of the former colonial power in so far as they had been applicable to the territory before independence. This approach was reflected in the *devolution agreements* entered into by Iraq in 1931 and by some former Asian colonies in the 1940s and 1950s.[21] From 1955, all former British colonies in West Africa, except for The Gambia, concluded devolution agreements with the United Kingdom. These provided that, as from the date of independence, all treaty obligations and responsibilities of the United Kingdom would be assumed by the new State in so far as they could apply to it. Although these agreements created a presumption that a treaty which could have application to the new State would apply to it, they naturally left many questions unanswered.[22] A devolution agreement cannot bind a third State unless it consents, although this might be signified by conduct. Nevertheless, a devolution agreement did serve as a formal and public statement of the general attitude of the new State on the subject.

The other starting point is the so-called *clean-slate* doctrine, under which the new State is free to pick and choose which treaties to succeed to. This approach was followed most famously by the colonies that joined together to form the United States in 1776. However, even when the doctrine is applied, treaties that concern territorial rights, like boundary treaties and those granting rights of navigation or passage, will usually bind the new State.[23] The doctrine has been applied in different ways. Following the so-called Nyerere Doctrine, in the 1960s a number of former British territories made unilateral declarations in which they undertook that, for a specified period, they would continue to apply all bilateral treaties validly concluded by the United Kingdom, unless abrogated or modified by agreement. After that period, the new State would 'regard such of these treaties which could not by application of the rules of customary international law be regarded as otherwise surviving, as having terminated'.[24]

Unilateral statements do not bind third States unless they have consented in some way, and so in the longer term such declarations do not resolve all succession problems. Once the time limit has been reached, the effect of the declaration is uncertain unless by then the position of the new State in respect of all bilateral treaties which might apply to the new State has been clarified. This is particularly so for treaties entered into expressly for the territory by the

[21] UKTS (1931) 15 (Iraq); Indonesia, 1949 (69 UNTS 266); Vietnam, 1954 (161 BSP 649); Malaya, 1957 (279 UNTS 287 (No. 4046)).

[22] T. Maluwa, 'Succession to Treaties in Post-independence Africa' (1992) *African Journal of International and Comparative Law* 804.

[23] See p. 38 above.

[24] See the Declaration by Malawi on 24 November 1964 in the ILA study, *The Effect of Independence on Treaties*, London, 1965, p. 388; T. Maluwa, 'Succession to Treaties in Post-independence Africa' (1992) *African Journal of International and Comparative Law* 804, at 806–7; Oppenheim, p. 231, n. 21.

former colonial power, although the International Court of Justice held in 1952 that they bind the new State.[25]

Germany

The Unification Treaty entered into by the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR)[26] provided that, in principle, most treaties entered into by the FRG would apply to the whole of the reunified State (the moving-boundary principle), and for consultations with the other parties regarding treaties to which only the former GDR had been a party.[27] Although the treaty did not bind other parties, most accepted what had been agreed: that most of the GDR's *bilateral* treaties had lapsed. Germany became party to only a few *multilateral* treaties to which the GDR alone had been a party.[28] The arrangements did not follow Article 31(2) of the 1978 Convention, since it deals with a true merger of States to form a third State.[29]

Russia

Although it declared itself the continuation of the Soviet Union,[30] Russia declared (rather unnecessarily) that it would continue to comply with all the international obligations entered into by the Soviet Union.[31] But it also sought to agree with some States a list of the bilateral treaties which would continue to apply as between them, since there were treaties entered into by the Soviet Union which in practice concerned only a part or parts of the Soviet Union which had now become independent. The approach taken by Russia and the other States can be seen as consistent with Article 35 of the 1978 Convention.

Former Soviet republics

The practice of Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan regarding treaties is instructive, although not consistent or entirely clear.[32]

[25] *US Nationals in Morocco*, *ICJ Reports* (1952), pp. 176, 193–4; 19 ILR 255.
[26] See p. 363 above. [27] ILM (1991) 457, Arts. 11 and 12.
[28] See the entry for Germany in *UN Multilateral Treaties*, n. 18 above; (1992) AJIL 152–73; D. Papenfuss, 'The Fate of the International (*sic*) Treaties of the German Democratic Republic within the Framework of German Unification' (1998) AJIL 469.
[29] Shaw, pp. 971–3. [30] See p. 364 above.
[31] See the entry for the Russian Federation in *UN Multilateral Treaties* (n.18 above).
[32] See Aust MTLP, pp. 376–8.

The Baltic States

Since Estonia, Latvia and Lithuania had been independent States until 1940, when in 1991 they regained their independence they did not regard themselves as successor States to the Soviet Union.[33] Instead, they *acceded*[34] to many *multilateral* treaties to which the Soviet Union had been (and to which Russia continues to be) a party. Multilateral treaties entered into by them during the period between the two World Wars will, if they are still relevant, again be in force for the Baltic States.

There was, however, a problem with *bilateral* treaties entered into by the Soviet Union during the period of unlawful annexation; to maintain that they had no relevance would have been to ignore the reality of 50 years. With admirable pragmatism, agreement was therefore reached with some neighbouring States to regard certain of those treaties as in force, at least for the time being. Some bilateral treaties entered into in the period between the two World Wars, when the three Baltic States were independent, were also agreed by the parties to be still applicable, the rest being obsolete or irrelevant by the 1990s.

Former Yugoslav republics

The dissolution of the SFRY[35] was anything but amicable, but it created similar succession questions as the break-up of Czechoslovakia (see below), although the attitude of the FRY (Serbia and Montenegro) was a complication.[36]

Bosnia and Herzegovina, Croatia, Macedonia and Slovenia each informed the UN Secretary-General that they considered themselves bound by virtue of State succession to multilateral treaties to which the SFRY had been bound. The SFRY had been a party to the 1978 Convention, and the four new States each deposited instruments of succession to it and other multilateral treaties. They were apparently guided by Article 9(1) of the 1978 Convention that provides that making a *unilateral* declaration of succession is not enough to make the successor a party to a treaty.[37] The former republics also entered into *bilateral* treaty succession arrangements with various States.

The new State of the Federal Republic of Yugoslavia (FRY) asserted, by analogy with Russia, that it was the continuation of the SFRY. The other former republics of the SFRY, as well as most third States, did not accept this.[38] The FRY's assertion of continuation was reflected in its attitude to treaties. The FRY

[33] See their entries in *UN Multilateral Treaties* (n.18 above).
[34] See p. 61 above. [35] See p. 362 above.
[36] See Wood, 'Participation of the Former Yugoslav States in the United Nations' (1997) *YB of UN Law* 231; and ILM (1992) 1488.
[37] But cf. Art. 34.
[38] (1992) BYIL 655–8. See also the report of the Badinter Commission, 92 ILR 162 at 166. The ICJ elided the question in *Genocide (Bosnia* v. *Yugoslavia)* (Provisional Measures), *ICJ Reports* (1993), p. 3, at pp. 20–3; ILM (1993) 888; 95 ILR 1.

formally declared that as the continuation of the SFRY it would strictly abide by the SFRY's treaty obligations. This accorded with the wishes of other States that the FRY should abide by those obligations, albeit as one of the successor States of the SFRY. But other States were therefore faced with a dilemma: they wanted the FRY to respect the treaties, especially those on human rights, to which the SFRY had been a party, but they could not accept the FRY as a party on the basis of continuation of statehood. It was not only a matter of principle: acceptance of the FRY's assertion of continuation could have had an effect on the important question of succession to other rights and obligations of the SFRY, especially with regard to property and debts (see below). In 2000, the FRY accepted that it was not the continuation of the SFRY, and in 2003 changed its name to Serbia and Montenegro. In 2006 Montenegro seceded by agreement becoming an independent State and joining the United Nations. For Kosovo, see p. 17.

Czechoslovakia

At midnight on 31 December 1992, the State of Czechoslovakia was dissolved and succeeded by two States, the Czech Republic and Slovakia. Both declared themselves to be successors to Czechoslovakia and committed to fulfilling its treaty and other obligations.[39] In this they consciously applied the rules in Article 34 of the 1978 Convention. There was no suggestion that the Czech Republic, although the larger of the two new States, was the continuation of Czechoslovakia. The policy adopted by both States with regard to all *multilateral* treaties to which Czechoslovakia had been a party was that they would continue to bind each of the new States. In addition, each State regarded itself as a signatory of all those multilateral treaties that, before the dissolution, had been signed but not ratified. Hence, the 'velvet divorce'.

Bilateral treaties entered into by Czechoslovakia were regarded by the two new States as continuing to apply, except in so far as this would not be appropriate. For example, the application of certain treaties had always been limited to the territory of Slovakia, in particular the 1977 Czechoslovakia – Hungary Treaty regarding the Danube Dam Project. In the *Gabčíkovo – Nagymaros* case, the International Court of Justice decided that Article 12 of the 1978 Convention (succession does not, as such, affect territorial regimes) reflected a rule of customary international law and applied to the 1977 Treaty; thus the dissolution of Czechoslovakia did not affect the application of the 1977 Treaty to Slovakia, it becoming binding on Slovakia alone on the dissolution.[40]

The Czech Republic and Slovakia each had discussions with certain States which had had bilateral treaties with Czechoslovakia, seeking confirmation

[39] See the entries for the Czech Republic and Slovakia in *UN Multilateral Treaties*, 'Historical Information' (n. 18 above); V. Mikulka, 'The Dissolution of Czechoslovakia and Succession in Respect of Treaties' (1996) *Development and International Co-operation* 45–63.

[40] *Gabčíkovo – Nagymaros Project (Hungary* v. *Slovakia)*, *ICJ Reports* (1997), p. 3, paras. 116–24; 116 ILR 1, ILM (1998) 162.

that, unless there was a special reason, all the treaties would continue to apply to the two new States. The discussions were also an opportunity to consider whether some treaties might be terminated or be replaced by new ones, particularly taking into account the political changes that had taken place since the end of the communist regime.

Hong Kong and Macao

The circumstances of the handover of Hong Kong to China at midnight on 30 June 1997 were unique and do not provide much in the way of insight into the more usual treaty succession problems. Elaborate arrangements were made by China and the United Kingdom to enable treaty continuity after the return of Hong Kong to China, and to leave the Hong Kong Special Administrative Region (HKSAR) a large degree of autonomy in the conclusion of treaties in its own right. (For details, see Aust MTLP, pp. 386–91, and www.doj.gov.hk.)

Similar provisions were made for Macao.[41]

Succession to State property, archives and debts

As with the 1978 Vienna Convention, the Vienna Convention on the Succession of States in respect of State Property, Archives and Debts 1983 ('the 1983 Convention')[42] does not provide answers to all the myriad problems raised by the topic. Now twenty-six years old, it has received only seven of the fifteen ratifications needed for it to enter into force. They are those of the new States of Croatia, Estonia, Georgia, Macedonia, Slovenia and Ukraine, (as well as Liberia) which seemed to have believed (not unreasonably) that the 1983 Convention might help in the settlement of their own succession issues. That Convention began as an ILC draft, and contains many provisions representing progressive development of international law. It neither reflects customary law, nor makes new law that would be generally acceptable. It may be that the subject is just not amenable to prescriptive treatment. As with succession to bilateral treaties, it may be something that can only be dealt with mainly on a case-by-case basis.

One of the main flaws of the 1983 Convention is the heavy reliance throughout on equity as a guiding, but supplementary, principle for the distribution and apportionment of tangible property. This was entirely understandable as a matter of principle, but it contributed to the lack of effectiveness of the 1983 Convention, making it just too vague for application to specific situations. States have to agree on the distribution of assets, yet the 1983 Convention

[41] See the statement by China recorded in *UN Multilateral Treaties* (n. 18 above).

[42] ILM (1983) 298. For the treaty, the ILC draft and commentary, and an introduction, see A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, vol. II, pp. 1209–329. See also A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243, at 254–5. Oppenheim has a summary of the Convention, at Oppenheim, pp. 237–40.

gives them no clear or precise guidance on how to do this. It also gives undue emphasis to the simpler case of former overseas territories, yet decolonisation was largely over by the time the 1983 Convention was adopted.

Former Yugoslav republics

So, the 1983 Convention was not a useful guide for the negotiations between the former Yugoslav republics on the complex problems of succession to State property, archives and debts, although the lengthy and difficult negotiations are instructive in understanding the problems and how they can best be met. The principle of equity was of little practical help.[43]

Until the fall of the Milošević regime, the negotiations dragged on, largely because the FRY maintained the attitude that it was not a successor State to the SFRY.[44] The 1983 Convention also gave further scope for delaying tactics. Article 8 provides that the 'State property' of the predecessor State is the property owned by it according to its internal law. The SFRY had claimed to be the most purist of all communist States in believing that it was the people who owned all property. Under the SFRY Constitution, property was therefore in 'social ownership', so replacing ownership by the State with ownership by society as a whole. It was therefore argued – rather Jesuitically – that either all property (including private property) was State property or that there was no State property that could be the subject of State succession. Eventually, on 29 June 2001, the five successor States concluded the Agreement on Succession Issues,[45] which entered into force in 2004. Although its articles on State archives were helpful, the rest were not of much assistance, the settlement of the issue of State debts being done by horse-trading, as graphically illustrated by the fifty pages of detailed annexes. The Agreement does not mention the 1983 Convention.

Membership of international organisations[46]

A new State will *not succeed* to membership of the United Nations or other international organisations if the predecessor State still exists. In 1947, India (an original Member of the United Nations in 1945) was partitioned into India and Pakistan. Since India was regarded by the General Assembly to be the continuation of India, the new State of Pakistan had to apply for membership. If, however, a new State is the result of the union of two States, at least one of which was a UN Member before the union, the new State will usually be accepted as a

[43] For an authoritative account of the problems experienced in the negotiations, see A. Watts, 'State Succession: Some Recent Practical Problems', in V. Goetz, P. Selmer and R. Wolfrum (eds.), *Liber Amicorum Günther Jaenicke*, Berlin, 1998, pp. 405–26.

[44] See p. 369 above. [45] See 2262 UNTS 251 (No. 40296); ILM (2002) 1.

[46] See J. Klabbers, *An Introduction to International Institutional Law*, Cambridge, 2nd edition, 2009, pp. 93–114.

Member under its new name, and without having to apply for membership. When the two Yemens joined together as one State, they retained one seat in the United Nations under the name of Yemen, no application for membership being required. Egypt and Syria were original Members, but had only one UN seat after they joined together in 1958 as the United Arab Republic. When they separated in 1961, Egypt continued as a Member under the name of the United Arab Republic (changing to the Arab Republic of Egypt in 1971), and Syria resumed its separate UN membership.[47]

When the Soviet Union broke up in 1991, following the precedent of India, the Russian Federation was accepted by the UN membership as the continuation of the Soviet Union and so did not have to apply for membership of the United Nations or other international organisations.[48] By contrast, twelve of the former Soviet republics each had to apply for UN membership, Belarus (previously the Byelorussian SSR) and Ukraine (previously the Ukrainian SSR) already being members in their own right.[49]

Since neither the Czech Republic nor Slovakia claimed to be the continuation of Czechoslovakia, they each had to apply for membership of international organisations, each becoming a Member of the United Nations in 1993.

Between 1991 and 1992, the Socialist Federal Republic of Yugoslavia (SFRY) broke up into five States: Bosnia and Herzegovina, Croatia, Macedonia, Slovenia and the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY). The first four applied for UN membership and were admitted between 1992 and 1993.[50] But the FRY's claim to be the continuation of the SFRY was rejected by the UN membership. In September 1992 the UN General Assembly decided that the FRY could not automatically continue the membership of the SFRY; it should apply for membership, and meanwhile could not take part in the work of the General Assembly.[51] For some years the FRY was in something of a legal limbo.[52] The consistent advice from successive UN Legal Counsel was that the effect of the General Assembly's decision was that the membership of 'Yugoslavia' was not terminated or suspended. But, its practical consequence was that FRY representatives could no longer take part in the work of the General Assembly and its subsidiary organs, or in conferences or meetings

[47] See the entry for United Arab Republic in *UN Multilateral Treaties* (n. 18 above).

[48] Y. Blum, 'Russia takes over the Soviet Union's Seat at the United Nations' (1992) EJIL 354.

[49] See pp. 186–7 above.

[50] Because of Greece's absurd objections to the simple name of 'Macedonia' (which is also the name of a northern Greek province), Macedonia was not admitted into the United Nations until 1993, and then only under the graceless title of '*the former* Yugoslavia Republic of Macedonia' (emphasis added), and sits with the 'T's. See also Aust MTLP, p. 420 on the Interim Accord 1995.

[51] See UNSC Res. 757, 777, 821 and 1074, and UNGA Res. 47/1. 47/229 and 48/88; ILM (1992) 1421.

[52] (1992) BYIL 655–8. See also the report of the Badinter Commission, 92 ILR 162 at 166. The ICJ elided the issue in *Genocide (Bosnia* v. *Yugoslavia)* (Provisional Measures), *ICJ Reports* (1993), p. 3, at pp. 20–3; 95 ILR 1; ILM (1993) 888. The full history of UN/FRY relations can be found in its judgment on the *Application for Revision of the 1996 Judgment*, *ICJ Reports* (2003), paras. 24–64. See also n. 54 below.

convened by the General Assembly. It was therefore not allowed to be seated in the United Nations, although, as the result of a pragmatic arrangement, it was allowed to keep open its diplomatic mission to the United Nations and to receive UN documents, and the Yugoslav flag was still flown on the UN building.[53] Following the fall of Milošević, the FRY dropped its claim of continuation and applied for membership, being admitted in 2000, and, in 2003, changed its name to Serbia and Montenegro,[54] and, following the loss of Montenegro, to Serbia in 2006.

Representation in international organisations

It must be remembered that the question of who is entitled to represent a State in an international organisation is a quite different matter from whether a State is a member.[55]

Hong Kong Special Administrative Region

Section VI of Annex I to the China – United Kingdom Joint Declaration on the Question of Hong Kong[56] provides that the Hong Kong Special Administrative Region (HKSAR) shall be a separate customs territory, and may participate in relevant international trade agreements and organisations (including preferential trade arrangements). For this purpose, the HKSAR does not need authorisation from the Chinese Government. The HKSAR became a member of the World Trade Organization (WTO), as did China some years later. Both China and the HKSAR are members of the International Textiles and Clothing Bureau, the World Tourist Organization, and the World Meteorological Organization (WMO). As a member of these organisations, the HKSAR has a vote in its own right.

Similar arrangements were made for Macao when it became the Macao Special Administrative Region of China in 1999.[57]

Nationality of natural persons

When a new State emerges, some of the inhabitants who had been nationals of the predecessor State do not necessarily acquire the nationality of the successor State. In UNGA Resolution 55/153 of 2000, the General Assembly recognised that the ILC's draft articles on the nationality of natural persons in relation to

[53] For the details, see UN Doc. A/47/485. For a full account, see M. Wood, 'Participation of the Former Yugoslav States in the United Nations' (1997) *YB of UN Law* 231.

[54] See the detailed consideration of the status of the FRY between 1992 and 2000 in *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)* (Preliminary Objections), *ICJ Reports* (2004), paras. 25 and 54–91; and C. Gray (2005) ICLQ 787–94.

[55] See p. 179 above.

[56] 1399 UNTS 33 (No. 23391); ILM (1984) 1366; UKTS (1985) 26.

[57] See www.macau.gov.mo.

the succession of States would provide a useful guide for practice, and invited governments to take its provisions into account, as appropriate, in dealing with this issue. The basic principle of the draft articles is that no national of a successor State should as a result of succession become stateless. In 2004, the General Assembly invited Members to submit comments on the advisability of elaborating a legal instrument and postponed further consideration until 2008. That year it adopted a resolution inviting further comments from States, and proposing consideration of the topic in 2011.[58]

[58] A/RES/63/118.

21

State responsibility

It is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences.[1]

Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, 2002 ('Crawford')[2]
Higgins, *Problems and Process*, Oxford, 1994, pp. 146–68 ('Higgins')
Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 499–511 and 528–54 ('Oppenheim')
Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 778–843 ('Shaw')

Introduction

A State is responsible in international law for conduct in breach of its international obligations. Although the International Law Commission (ILC) began studying the subject in 1956, it was not until 2001 that it produced its final draft Articles ('the Articles') on the Responsibility of States for Internationally Wrongful Acts.[3] The UN General Assembly circulated them in 2001. In A/RES/59/35 (2004), the General Assembly commended the draft Articles without prejudice to the question of any further action on them (such as adopting them as a treaty), invited Members to comment on future action, and decided to consider the matter again in 2007. Then, since there was still no decision as to what to do (A/RES/62/61), the matter was again referred to the Sixth Committee, in 2010.[4]

The law of State responsibility is customary international law. Unlike State immunity, which has been developed largely by domestic legislation and domestic courts, State responsibility is pre-eminently an area of international

[1] Roberto Ago, *ILC Yearbook*, 1970, vol. II, p. 306, para. 66(c).
[2] A very useful book by the very last ILC Special Rapporteur on the subject, containing the text of the final draft articles, the ILC's detailed Commentary on them, background documents, and a sixty-page introduction.
[3] The final draft articles and the ILC Commentary are also in the ILC's 2001 report (A/56/10), and at www.un.org/law/ilc/.
[4] See Crawford and Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) ICLQ 959–71.

law developed by State practice and international judgments, of which numerous examples are referred to in the ILC's Commentary on the Articles.[5] The ILC's work has been followed closely by States, and its comments taken into account by the ILC. The ILC adopted the Articles without a vote, and with consensus on virtually all points.[6] The Articles inevitably include some elements of progressive development, such as that on the procedural aspects of countermeasures. But, being essentially a codification of customary international law, the ILC's work was a good indication of what the international law is on this subject. International courts and tribunals have over the years cited previous ILC drafts.[7] Even if the final draft Articles are never turned into a new convention, they are certain to continue to be very influential with international courts and tribunals.[8]

The Articles will not be quoted in full, but will be described in the light of the ILC Commentary. Inevitably, this is only a general introduction; each new issue will require a thorough consideration of the particular facts, the Articles, the ILC Commentary, relevant judgments and other sources.

Terminology

Some of the words and phrases as used by the ILC, and in this chapter, have the following meanings:

'international obligation': an obligation owed under international law by one State to another State (therefore 'primary obligation');

'primary rules': the rules of international law which determine whether there has been a breach of a primary obligation;[9]

'secondary rules': the rules of international law which determine whether a breach of a primary obligation is attributable to a State and the legal consequences (i.e. the law of State responsibility);

'internationally wrongful act': a breach of a primary obligation which is attributable to a State;

'injury': the effect of an internationally wrongful act on another State or its nationals, including any damage, material or moral;

'injured State': the State harmed by the injury;

'responsible State': the State which caused, or is believed to have caused, the injury;

'act': includes on omission;

'person': includes a legal person, such as a corporation and other legal entities.

(Unless otherwise indicated, references to numbered Articles or to the Commentary are to the ILC's final draft Articles and the related paragraphs of its Commentary, respectively.)

[5] See the list of some 400 (mostly international) cases in Crawford, pp. xv–xxxiii.
[6] Ibid., p. 60.
[7] See, for example, *Gabčíkovo–Nagymaros Project (Hungary* v. *Slovakia)*, *ICJ Reports* (1997), p. 3, para. 47; 116 ILR 1; ILM (1998) 162.
[8] See again Crawford and Olleson, n. 4 above.
[9] See Shaw, pp. 783–5.

General matters

Three general points need to be made. First, Article 55 makes it clear that the Articles are residual in the sense that they do not apply 'where and to the extent that the conditions for the existence of an internationally wrongful act, or the content or implementation of the international responsibility of a State, are governed by special rules of international law'. Such *lex specialis* includes treaty provisions that: make certain conduct unlawful; provide how responsibility is to be apportioned for certain aspects of reparation (Article IV of the Convention on the International Liability for Damage Caused by Space Objects 1972 provides for joint and several liability for damage to a third State caused by a collision between space objects launched by two States, and for strict and fault liability);[10] or provide a specific mechanism to settle questions of responsibility and reparation, the WTO system making special provision for the consequences of breaches of its rules.[11]

Second, Article 56 makes it clear that customary international law will continue to apply to matters not covered by the Articles, so leaving open the development of the law of State responsibility, such as liability for the injurious consequences of acts *not* prohibited by international law.[12] It also has the effect of preserving those legal effects of a breach covered by the law of treaties or another area of international law.

Third, the Articles are without prejudice to the UN Charter, Article 103 of which provides that obligations under it prevail over any other treaty obligations.[13] The purpose of Article 59 is to make it clear that the Articles will not prejudice any action by the United Nations concerning compensation by a State.[14]

The internationally wrongful act of a State

This part of the Articles defines the general conditions necessary for State responsibility to arise.

General principles

Articles 1, 2 and 3 provide that every internationally wrongful act of a State entails its international responsibility. The act is wrongful only when conduct (a) is *attributable* to that State under international law and (b) constitutes a *breach* of an international obligation of that State

[10] 961 UNTS 187 (No. 13810); ILM (1971) 965; UKTS (1974) 16; TIAS 7762. For a list of other treaties providing for absolute or strict liability, see Oppenheim, pp. 510–11. See also Art. 41 on just satisfaction in the (amended) European Convention for Human Rights (www.echr.coe.int).

[11] See pp. 353 et seq. above.

[12] For current ILC work on this topic, go to www.un.org/law/ilc/.

[13] See p. 197 above.

[14] Such as the provisions concerning compensation to be paid by Iraq: see p. 201 above.

(Article 2).[15] The Articles do not define when a State will be in breach of international law (see the quote at the start of the chapter). That has to be determined by applying the primary rules (the law of treaties, customary international law and other sources of international law) to the facts of each case. Whether a degree of fault, such as wilfulness or negligence, is necessary is determined in each case by those primary rules. Actual damage is not necessary unless the particular rule so provides. It is irrelevant that the conduct is lawful (or, for that matter, unlawful) in the responsible State's internal law.[16] *The Articles are therefore secondary rules as to when wrongful conduct will be attributable to a State and the legal consequences.* The Articles do not deal with the responsibility of international organisations or individuals.[17]

Attribution of conduct to a State

Organs of the State

For a State to be responsible, the conduct in question must be attributable to it. The general rule is that only the conduct of a State's organs of government or its agents (persons or entities acting under the direction, instigation or control of those organs) can be attributable to the State. The organ can be legislative, executive or judicial, or of any other nature, including one carrying out commercial functions. (Although a breach of valid contract will not entail a breach of international law, a denial of justice by the courts of the State in enforcing, or failing to enforce, the contract would.) Organs include those of national, regional or local government, and persons or entities whatever their level (Article 4(1)), and any person or entity having that status under the internal law of the State (Article 4(2)). It also includes persons or entities that act in fact as organs, even if they are not classified as such by internal law. Police forces outside London are not treated in UK law as State organs,[18] but are regarded as such in international law since their task, the maintenance of law and order, is a fundamental function of the State.

Purely personal acts cannot be attributed to a State, even if committed by someone who appears to be an agent of the State, such as an assault by an off-duty policewoman on a foreign national she catches in bed with her husband, even if she has not yet taken off her uniform.[19] The conduct of persons or entities that are not organs, but are empowered by internal law to exercise 'elements of governmental authority', will be considered as an act of the State if

[15] See *Behrami* (ECHR App. 71412/01; (2007) 45 EHRR SE 10; 133 ILR 1; (2007) ILM 742). Read para. 134 et seq., which explains why any responsibility was that of the United Nations, not of France. See also, *Al-Jedda* [2007] UKHL 58; [2008] 1 AC 332.

[16] See p. 75 above on Art. 27 of the VCLT 1969.

[17] On which, see pp. 394–5 below.

[18] *Halsbury's Laws of England*, 4th edn, 1999, vol. 36(1), para. 205.

[19] See *Mallén*, RIAA, vol. V, p. 516 (1929); 4 AD 23; at p. 531. The example, unfortunately, is not taken from the case cited, but shows how sensitively the line sometimes has to be drawn.

in the particular instance the person or entity acts in that capacity (Article 5). The rule covers the relatively new phenomenon of parastatals and privatised State corporations. Even private persons or entities can be included if they are specifically empowered by internal law to carry out governmental functions, such as administering government regulations or guarding prisons. The degree to which the State may be involved in an entity, such as owning or funding it, is not decisive.[20] But in all cases, the internal law must specifically authorise the conduct as involving the exercise of governmental authority. The rule is thus unlikely to apply to such public corporations as the BBC or the British Council.[21]

If an organ of State A is 'placed at the disposal' of State B to exercise elements of governmental authority of State B, its conduct is considered an act of State B (Article 6). The organ must be acting with the consent, and under the authority and direction and control, of the other State and for its purposes. The rule would apply to the armed forces of one State sent to help another State if, and only if, those forces are placed under the exclusive command and control of the latter State.

Unauthorised or *ultra vires* conduct

The conduct of State organs, or persons or entities empowered to exercise elements of governmental authority, are considered acts of the State if they act in that capacity, and even if they exceed their authority or contravene instructions (Article 7). This is a strict rule, States having sought to evade responsibility by claiming that the conduct was unauthorised. We are here concerned not with purely personal acts (see above), but with conduct done in a government capacity, even if it is unauthorised or in excess of authority (*ultra vires*), torture being an all too typical example. The act must have been purportedly or apparently done while carrying out official functions ('cloaked with governmental authority').[22] In the leading case of *Caire*, two Mexican officers, having failed to extort money from a French national, took him to their barracks and murdered him. Mexico was held liable.[23] A Libyan was convicted by a Scottish Court of having, as a member of the Libyan intelligence services, committed the Lockerbie murders. Even if he acted without authority, Libya would still have been responsible for his conduct. In applying this rule, one is concerned only with the question of attribution, not with whether the conduct itself was a breach of international law, which is a separate matter. Where the conduct was unlawful under local law and there are local remedies available, generally those remedies must first be sought by the national of the injured State.[24]

[20] *Hyatt International Corporation* v. *Iran* (1985) 9 Iran–US CTR 72, at 88–94.
[21] See also p. 149, (iii) above on similar issues in State immunity.
[22] *Petrolane Inc.* v. *Iran* (1991) 27 Iran–US CTR 64 at 92; 95 ILR 146.
[23] RIAA, vol. V, p. 516 (1929), at p. 531; 5 AD 146.
[24] On exhaustion of local remedies, see pp. 406–7 below.

Other conduct attributable to the State

Articles 8 to 11 deal with conduct that is not that of a State organ etc., but is nevertheless attributable to the State.

The conduct of a person or group of persons is considered that of a State if in fact he or they were acting on the State's instructions or under its direction or control (Article 8). They can be private persons and the conduct does not have to involve governmental activity. Thus a State is responsible for the acts of private groups that carry out, say, terrorist attacks on its instructions. Conduct will be attributable to the State if it was an integral part of a specific operation directed or controlled by it. So, in the case of the Nicaraguan *contras*, only those activities which the United States actually participated in or directed were held attributable to it.[25] When the conduct is under the effective control of the State, even acts going beyond what was authorised will be attributed to the State.

In exceptional circumstances (for example, during or in the immediate aftermath of revolution, war or foreign occupation), the conduct of private persons is attributable to the State only if three conditions are met: (a) they are in fact exercising elements of governmental authority, even if this is on their own initiative; (b) they do so in the absence or default of the official authorities, which may be due to the total or partial collapse of State institutions; *and* (c) the circumstances 'call for' the exercise of those elements of governmental authority, in that there is a need for the functions to be carried on (Article 9).[26]

Article 10 concerns another exceptional case, that of an insurrectional movement.[27] If it becomes the new government of a State, so that there is real and substantial continuity between the former movement and the new government, the movement's previous conduct during the struggle is attributable to the State,[28] as well as acts of the previous government. (Whereas a government can be overthrown, the State generally remains in being, and it is the State to which international obligations attach.)[29] If an insurrectional or other movement succeeds in establishing a *new* State, either by decolonisation or secession, the previous conduct of the movement is attributable to the new State. In any event, some conduct of the *previous* government in relation to a movement, whether or not the movement was successful, will also be attributed to the State, such as failure to protect an embassy from an attack by insurgents.

Even if conduct is not attributable to a State under Articles 4–10, it will be attributable to the extent that the State acknowledges and adopts the conduct as its own (Article 11). Mere (non-tangible) support or endorsement is not

[25] *ICJ Reports* (1986), p. 14, paras. 75–125, 215–20 and 254–6; 76 ILR 1. Although in *Tadić* (Case IT-94–1; 105 ILR 453; ILM (1997) 908) the ICTY Appeals Chamber appeared to go further, it was dealing with questions of individual criminal responsibility.

[26] See *Yeager* v. *Iran* (1987) 17 Iran–US CTR 92, at 104, para. 43; 82 ILR 178.

[27] See for example p. 13 (NLMs) above.

[28] See *Pinson*, RIAA, vol. V, p. 327 (1928), at p. 353; 4 AD 9; *Short*, 82 ILR 148; *Yeager* (see n. 26 above); *Rankin*, 82 ILR 204.

[29] See p. 361 above.

enough. The conduct will usually be that of private persons. When the acknowledgement and adoption is unequivocal and unqualified, attribution may well be given retrospective effect. In the *Tehran Hostages* case, the International Court of Justice found that the seizure of the US embassy and the detention of its staff by militant students was attributable to Iran. This was because, by subsequently endorsing the actions and perpetuating them, organs of the Iranian State had made those actions into acts of the State.[30]

Breach of an international obligation

But, even if conduct is attributable to the State, it must still be established that the conduct was in breach of the State's international obligations. That will be the case if the act is 'not in conformity with what is required of [the State] by that obligation', and regardless of the origin or character of the obligation (Article 12). Articles 13–15 set out ancillary rules in general terms. To determine whether there has actually been a breach of an international obligation, one has to examine the facts of each case in the light of the primary rules, whether the obligation is contained in a treaty or in customary international law. International law does not draw the distinction found in domestic law between contractual and tortious responsibility, and therefore, in deciding whether there has been a breach of a treaty, one may have to interpret its provisions in the light of relevant customary international law. An international obligation can exist in respect of any matter. The enactment of legislation that is in conflict with an international obligation will not necessarily amount to a breach: it depends how the legislation is given effect.[31]

Intertemporal rule[32]

The rule in Article 13 is critical:

> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

This is a general principle of international law: an act must be judged according to the applicable international law at the time, not the law when a dispute about it arises, which could be many years later.[33] The corollary is that, even if the obligation were to cease (for example, by termination of a treaty), any responsibility that had already accrued would be unaffected. The principle applies equally to a new *jus cogens* (peremptory norm).[34]

[30] *US Diplomatic and Consular Staff in Tehran, ICJ Reports* (1980), p. 3, para. 74; 61 ILR 502.
[31] See Commentary on Art. 12, para. (12).
[32] As to territorial disputes and the evolutionary interpretation of treaties, see pp. 35 and 86 above, respectively.
[33] *Island of Palmas*, 4 AD 3. [34] See p. 10 above.

Extension in time of breach of an international obligation

Identifying when an internationally wrongful act begins, and how long it continues, is a problem that often arises. Article 14(1) provides that the breach of an international obligation by an act that itself does not have a 'continuing character' occurs at the moment the act is performed, even if its *effects* continue. When a wrongful act has been completed but its effects continue (for example, pain from torture), this prolongation is relevant to the amount of compensation. A breach by an act that does have a continuing character extends over the entire period the wrongful act continues, such as unlawful occupation of territory or an embassy (Article 14(2)). The same rule applies to a breach of an obligation to prevent a given act occurring. The concept of a wrongful act having a continuing character is particularly important if a court did not have jurisdiction in respect of the act when it began, but acquires jurisdiction later.[35] When the wrongful act actually occurs depends on the nature of the international obligation that is alleged to have been breached and on the facts. Normally, conduct of a preparatory character will not be enough.[36]

Breach consisting of a composite act

The breach of an international obligation through a series of acts 'defined in the aggregate as wrongful' occurs when conduct occurs which, taken with other acts, is sufficient to constitute the wrongful act. The breach then extends over the entire period the acts are repeated and are still wrongful (Article 15). Genocide or systematic acts of discrimination prohibited by a trade agreement would fall into this category.

(Articles 16–19 deal with the responsibility of a State that aids, assists, directs, controls or coerces another State to commit an internationally wrongful act.)

Circumstances precluding wrongfulness

Although they do not affect the international obligation, certain circumstances can justify an act in breach of that obligation, thus precluding the wrongfulness of the act. The circumstances are therefore in the nature of a defence, the onus of establishing it lying with the State seeking to avoid responsibility.

The first obvious case is when *consent* is given by a State to the commission of an act by another State which would otherwise be wrongful (Article 20). Consent to foreign military aircraft entering sovereign airspace is a simple and obvious example.[37]

[35] Such as when property is seized before the court had competence for the matter: *Loizidou* v. *Turkey* (Merits) (1997) 23 EHRR 513, paras. 41–7 and 63–4; 108 ILR 443.

[36] *Gabčíkovo–Nagymaros Project*, *ICJ Reports* (1997), p. 7, para. 79; 116 ILR 1; ILM (1998) 162.

[37] See p. 320 above.

The wrongfulness of an act is precluded if it constitutes a lawful measure of *self-defence* done in conformity with the UN Charter (Article 21). The act must therefore be within the limits placed on acts of self-defence. This is judged according to the law on the use of force (*jus ad bellum*).[38] But, even when the use of force is lawful, responsibility will remain for any breaches of the law of armed conflict (*jus in bello*)[39] or of non-derogable human rights.[40] Nor are *countermeasures* wrongful, provided they are lawful (Article 22) (see page 391 et seq. below).

There are some exceptional defences. An act is not wrongful if it was done because of *force majeure*, although this is difficult to establish. *Force majeure* is defined as

> the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the [international] obligation. (Article 23)[41]

So, severe weather or a military attack may make it materially impossible to avoid a breach of the obligation. But, *force majeure* will not be a defence if the situation is due to the conduct of the State or if it has unequivocally assumed the risk of the situation arising. It is not enough that it may have become more difficult to perform the obligation.[42]

Similarly, an act is not wrongful if its author has no other reasonable way, in a situation of *distress*, of saving his life or that of others entrusted to his care. The defence does not apply if the situation of distress is due to the conduct of the State or if the act is likely to create a comparable or greater peril (Article 24). Here we are concerned with the immediate need to save human life, usually when a ship or aircraft is in distress due to weather or mechanical failure.[43]

More general cases of emergencies come within the defence of *necessity*. Since the defence arises only when there is an irreconcilable conflict between an essential interest of a State and its international obligations, the defence can be open to abuse. So, Article 25 circumscribes it severely. Necessity may not be invoked to excuse an act in breach of an international obligation unless the act (a) is the 'only way' to safeguard 'an essential interest' against a 'grave and imminent peril' and (b) does not seriously impair an essential interest of a State owed the obligation or the international community as a whole.[44] Moreover, it cannot be raised if the international obligation excludes the possibility of invoking necessity (as in the law of armed conflict) or the State contributed to the situation of necessity. The defence has often been invoked, but will be successful only in exceptional circumstances, and not usually when financial or economic circumstances are cited.[45]

[38] As to self-defence generally, see pp. 208–11 above.
[39] See pp. 235–6 above. [40] See pp. 228–9 above. [41] See the *Rainbow Warrior*, 82 ILR 499, at 553.
[42] The conditions for termination of a treaty on the ground of supervening impossibility are even stricter (see p. 96 above).
[43] See also Art. 18(2) of UNCLOS.
[44] See *M/V Saiga (No. 2)*, 110 ILR 143 at 191–2; ILM (1998) 360 and 1202.
[45] See *Gabčíkovo–Nagymaros Project, ICJ Reports* (1997), p. 3, paras. 51–2; 116 ILR 1; ILM (1998) 162. And compare Art. 62 of the VCLT 1969 (p. 97 above).

Nothing in Articles 20–25 permits a State to breach a peremptory norm (*jus cogens*) of international law, such as the prohibitions on genocide, slavery, aggression or crimes against humanity (Article 26).[46] Even when wrongfulness is precluded by one of the defences, once the circumstances precluding wrongfulness no longer exist, the State must comply with the international obligation, unless the obligation has by then been terminated (Article 27(a)). And, even where the wrongfulness of an act is precluded, compensation may be due if 'material loss' has been suffered, although such loss would not be determined in accordance with the latter Articles but by agreement (Article 27(b)).[47]

Content of the international responsibility of a State

When an internationally wrongful act has been committed, a new legal relationship arises between the States involved, in particular the obligation to make reparation. This constitutes the substance of the responsibility of the State.[48] Article 28 repeats the principle in Article 1 that an internationally wrongful act of a State entails its international responsibility, and links it with the corollary that such responsibility involves legal consequences, which are then set out in Articles 29–33. The legal consequences of an internationally wrongful act do not affect any continuing duty to comply with the obligation that has been breached; the breach, as such, does not terminate the obligation (Article 29).

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation (a) to cease the act, if it is continuing,[49] and (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require (Article 30). Since wrongful acts of a continuing character are quite common, cessation – and thus a resumption of compliance with the obligation – is often the main demand by the injured State, reparation being a secondary consideration. In some cases, cessation may shade into restitution (see below), such as the return of stolen objects. An assurance or guarantee of non-repetition, with perhaps a promise to repeal objectionable legislation, may overlap with satisfaction (see below).

Reparation

The principle of reparation in Article 31 is central. The responsible State is under an obligation to 'make full reparation for the injury caused by the internationally wrongful act'. 'Injury' includes 'any damage, material or moral', caused by the act.[50] It is not necessary for there to be material damage.

[46] See pp. 250–3 above, and the discussion of Arts. 40 and 41 below.
[47] See the ILC Commentary on Art. 27, paras. (4)–(6).
[48] See also Art. 36(2)(c) and (d) of the Statute of the ICJ.
[49] See pp. 354–7 above on the WTO dispute settlement mechanism.
[50] See Crawford, p. 31.

'Moral' damage includes pain and suffering, loss of loved ones and affronts to honour, dignity or prestige.[51] The obligation to 'make full reparation' is used in the most general sense of making amends by wiping out the consequences of the wrongful act,[52] and consists of restitution, compensation or satisfaction. The obligation arises automatically on the commission of the wrongful act. It does not require a demand from the injured State, although the form of reparation will usually be dependent on that State's response. There must of course be a causal link between the act and the injury, and questions of remoteness of damage may arise. Failure by the injured State to take reasonable steps to mitigate the damage will not affect the right to reparation, although it may be taken into account in calculating any compensation.

Article 32 echoes Article 3: the responsible State cannot rely on provisions of its internal law to justify a failure to comply with its obligations of cessation and reparation. The obligations of the responsible State may be owed to more than one State, or to the international community as a whole; and any right arising from the international responsibility of a State may accrue directly to a person or entity other than a State (Article 33). For example, a person whose human rights have been violated may have a procedure by which he can obtain reparation without his State of nationality being involved.[53]

Forms of reparation

Articles 34–39 elaborate the general principle in Article 31 of full reparation by describing its three forms, the relationship between them, interest and the effect of any contribution to the injury made by the injured State. The three forms of reparation (restitution, compensation and satisfaction) are not mutually exclusive; an injury may be such that more than one form, even all three, will be needed (Article 34). The invasion and occupation of Kuwait by Iraq required all three: the return of people and property, compensation for bodily injury and property loss or damage, and an acknowledgement by Iraq of its wrongful acts.[54] Each form of reparation must be proportionate to the injury.[55] Reparation for the illegal seizure of property may well require both its restitution and compensation for loss of use and material damage, although in most cases an injured State can choose to receive compensation in place of restitution (Article 43(2)(b)).

Restitution

The responsible State is under an obligation to re-establish the situation that existed before the wrongful act, in so far as this is 'not materially impossible' or 'does not involve a burden out of all proportion to the benefit deriving from

[51] *Rainbow Warrior*, 82 ILR 499, at 563 et seq.
[52] See the leading case of the *Chorzów Factory* (1927) 4 AD 258.
[53] See pp. 229 et seq. above.
[54] See UNSC Res. 687 (1991), the so-called ceasefire resolution or 'the Mother of all Resolutions'.
[55] See Shaw, pp. 800–6 for a useful summary of some of the case law.

restitution instead of compensation' (Article 35). The release of a detainee, the return of property or the repeal of legislation are simple examples.[56] Restitution is simply the re-establishment of the *status quo ante*, any further damage being a matter for compensation. Restitution will not be required if property has been lost or destroyed or has become valueless, but mere legal or practical difficulties to restitution are generally no excuse. Third party rights may have to be taken into account if, for instance, illegally seized property has since been acquired in good faith by a third party.

Compensation

Not surprisingly, compensation is the most common form of reparation, either alone or together with restitution or satisfaction, or both. But, in *Genocide (Bosnia v. Serbia and Montenegro)* the ICJ did not consider financial compensation as an appropriate from of reparation for the breach of the obligation to prevent genocide. There was no causal connection between Serbia's violation of that obligation and the question of the activity actually occurring at Srebrenica. Therefore satisfaction was appropriate, and Bosnia agreed that the finding of Serbia's failure to prevent genocide was sufficient reparation.[57] But, the responsible State is under an obligation to compensate for damage caused by its wrongful act in so far as it has not been made good by restitution (Article 36). This includes damage suffered by the State itself, its property and personnel, and damage suffered by the State's nationals, whether natural or legal persons.[58] Compensation also covers any 'financially assessable' damage, including loss of profits in so far as that can be established. Although Article 31 defines damage as including 'moral' damage, the term 'financially assessable' excludes compensation for moral damage to a State, for which it has to be content with satisfaction. Compensation can be awarded for damage to the environment of a State, such as by pollution.[59]

Compensation is for actual loss: unlike some domestic laws, international law has no settled concept of penal or exemplary compensation.[60] How the amount of compensation is assessed will depend on the content of the relevant *primary rules* and the behaviour of the States concerned, the aim being to reach an equitable and acceptable outcome.[61] The valuation of capital is a particular problem.[62] Expropriation of assets gives rise to special difficulties.[63]

An international court or tribunal can award compensation even if it is not specifically claimed.[64] An arbitration tribunal may already be provided for by a

[56] For more specific examples, see the Commentary on Art. 35, para. (5).
[57] See *ICJ Reports* (2007), p. 1. See also the ICJ judgment of 4 June 2008 in *Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), *ICJ Reports* [2008], p. 1, where the ICJ decided that its finding of a treaty violation by France was appropriate satisfaction.
[58] See p. 166 above. [59] See pp. 317–18 above.
[60] See Art. 41 below; Oppenheim, p. 533; and Crawford, p. 36.
[61] See the ILC Commentary on Art. 36, paras. (7) to (34). [62] Ibid., paras. (22) to (34).
[63] Ibid., para. (20), n. 582; and pp. 169–70 above. [64] *Chorzów Factory* (1927) 4 AD 258.

treaty[65] or established ad hoc. Compensation can of course be agreed as part of a settlement, often on a without prejudice or *ex gratia* basis.

Satisfaction

In so far as an injury cannot be made good by restitution or compensation, the responsible State must give satisfaction. This may be an acknowledgement of the breach, an expression of regret, a formal apology or 'another appropriate modality'. Satisfaction must not be out of proportion to the injury or be humiliating (Article 37). An injured State cannot insist on satisfaction if full reparation can be given by other means. Normally, moral damage can be remedied by compensation, so only an injury that is not financially assessable can be made good by satisfaction. Such injuries would have to amount to an affront or other non-material injury to a State, and are often of a symbolic character arising from the very fact of the breach. Examples include insults to State symbols like the flag, violations of sovereignty, or ill-treatment of ministers or diplomats. The form of satisfaction will depend on the circumstances. It may consist in the taking of disciplinary or criminal proceedings or in paying symbolic damages. An apology, verbal or written, is common and can be required by an international court or tribunal or be made voluntarily.

Interest

Interest is payable on the principal sum of any compensation 'when this is necessary to ensure full reparation', the rate and the method of calculation being set so as to achieve that result. Interest runs from when the compensation 'should have been paid' (Article 38). If compensation is assessed as at the date of the injury, interest will generally run from then. Alternatively, it may run from the date of the claim, the award or the settlement. There is no established rule or practice, the matter being left to courts and tribunals to decide in the light of all the circumstances. The award of interest is not automatic, but payment of interest is now normal. It can be awarded by an international court or tribunal (which, unless there are express provisions to the contrary, have an inherent power to do so), or be agreed as part of a settlement. Traditionally, compound interest has not been awarded unless there were special circumstances,[66] although this might change.[67] Interest is not usually included where compensation for loss of profits is awarded.

[65] see Chapter 22.

[66] *Compañía des Desarrollo de Santa Elena SA* v. *Republic of Costa Rica*, 5 ICSID 180, Case No. ARB/95/1, February 2000, paras. 103–5; ILM (2000) 1317, or www.worldbank.org/icsid/.

[67] See F. Mann, 'Compound Interest as an Item of Damage in International Law', in F. Mann, *Further Studies in International Law*, Oxford, 1990, p. 377, at p. 383.

Contribution to the injury

In determining reparation, account must be taken of any contribution to the injury by a wilful or negligent act of the injured State, or by any person or entity in relation to whom reparation is sought (Article 39). This reflects a common, basic principle of domestic law.[68]

Serious breaches of obligations under peremptory norms of general international law

Articles 40 and 41 concern the international responsibility of a State for a 'serious' breach of an obligation arising under a peremptory norm of general international law (*jus cogens*).[69] To be 'serious', the breach must involve a 'gross or systematic' failure to fulfil the obligation. The particular consequences are, first, States must cooperate to bring, through lawful means, the serious breach to an end, irrespective of whether or not an individual State is actually affected by the breach. (Unlike most of the provisions of the Articles, this particular requirement almost certainly represents progressive development.) Second, States must not recognise as lawful a situation created by a serious breach, nor give aid or assistance to maintain that situation.[70] Third, a serious breach will have all the consequences of an internationally wrongful act and to such further consequences that the breach may entail under international law, and, possibly, punitive damages. All States are entitled to invoke the responsibility of a State for breaches of such obligations (Article 48).

The implementation of the international responsibility of a State

Invocation of responsibility by an injured State

Article 42 defines the injured State entitled to invoke the responsibility of another State by reference to which the obligation is owed.[71] First, it is owed to a State to which the obligation is owed individually. This is the most usual situation, and it would arise in the case of breach of a bilateral treaty. Second, it is owed to one of a group of States, or the international community as a whole, but the breach affects a State 'specially'. The group may be all the parties to a multilateral treaty, but only one or some are affected by the breach by another party. Third, it is owed to all States of the group, or of the international

[68] For references to examples, see the Commentary, para. (4), n. 658.

[69] See p. 10 above and the discussion of Art. 26 at p. 385 above.

[70] See UNSC Res. 662 (1990) regarding the purported annexation of Kuwait. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, *ICJ Reports* (2004), paras. 154–60; 129 ILR 37; ILM (2004) 1009, the ICJ appears, rather rashly, to have endorsed draft Art. 41 and adopted its wording, even though the matter had not been thoroughly argued in the written or oral submissions. As to the status of advisory opinions, see p. 427 below.

[71] Based on Art. 60(2) of the VCLT 1969.

community, when the breach is 'of such a character as radically to change the position of all other States to which the obligation is owed'. This is likely to apply to breach of a disarmament treaty or of a plurilateral treaty,[72] if the breach affects them all. Invocation of responsibility by a State, other than the injured State, acting in the collective interest is dealt with by Article 48 (see above).

Notice of claim by an injured State (Article 43)

Although State responsibility arises without any need for the injured State to invoke it, in practice an injured State has to give notice of its claim to the responsible State. No special form is required, but a protest is insufficient. A formal notice of claim must be made either to the responsible State or to an international court or tribunal. Since the injured State can only require the responsible State to comply with its obligations, it cannot stipulate what the responsible State must do. But, if the wrongful act is continuing, it may specify the conduct that the responsible State should take in order for to cease, and what form reparation should take. The form in which the claim should be presented is not specified, although in practice it should be written, and, if it is made to an international court or tribunal, it must conform to its rules and practice.

Admissibility of claims

Article 44 restates two fundamental rules that a State may not invoke the responsibility of another State in respect of injury to its nationals if the claim (a) does not satisfy the nationality of claims rule[73] or (b) is one to which the rule of the exhaustion of local remedies applies,[74] and any available and effective local remedy has not been exhausted.

Loss of right to invoke responsibility

An injured State cannot invoke State responsibility if it (a) has validly waived any claim or (b) is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim (Article 45). Waiver must be clear and unequivocal. An unreasonable delay in pursuing the claim could amount to acquiescence. This will depend on all the circumstances, including whether the responsible State has been severely disadvantaged. This is more likely if the original notification of the claim was unduly delayed, rather than if there was merely a leisurely prosecution of the claim.

Plurality of injured or responsible States

Where several States are *injured* by the same internationally wrongful act (see Article 42(b)), each injured State may separately invoke the responsibility of the

[72] See p. 67 above. [73] See p. 406 below. [74] See pp. 406–7 below.

responsible State (Article 46). Where several States are *responsible* for the same internationally wrongful act (by a joint operation, acting through a common organ, or one or more acting under the direction and control of another), the separate responsibility of each State may be invoked for conduct attributable to it. But this does not permit an injured State to recover more compensation than the damage it suffered, and is without prejudice to any right of recourse by a responsible State against the other responsible States for a contribution (Article 47). Whether each will be liable for the whole damage (so-called joint and several liability) or for a proportion will depend on all the circumstances.[75]

Countermeasures[76]

The ability to take countermeasures is a most important means by which a State can respond effectively to breaches of its international rights rather than relying solely on methods of peaceful settlement. Even if such methods are readily available, they may take years to produce a result (an international interim measure of protection (injunction) not being that easy to get or to enforce),[77] and compensation (even if full and paid promptly) often not being a real substitute for performance of the broken obligation. Given that enforcement of international law is not done within a legal system with a hierarchy of courts supported by sophisticated enforcement mechanisms, a State sometimes has to resort to such self-help measures to protect effectively its rights and those of its nationals. The right to take countermeasures is well established. But by taking them a State takes the risk that the action of the other State may be held to be lawful, thereby making the countermeasures themselves unlawful.

Countermeasures must be distinguished from reprisals (a term now properly used only in the context of the law of armed conflict),[78] retorsion (a response not involving any breach),[79] sanctions, as generally understood,[80] or suspension or termination of a treaty.

Countermeasures consist in the injured State not performing certain of its international obligations towards the responsible State, but only for the purpose of inducing the responsible State to cease acting wrongfully and make full reparation (Article 49). Lawful countermeasures are not wrongful (Article 22). The issue of countermeasures normally arises in a bilateral context. The classic example involves obligations under a treaty, especially an air services agreement.[81] The agreement between Ruritania and Freedonia allows one

[75] See *Certain Phosphate Lands in Nauru, ICJ Reports* (1992), p. 240, paras. 48 and 56; 97 ILR 1. The case was settled (*ICJ Reports* (1993), p. 322) on terms whereby Australia met the claim and New Zealand and the UK contributed (1770 UNTS 379 (No. 30807)).

[76] See O. Elagab, *The Legality of Non-Forcible Counter-measures in International Law*, Oxford, 1998.

[77] See p. 422 below. [78] See p. 240 above.

[79] See Shaw, pp. 1128–9. [80] See p. 199 above. [81] See p. 322 above.

airline of each State to operate a daily return flight between the two capitals using jumbo jets. Ruritania Air decides to fly with a smaller aircraft, but Freedonia Air continues to fly jumbos. Although that is Freedonia Air's right under the agreement, Ruritania Air asks its government to deny Freedonia Air permission to land jumbos, and the Ruritanian Government does so. Rightly incensed, Freedonia Air asks its government to deny Ruritania Air permission to land more than three times a week until the Ruritanian Government withdraws its action. The Freedonia Government does so. That is a countermeasure.[82]

Objects and limits of countermeasures

Article 49(1) emphasises that countermeasures are exceptional and limited; in particular they must be necessary and not a punishment. Countermeasures do *not* have to be reciprocal, in the sense of being limited to suspension of the performance of the same or a closely related obligation. In the above example, Freedonia cannot reply precisely in kind, although the countermeasure is directly related to an obligation under the air services agreement. Sometimes taking countermeasures in an unrelated field of activity may be unavoidable. A State cannot respond by breaching certain sacrosanct obligations (see below). As with other Articles, the rules on countermeasures are residual.[83] Occasionally, a treaty may prohibit countermeasures, or require their prior authorisation.[84] Countermeasures must cease once they have had the desired effect (Article 49(2)) and must, as far as possible, be taken in such a way as to permit the resumption of performance of the responsible State's obligations, i.e. be reversible (Article 49(3)).

Proportionality

Countermeasures must be 'commensurate with' (proportionate to) the injury suffered, taking into account 'the gravity of the wrongful act' and 'the rights in question' (being those of both States) (Article 51). Proportionality is an essential requirement. If the countermeasures are excessive, the injured State will itself have committed an internationally wrongful act. In many cases, there will be no exact equivalence between the acts of the responsible State and the countermeasures. But the more closely countermeasures are related to the breach, the more likely they are to be proportionate. It will usually be sufficient if there is a rough approximation. So, the suspension by the United States of all Air France flights between Paris and Los Angeles, in response to France's refusal to allow US airlines flying between Los Angeles and Paris to change to

[82] For air services examples, see *Air Services Agreement of 27 March 1946 (US* v. *France)*, (1963) 38 ILR 182 and (1978) 54 ILR 303. See also *US* v. *Italy* (1965) 45 ILR 393.

[83] On Art. 55, see p. 378 ('General matters') above. [84] See p. 357 above.

smaller aircraft for the section between London and Paris, was held to be not 'clearly disproportionate'.[85] But everything depends on the particular facts and circumstances.

Procedural conditions

Resort to countermeasures is an exceptional action. Therefore, before embarking on that course, the injured State *should* take the procedural steps set out in Article 52. Since the step suggested may well not represent customary international law, I have therefore used the conditional tense 'should', rather than the obligatory 'shall' or 'must'. The steps are, *first*, that the injured State should call upon the responsible State to cease its wrongful act and to make reparation. In practice, it is likely that this requirement will have already been met by discussions between the two States. *Second*, the injured State should notify the responsible State of its decision to take countermeasures, and offer to negotiate. *Third*, since in many situations these two requirements may take too long, paragraph 2 recognises that the injured State may take 'such urgent countermeasures as are necessary to preserve its rights', such as freezing bank accounts held in the injured State. The 'rights' referred to are both the right to take countermeasures and the primary rights that are the subject matter of the dispute. *Fourth*, the countermeasures should be suspended 'without undue delay' if the wrongful act has ceased or the dispute is 'pending' before an international court or tribunal that has jurisdiction to make decisions on the parties. The dispute will be 'pending' only once the court or tribunal is in a position to deal with the case. If it is an ad hoc tribunal set up pursuant to a treaty, the dispute will be pending only when the tribunal is actually constituted, and this can take many months.[86] This latter provision presupposes that the court or tribunal will have the power to order interim measures of protection.[87] If the dispute has been referred by a national of the injured State to a tribunal,[88] countermeasures would not be justified except in exceptional cases. *Fifth*, countermeasures may be taken or continued if the responsible State fails to implement the dispute settlement procedures in good faith, such as non-cooperation in the establishment or procedure of a tribunal, non-compliance with an interim measures order or a refusal to accept the final decision. Countermeasures must of course be terminated as soon as the responsible State has complied with its obligations of cessation and reparation (Article 53).

It is possible that a State may lose its right to take countermeasures if it delays doing so for so long that it must be deemed to have waived its right to take them.

[85] *Air Services Agreement of 27 March 1946* (*US* v. *France*), (1978) 54 ILR 303, para. 83. See also *Gabčíkovo–Nagymaros Project* (*Hungary* v. *Slovakia*), *ICJ Reports* (1997), p. 3, at paras. 85 and 87; 116 ILR; 1 ILM (1998) 162.

[86] See pp. 407–8 below. [87] See p. 422 below. [88] See p. 346 above.

Obligations not affected by countermeasures

Article 50 lists four obligations which must never be affected by countermeasures: (a) to refrain from the threat or use of force; (b) to protect fundamental human rights; (c) to comply with the prohibition on reprisals; (d) to comply with peremptory norms of general international law. Paragraph 2 lists two other obligations which have important functions in relation to the resolution of the dispute that has given rise to the threat or use of countermeasures, and which must therefore also be respected: (1) obligations under any dispute settlement procedure applicable between the two States; and (2) obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents. Whether, in practice, (1) will be respected is open to question.

Responsibility of an international organisation

Article 57 makes it clear that the Articles do not affect any question of the responsibility of an international organisation, or of any State for the conduct of an international organisation. An international organisation has international legal personality separate from its member States,[89] and there can no longer be any doubt that the organisation is responsible in international law for its own acts.[90] The ILC began consideration of the topic of the responsibility of international organisations only in 2002. It seems very likely that, in producing draft Articles on this topic, it will use those on State responsibility as a model.[91]

Various problems will have to be addressed. *First*, whose conduct can be attributable to the organisation? In most cases, there will be no problem with this, but what if a person is injured (in the broadest sense) by the conduct of an official of a State implementing a decision of the organisation, such as sanctions? Is the organisation liable? *Second*, whereas an organisation can be liable to a State that is not a member of it, can it be liable to its Member States? There would seem no reason in principle why not. Although one must be careful of pushing the analogy with companies too far, a company that injures a person is liable even if he is a shareholder. *Third*, are the Member States liable collectively for the conduct of the organisation? This is the most controversial issue.[92] Article 3(4) of the Agreement establishing the International Fund for Agricultural Development 1976 provides expressly that no Member State shall be liable by reason of its membership for acts or obligations of the

[89] See p. 180 above.

[90] See *Cumaraswamy* (Advisory Opinion), *ICJ Reports* (1999), p. 62, at para. 66; 121 ILR 405; and Art. 60 of the VCLT between States and International Organisations and between International Organisations 1986 (ILM (1986) 543), although it has not yet entered into force.

[91] See the ILC Report for 2003, para. 44, and the current State of play at www.un.org/law/ilc/.

[92] See the helpful summary of how the English courts wrestled with this problem in the International Tin Council legislation in J. Klabbers, *An Introduction to International Institutional Law*, 2nd edn, Cambridge, 2009, pp. 271–93 generally on this particular topic.

Fund.[93] If this represents the position in international law, a subsidiary question is whether there could be circumstances in which one could, so to say, lift the corporate veil to expose the Member States to liability? Although it is not directly related to these issues, it may be relevant that most international organisations have more or less total immunity from jurisdiction conferred on them, so that *domestic* legal remedies are generally not available,[94] and that international dispute settlement mechanisms generally do not have jurisdiction over international organisations.[95]

Individual responsibility

Article 58 makes it clear that the Articles do not affect any question of the individual responsibility under international law of any person acting on behalf of a State.[96] Although a State is responsible for a wrongful act of its officials or agents, such persons may also have individual criminal responsibility for those acts; and this is especially so for violations of the law of armed conflict and other international crimes.[97] The Article leaves open the issue of possible individual *civil* responsibility for such crimes.[98]

[93] 1059 UNTS 191 (No. 16041); ILM (1976) 922; UKTS (1978) 41.
[94] See pp. 181 et seq. above.
[95] J. Klabbers (n. 93 above), pp. 229–30.
[96] See *Oppenheim*, pp. 548–54. Though they may be more concerned with immunity for jurisdiction, for more (and in the case of Fox, more up-to-date) detail as to Heads of State, diplomats and members of armed forces, see Watts, 'The Legal Position on International Law of Heads of States, Heads of Government and Foreign Ministers, *Recueil des Cours*, 242 (1994-III), at 13 et seq.; and Fox, *The Law of State Immunity*, 2nd edn, Oxford, 2008, pp. 665–74.
[97] See p. 161 above.
[98] See Art. 14 of the Torture Convention, 1465 UNTS 85 (No. 24841); ILM (1984) 1027; UKTS (1991) 107.

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Settlement of disputes

the law's delay …[1]

Collier and **Lowe**, *The Settlement of Disputes in International Law*, Oxford, 1999 ('Collier and Lowe')

Brownlie, *Principles of Public International Law*, 7th edn, Oxford, 2008, pp. 701–25 ('Brownlie')

Merrills, *International Dispute Settlement*, 4th edn, Cambridge, 2005 ('Merrills')

Introduction

Any respectable domestic legal system has a hierarchy of tribunals ending with a final court of appeal. International law has no such system. Since each State is sovereign, it cannot be required to submit to the jurisdiction of an international tribunal (which term includes international courts) unless it has consented to its jurisdiction. So, there is no hierarchy of tribunals, just a rather unsystematic patchwork.[2] Even though judgments of the International Court of Justice (ICJ) are very influential, it is *not* at the apex of the international legal system, and it is *not* a court of appeal. In this chapter, we look at some international tribunals. (See p. 229 above for the European Court of Human Rights, p. 254 above for international criminal tribunals, p. 354 above for the World Trade Organization and p. 438 below for the European Court of Justice.)

Many disputes are settled quickly and informally; others can take many years to resolve; some are never resolved; and with some it is better to manage them than attempt a formal resolution of the dispute.[3] A dispute is usually between only two parties. There is no one method of dispute settlement, or even one that is

[1] W. Shakespeare, *Hamlet*, II.i.56.

[2] For a chart showing the main universal and regional international courts and tribunals, see www.pict-pcti.org.

[3] See R. Jennings, 'The Role of the International Court of Justice' (1997) BYIL 1, at 51, n. 100, where he cites as an example the Antarctic Treaty 1959 (402 UNTS 71 (No. 5778); UKTS (1961) 97), in which the parties have effectively 'frozen' their sovereignty dispute, although the dispute will inevitably figure in their submissions to the Commission on the Limits of the Continental Shelf: see p. 287 above.

generally used. Nor is the method necessarily dictated either by the importance or magnitude of the dispute or how long it has lasted. There are treaty disputes that are never settled even when a method is provided in the treaty itself. (The term 'settle' is used here in the more general sense of 'resolve', and not in its narrower sense of agreeing terms upon which pending litigation is discontinued.)

In the UN Charter, Article 33 elaborates the basic principle, enunciated in Article 2(3), that all Members shall settle their international disputes by peaceful means, and lists the most usual ones: negotiation, mediation, conciliation, arbitration and judicial settlement. The methods can be broadly divided into voluntary and compulsory, depending on whether or not the parties to a dispute are under a legal obligation to enter into a particular means of settlement. But this does not mean that under a voluntary process the parties will never be bound by the result; nor that under a compulsory process the result will always be binding: it depends entirely on the terms that have been agreed.

Informal means

We will first look at methods of resolving legal disputes that do not involve an international tribunal, although the parties should still need lawyers, who will be expensive.

Negotiations and consultations

There is of course nothing to prevent the parties seeking to resolve a dispute by negotiations, and this is normally the first step in any dispute. Even if the dispute is to be referred to arbitration or judicial settlement, it is desirable that the points at issue should be better defined by negotiations. Held in decent privacy, they may also make it easier to reach a settlement. Once a dispute is elevated to a more formal or public level, it can be more difficult, at least politically, to settle. Positions become entrenched and public 'face' may require that neither side should be seen to compromise.

Negotiating procedures are infinitely flexible, the process being completely under the control of the parties. Once a third party is brought in, the negotiations may gain a momentum of their own which the parties (at least individually) may not be able to stop or influence effectively. This may be one reason why most disputes are settled by bilateral negotiations; although it may also be true that most disputes are not so intractable that the parties have to resort to more formal methods. One should treat with great caution any proposal for a new general treaty on dispute settlement.[4] There are already quite enough of them and, although formal methods of dispute settlement have an important role to play, they are often no substitute for, or no better than, a carefully negotiated settlement. Today, many – but not all – disputes, to varying degrees, concern one or more treaties.

[4] See A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243, at 247–8.

Negotiations can last as long as the parties wish, and may be stopped and resumed at any time, although some dispute settlement clauses in treaties prescribe a time limit after which either party is free to invoke a third-party means of settlement provided for in the treaty or ad hoc.

There is no significant difference between consultations and negotiations, although consultations are often made a formal precondition for moving to a third-party settlement procedure. The UK–US Air Services Agreement 1977 ('Bermuda 2')[5] provided for a dispute to be the subject of a 'first round of consultations' before it can be submitted to third-party settlement, and 'first *round*' means at least two meetings with a break in between for reflection. Some treaties require the parties to do no more than enter into consultations or negotiations with a view to reaching a settlement or to agreeing on another method of settlement. These have to be implemented in good faith, so they must be conducted purposefully.

If negotiations are successful, it is essential that the parties record what has been agreed. The form will depend on the circumstances. It may involve an amendment to a treaty or a public statement. If the parties do not want publicity, they may record the terms of settlement in a (usually unpublished) MOU.[6] Although not itself legally binding, an MOU may nevertheless have legal consequences, as was demonstrated in the award in the *US–UK User Charges Arbitration*.[7]

If negotiations are unsuccessful, one of the parties to a treaty dispute may decide to terminate the treaty. This could be described as 'the other way of settling a dispute'. Since 1945, the United Kingdom has terminated at least four air services agreements: Philippines (1953 and 1984); United States (1976); and Lebanon (1981).[8] Sometimes a dispute becomes so bad that termination and starting afresh is the only sensible way out of the impasse. It does not mean, of course, that the dispute may not still be settled by reference to a third party if the treaty so provides (a dispute settlement clause usually remains in force in relation to matters occurring before termination of the treaty),[9] or the parties may agree to this ad hoc. Termination can have the advantage of effectively drawing a line under the dispute, so enabling the parties to negotiate a new treaty.

Involvement of third parties

But, it may be necessary to seek the help of a third party. Whether this will be successful – even whether it will be possible – will depend on various factors. One will be the degree of cooperation from the other party to the dispute. Despite the existence of several general treaties on the settlement of disputes, in

[5] 1079 UNTS 21 (No. 16509); UKTS (1977) 76. It has now been overtaken: see p. 323, n. 11 above.
[6] See pp. 51–4 above on MOUs. [7] 102 ILR 215, esp. 561 – 4.
[8] A. Aust, 'Air Services Agreements: Current United Kingdom Procedures and Policies' (1985) *Air Law* 189, at 198–9.
[9] See Aust MTLP, pp. 302–3.

many cases there will be no agreement binding the parties to any means of third-party settlement applicable to the particular dispute. It would then be necessary to negotiate – probably in unfavourable circumstances – an ad hoc agreement on a method of settlement. If the method is mediation or conciliation, unless the agreement provides for the parties to accept the recommendations of the third party (which is not usual), neither party is legally bound to accept them.

Conciliation

Conciliation may be provided for in a treaty that is the subject of the dispute or in a general treaty on the settlement of disputes to which the parties in dispute are both bound,[10] or it may be agreed ad hoc. The nature of conciliation is neatly expressed in the Annex to the Vienna Convention on the Law of Treaties 1969, which provides for conciliation of disputes between parties to the Convention in certain limited circumstances. The Annex provides in part that:

4. The [Conciliation] Commission may draw the attention of the parties to the dispute to any measures that might facilitate an amicable settlement.
5. The Commission shall hear the parties, examine the claims and objections, and make *proposals* to the parties with a view to reaching an amicable settlement of the dispute. [Emphasis added]

This formula became a model for multilateral treaties, in particular for the UN Convention on the Law of the Sea 1982.[11]

A conciliation commission is usually composed of three to five members, one national member being appointed by each party and the other one or three neutral members chosen jointly by the national members, at least ostensibly. A neutral member serves as chairman. If a party fails to appoint its member, or there is no agreement on the choice of the neutral member(s), it is *essential* for the treaty to provide for the necessary appointment to be made by an eminent independent person, such as the President of the ICJ or the Secretary-General of the Permanent Court of Arbitration. It is therefore also essential to set time limits for all appointments to try to avoid one party obstructing the process. The Annex to the Vienna Convention provides a useful model for multilateral treaties, and was a model for provisions which, by providing for a permanent list of conciliators, largely avoid the problem of leaving the appointment of conciliators solely in the hands of the parties.[12]

Conciliation is inevitably more expensive than negotiation, since each party will not only have to pay its own expenses, including the fees of any outside

[10] The ambitious, but so far unused, OSCE Convention on Conciliation and Arbitration 1992 (ILM (1993) 557) provides for *compulsory* conciliation, although the outcome is not binding. See Bloed (ed.), *The Conference on Security and Co-operation in Europe*, Dordrecht, 1993, p. 870.

[11] 1833 UNTS 397 (No. 31363); ILM (1982) 1261; UKTS (1999) 81 (Annex V, Arts. 5 and 6).

[12] For a bilateral precedent, see the Switzerland–United Kingdom Treaty for Conciliation, Judicial Settlement and Arbitration 1965, 605 UNTS 205 (No. 8765); ILM (1965) 943; UKTS (1967) 42.

lawyers or experts it engages, but also half of the costs of the conciliators, their accommodation and staff.

The results of conciliation are almost invariably non-binding. Once again, the matter is expressed well in the Annex to the Vienna Convention:

> 6… The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

Thus, conciliation is, from one point of view, usually less effective than arbitration or judicial settlement, the results of which are legally binding, yet it can be just as expensive and time-consuming. If conciliation has not led to a settlement, unless a party can then take the dispute to arbitration or judicial settlement, there may be no formal and independent means of resolving it.

Mediation and good offices

Mediation is usually an ad hoc method involving the agreed intervention of a third person in an attempt to reconcile the claims of the parties by advancing his own ideas for a compromise. It is more of a political process and, as such, it may not be suitable for the resolution of a legal dispute. Good offices are very similar in nature, indeed the terms are almost interchangeable, and consist in a third person (these days often the UN Secretary-General, or rather his special representative) giving his impartial assistance. The process therefore suffers from the same weaknesses as mediation, at least so far as legal disputes are concerned.

Compulsory binding settlement

The real value of a compulsory binding settlement procedure is not dissimilar to the nuclear option: one should *not* have to use it. A party which knows it is in the wrong should be well aware that if it persists in its unlawful action it risks all the trouble and expense of international legal proceedings, and eventual judgment against it. Of course, States do not always act rationally, and some will take a risk or view legal proceedings as a useful way of buying time. Nevertheless, even though one cannot know to what extent the threat, or simply the possibility, of compulsory settlement influences the decisions of States, from the experience of domestic legal disputes it is reasonable to assume that the deterrent factor is not insignificant. But, of course, in many cases there will be a genuine legal dispute.

The settlement of a dispute by compulsory means requires *mutual consent*. Whether a party is legally bound to submit the dispute to a particular method of dispute settlement depends entirely on whether it has agreed to do so, either in advance of the dispute arising or subsequently.

The two principal characteristics of compulsory binding settlement are (1) an agreement to submit disputes to a third party *and* (2) a provision in the agreement that the decision of the third party will be binding. These two matters may be provided for (a) in a general treaty on the settlement of disputes to which the parties in dispute are bound, (b) if, as is often the case, the dispute is about a treaty, in the treaty itself, or (c) in an ad hoc agreement. But, even if a treaty provides for a method of compulsory third-party settlement, unless the provision is tightly drafted one party may, in practice, be able to delay, or even avoid, the process (see below). We will look at the three basic methods in the context of international arbitration and the ICJ.

But first we must consider some essential preliminary matters.

Jurisdiction and admissibility

Before it judges the merits of a case, an international tribunal must decide both that it has jurisdiction (legal competence to hear the case), and that the claim is admissible. Although jurisdiction and admissibility are separate legal issues, the respondent[13] frequently raises them both at an early stage as *preliminary objections* to the tribunal dealing with the dispute, although raising them together can sometimes have the effect of blurring the distinction between them in tribunal decisions. The proceedings on the merits are suspended until preliminary issues have been decided, although, when an issue of admissibility is closely related to the merits of the case, the tribunal may postpone dealing with the issue until the merits stage. But, even if there is no jurisdiction, that does mean that the allegation may not be true.[14]

Jurisdiction

For an international tribunal to have jurisdiction, the States in dispute must have consented to conferring jurisdiction on it. Whether it has jurisdiction is decided by the tribunal itself, this inherent power being sometimes rather grandly referred to as *la compétence de la compétence*.[15] A plea that active negotiations between the parties are still proceeding will not prevent the tribunal from exercising jurisdiction,[16] unless perhaps such negotiations are required by a compromissory clause (see below) and the tribunal is satisfied that the required negotiations have not yet been completed. In contrast, the Members of the Council of Europe, the European Union or the World Trade Organization (but *not* Members of the United Nations),[17] are obliged by their

[13] Respondent = defendant; applicant = plaintiff.
[14] See paras. 126–7 of *Armed Activities on the Territory of the Congo (new application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *ICJ Reports* (2006) p. 6; ILM (2006) 562.
[15] See *Tadić*, 1995 (ICTY Appeals Chamber), Case IT-94-1; 105 ILR 419.
[16] *Cameroon* v. *Nigeria* (Preliminary Objections), *ICJ Reports* (1998), p. 275, para. 56.
[17] See pp. 412 et seq. about the ICJ.

constituent instruments to accept the jurisdiction of their permanent courts (see references in the Contents or the Index to such courts).

But, for the rest, jurisdiction can be conferred in various ways.

- A clause in a treaty (known as a *compromissory clause*) under which the parties agree to submit all or some of their disputes regarding the interpretation or application of the treaty to arbitration or judicial settlement. The two (parallel) *Lockerbie* cases were brought by Libya against the United Kingdom and the United States to the ICJ under the compromissory clause of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation 1971.[18] There can of course be a dispute as to whether the subject matter of the dispute relates to the treaty.
- Clauses providing for *arbitration* are often drawn in general terms and leave many important details to be worked out only when the clause has been invoked – the worst possible time. (In the case of a permanent court, such as the ICJ, there are rules of procedure and practice.) It is therefore better to put into the clause as much detail as possible, omitting only that which cannot easily be decided until a dispute has arisen. This will avoid some of the considerable delays that will ensue if crucial matters, such as the method of appointment of arbitrators, are not set out in sufficient detail. The arbitration clause of the UK–US Air Services Agreement 1977 (known as 'Bermuda 2'),[19] which was invoked by the United States in 1988 in the dispute concerning aircraft user charges at London (Heathrow) Airport,[20] contains the minimum necessary provisions. They were soon found to be inadequate for what turned out to be a very long and complicated arbitration, the rules of procedure of the arbitral tribunal having to be modified several times.[21]
- A treaty under which the parties agree to submit future disputes (not just disputes about treaties) to arbitration or judicial settlement. The treaty can be bilateral or multilateral.[22] The so-called Jay Treaty of 1794,[23] between Great Britain (as it then was) and the United States, led to a series of arbitrations. A more recent bilateral treaty is the UK–Swiss Treaty for Conciliation, Judicial Settlement and Arbitration 1965.[24] Iran successfully invoked the Iran–United States Treaty of Amity 1955[25] as the basis for the

[18] 974 UNTS 177 (No. 14118); ILM (1971) 10; UKTS (1974) 10 (Art. 14). See also *Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), *ICJ Reports* (2008), p. 1; in which Belgium based the jurisdiction of the ICJ on Art. 30 of the Torture Convention and reciprocal declarations under Art. 36(2) of the ICJ Statute.

[19] 1079 UNTS 21 (No. 16509); UKTS (1977) 6.

[20] 102 ILR 215. [21] For the text, see 102 ILR 551–61.

[22] See the American Treaty on Pacific Settlement 1948 (Pact of Bogatá) 30 UNTS 84 (No. 449) (under which the parties appear to have given jurisdiction to the ICJ to adjudicated disputes between the parties: see *Maritime Dispute (Peru v. Chile)*, *ICJ Reports* (2008).

[23] 52 CTS 243. See T. Bingham, 'The Alabama Claims Arbitration' (2005) ICLQ 1.

[24] See n. 12 above. [25] Article XXI(2). See 284 UNTS 93 (No. 4132); TIAS 3853.

ICJ's jurisdiction to hear the dispute it had with the United States over attacks on its oil platforms.[26] Earlier, Nicaragua successfully invoked before the ICJ its 1956 Treaty of Friendship, Commerce and Navigation with the United States.[27] The first *multilateral* treaties concerning dispute settlement were the Hague Conventions for the Pacific Settlement of International Disputes 1899 and 1907 that established the Permanent Court of Arbitration (PCA).[28] The (grandly named) General Act for the Pacific Settlement of Disputes 1928, as revised in 1949,[29] has only eight parties, and so its usefulness must be problematic.[30] Other such general treaties followed them, although they also have been little used.[31]

- Adherence to an *optional protocol* to a treaty an alleged breach of which is the subject of the dispute. Such a protocol is essentially a compromissory clause but, being a separate treaty, a party to the principal treaty will need to adhere to the protocol in order to accept the jurisdiction of the tribunal. A good example is the Optional Protocol to the Vienna Convention on Diplomatic Relations 1961,[32] which the United States invoked successfully in its dispute with Iran over the Tehran hostages;[33] and the Optional Protocol to the Vienna Convention on Consular Relations 1963,[34] which Paraguay invoked in its dispute with the United States in 1998.[35]
- A *compromis*. If there is no existing agreement, or if such an agreement does not contain enough detail, it may be necessary for the parties to the dispute to conclude a new treaty called a *compromis* (sometimes called in English 'special agreement', even though at least the British tend to prefer the French term, *compromis*). The *compromis* sets out all the details of the establishment and procedure of the arbitral tribunal, and usually covers:
  - the composition of the tribunal;
  - the number and means of appointment of its members, including the filling of vacancies;
  - the appointment of agents of the parties;
  - the precise question(s) to be decided;
  - the rules of procedure and methods of work;
  - languages;
  - the applicable law;
  - the seat of the tribunal;

[26] *ICJ Reports* (1996), p. 803, at p. 820.
[27] Article XXIV. See 367 UNTS 3 (No. 5224), and *ICJ Reports* (1984), p. 392; 76 ILR 104.
[28] See p. 408 below.
[29] 93 LNTS 343; UKTS (1931) 32 and 71 UNTS 101 (No. 912). See also A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243, at 247–8.
[30] See Collier and Lowe, pp. 137–8.
[31] For example, the European Convention for the Peaceful Settlement of Disputes 1957, 320 UNTS 423 (No. 4646); UKTS (1961) 10. See also p. 399, n. 10, above. See also 'Limping Treaties', n. 29 above.
[32] 500 UNTS 241 (No. 7312); UKTS (1965) 19. A more recent example is the Optional Protocol 2000 to the Rights of the Child Convention 1989, 2171 UNTS (No. 27531).
[33] *ICJ Reports* (1980), p. 3; 61 ILR 502. [34] 596 UNTS 487 (No. 8640); UKTS (1973) 14.
[35] *ICJ Reports* (1998), p. 248; ILM (1998) 810 and 824 (US Supreme Court); 118 ILR 1.

- the appointment of the secretary of the tribunal and his staff;
- costs; and
- the binding nature of the award.

It may not be necessary to cover all these points if, for example, the *compromis* provides that the working methods of the tribunal will be determined by the tribunal itself. For an example of a *compromis*, see the 1996 Special Agreement between Botswana and Namibia for reference to the ICJ on the determination of part of their common boundary.[36]

- *Reciprocal declarations* under Article 36(2) of the Statute of the ICJ (see p. 416 below).
- States can agree ad hoc that a dispute shall be decided by an international court or tribunal.[37]
- Consent to jurisdiction being implied from some action in connection with proceedings taken by a State that has not accepted the jurisdiction expressly, known as *forum prorogatum*. But, this is unusual.[38]

When a treaty provides for the establishment of an arbitral tribunal, it is vital to provide for a third party to make the appointment of a national or neutral arbitrator, should that appointment not have been made within the time specified. There should, however, be no need to include such a provision if the reference to arbitration is 'friendly'. But, giving the President of the ICJ or the Secretary-General of the PCA the power to make such appointments normally has a good effect on the parties: the power has seldom had to be used.[39]

What is a legal dispute?

In addition to the States in dispute having consented to its jurisdiction, for an international tribunal to have jurisdiction, there must be a *dispute* between the parties and the dispute must be *legal*. We are not concerned with a dispute about a matter regulated by domestic law, such as over a lease governed by the land law of one of them, unless there is also an international law aspect.[40]

What constitutes a dispute? In *Lockerbie*, the UK and US respondents argued there was no dispute. To no one's surprise, the ICJ decided that there was a dispute as to whether the Montreal Convention 1971 (on aircraft sabotage and

[36] ILM (2000) 314.

[37] See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *ICJ Reports* (2008), p. 1, paras. 80–95, and Art. 38(5) of the ICJ Rules of Court (www.icj-cij.org/).

[38] See *Djibouti* v. *France* (n. 37 above), esp. paras. 61–4 and 87–8. *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Rwanda*), ICJ Reports (2006), p. 6; ILM (2006) 562, esp. para. 18 et seq.; Collier and Lowe, p. 136; Schreuer, *The ICSID Convention: A Commentary*, Cambridge, 2001, p. 228–34; Merrills, p. 130.

[39] See *US* v. *France (Air Services)* (1963) 38 ILR 182.

[40] If, for example, the lease was entered into pursuant to a treaty between the two States and one claims that the other is in breach of the treaty. See also p. 114, n. 15 above.

to which the three States were, and remain, parties) applied in the circumstances of the case.[41] In so deciding, the ICJ referred to the statement of its predecessor, the Permanent Court of International Justice (PCIJ), in *Mavrommatis*: 'A dispute is a disagreement over a point of law or fact, a conflict of legal views or interests between two persons.'[42] The ICJ also quoted from *South West Africa* (Preliminary Objections): 'It must be shown that the claim of one party is positively opposed by the other;'[43] and from the *Peace Treaties with Bulgaria, Hungary and Romania* (First Phase), Advisory Opinion: 'Whether there exists an international dispute is a matter for objective determination.'[44] It is not enough that one party says there is a dispute and the other denies it; although when parties dispute that there is a dispute, there usually is, and there certainly was in the *Lockerbie* case.

The concept of a *legal* dispute is best explained by reference to Article 36(2) of the Statute of the ICJ. This defines legal disputes as those concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

This is a comprehensive definition. Other tribunals, permanent or ad hoc, will have jurisdiction over a specified range of disputes. The European Court of Human Rights has jurisdiction only over disputes arising under the European Convention on Human Rights, although in exercising its jurisdiction it may have to consider any of the four matters listed above.[45]

As with disputes between neighbours over a boundary fence, territorial – as well as other – disputes between States are often politically or emotionally charged, such as the long-standing dispute between Argentina and the United Kingdom over sovereignty of the Falkland Islands. But to an international tribunal it is – or at least should be – irrelevant that there is a political dimension to a claim or that the applicant State may have a political motive in bringing it, but the judges are no doubt well aware of the political aspects.

Jurisdiction *ratio temporis*

In deciding whether it has jurisdiction, the tribunal has to consider the provisions of the relevant agreement conferring jurisdiction, whether it was

[41] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya* v. *United Kingdom) (Preliminary Objections), ICJ Reports* (1998), p. 9, para. 53(3); ILM (1998) 587; 117 ILR 1. There was a parallel case against the United States. Since the issues raised by both cases were the same, the court dealt with them in parallel, although they were never joined. Both cases were withdrawn by consent in September 2003.

[42] *PCIJ, Series A*, No. 2 (1924), p. 11; 2 AD 27. [43] *ICJ Reports* (1962), p. 328; 37 ILR 3.

[44] *ICJ Reports* (1950), p. 74; 17 ILR 318. [45] See p. 229 above.

constituted by treaty or reciprocal declarations under Article 36(2) of the ICJ Statute. Either may limit jurisdiction to disputes arising after, or facts or situations subsequent to, the date the agreement entered into force, or another date, which could be earlier.[46]

If the tribunal decides that it has no jurisdiction, that ends the proceedings.

Admissibility

Even if the tribunal is satisfied that it has jurisdiction, if the claim is nevertheless inadmissible it will not proceed to the merits. The ICJ has wisely not sought to define the concept of admissibility or to determine the precise distinction between it and jurisdiction. The two claims of inadmissibility most frequently asserted are that the applicant has no legal interest and that local remedies have not been exhausted.

No legal interest

This plea normally arises when the claim is about loss or harm to one of the applicant's nationals, and the respondent asserts that the person (natural or legal) is not a national of the applicant State, and thus the respondent has no responsibility towards the applicant (*nationality of claims rule*). The generally accepted rule is that the person must have had, continuously and without interruption from the time of the loss or harm until judgment, the nationality of the applicant State, and not be a national of the respondent State.[47] The principle of continuity means that assignment of a claim to another national of the *same* State will not affect the claim. The nationality of the claim must also be assessed by reference to the nationality of the holder of the beneficial interest, not that of a trustee or other nominal holder. On the other hand, if an insurer has a subrogated claim, that should not affect an international claim provided the insured still satisfies the continuity principle. The nationality of corporations can be more difficult.[48]

Exhaustion of local remedies[49]

A State may not exercise its diplomatic protection, or resort to any international procedure to seek redress for one of its nationals, unless the national has exhausted the legal remedies available to him in the State of whose action he complains.[50] To establish this defence the respondent must show that an

[46] See *Certain Property (Liechtenstein* v. *Germany)*, *ICJ Reports* (2005), p. 6, paras. 28–52, and the cases therein mentioned.

[47] Oppenheim, pp. 512–15. See *Case concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo) Preliminary Objections*, *ICJ Reports* (2007), ILM (2007) 712; and P. Okowa, '*Ahmadou Sadio Diallo*: (*Guinea* v. *Democratic Republic of the Congo*), Preliminary Objections', (2008) ICLQ 219–24. On dual nationality, see p. 163 above.

[48] See p. 166 above.

[49] See C. Amerasinghe, *Local Remedies in International* Law, 2nd edn, Cambridge, 2003.

[50] *Interhandel* (Preliminary Objections), *ICJ Reports* (1959), p. 6, at p. 46; 27 ILR 475.

effective remedy is available and that it would not be futile to seek it. When Soviet fighters shot down a Korean airliner in 1983,[51] the United Kingdom was able immediately to demand compensation in respect of the UK nationals who had been killed, since there would have been no point in the relatives going to the Soviet courts which at that time were clearly not independent of the government. The rule is applied by most international tribunals, including the European Court of Human Rights, but there are three important exceptions: (a) bilateral investment treaties (BITS), where the rule generally does not apply,[52] (b) in contracts with States under which disputes may be submitted to international arbitration and (c) the Iran–US Claims Tribunal.[53] In the past, some contracts, especially with South American governments, included the so-called *Calvo Clause*. This required the foreign party to rely exclusively on local remedies and not seek any diplomatic protection. Although not seen much today, the clause did bolster the local remedies rule.[54]

Non liquet

Although this is an obsolete juristic doctrine, it is sometimes contemplated. According to this doctrine an international tribunal should decline to decide a case even where rules are not available for its determination because of a lacuna in international law.[55] Scholars have dismissed the notion that because international law was not complete a tribunal could abdicate its responsibility.[56] Article 42(2) of the ICSID Convention expressly prohibits a finding of *non liquet* on the ground of 'silence or obscurity of the law'.[57] This would not seem to imply that the doctrine could in certain circumstances be available, but rather is intended to be a dismissal of the doctrine.

International arbitration[58]

Arbitration is the submission of a dispute to a judge or judges, in principle chosen by the parties, who agree to accept and respect the judgment. The judges are called 'arbitrators' and their judgment an 'award'. Although some arbitrations are conducted by a single arbitrator, this is really only suitable for a relatively simple case involving a narrow, essentially factual, point. It is normally better to have one arbitrator appointed by each party and one (or, even better, three) neutral arbitrators, the appointments being made as for a conciliation commission.[59] Those appointed by each party be able to explain

[51] For details, see Shaw, 5th edn (2003), p. 474. [52] On this and ICSID, see p. 350 above.
[53] See p. 410 below.
[54] See *North American Dredging Company* (1926) 3 AD 4. (Note the date.) [55] Shaw, p. 1076.
[56] See, for example, E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Sir Hersch Lauterpacht*, Cambridge, 1970–8, vol. 2, pp. 213–36.
[57] See C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge, 2001, pp. 632–3.
[58] See Collier and Lowe, pp. 189–273, for a useful survey of arbitral procedure.
[59] See, for example, the Switzerland–United Kingdom Treaty (n. 12 above), Art. 16.

further their State's position, and be able to share what may be a considerable workload. Although it may be more common to have only three arbitrators (as in the Iran–US Claims Tribunal) this is not ideal since the chairman then needs the support of one of the two national arbitrators in order to reach a decision. He may therefore have to compromise, whereas three neutral arbitrators may be better able to reach a truly impartial decision.[60]

Many multilateral and bilateral treaties contain arbitration clauses and, apart perhaps from regional specialist tribunals like the European Court of Human Rights or the European Court of Justice, more treaty disputes are decided by arbitration than by judicial settlement.

Arbitration is not necessarily cheaper or less complicated than judicial settlement. But the parties may be better able to control the process (choice of arbitrators, language(s) and confidentiality). If they want a quick decision they can more easily direct the tribunal to try to give its award by a specific date. This is helped by the fact that, even with five arbitrators, reaching a decision should be that much easier than with, say, the fifteen judges of the ICJ. But, such advantages have to be weighed against the fact that all the costs of the arbitrators, the registrar, other staff and accommodation have to be borne by the parties (normally in equal shares whatever the outcome), in addition to their own legal costs. And, since an arbitral tribunal has to be constituted for each case and its rules of procedure may well have to be agreed, the mere setting up of the tribunal can take many months. As we shall see, judicial settlement has certain other distinct advantages over arbitration. In 1998, in *The M/V Saiga (No. 2)*, the parties, Saint Vincent and the Grenadines and Guinea, after beginning arbitration proceedings, agreed to take their dispute to the International Tribunal for the Law of the Sea (ITLOS).[61]

It is often said that the nature of the arbitration process is such that the result is usually a compromise. That may be so, but it would seem from some of their recent judgments that the ICJ judges (some of whom moonlight as arbitrators) also make compromises.

Permanent Court of Arbitration (PCA)

The Hague Convention for the Pacific Settlement of International Disputes 1899[62] established the Permanent Court of Arbitration (PCA) at The Hague, and for which the Peace Palace, now also home of the ICJ, was opened in 1913.[63]

[60] D. Bowett (ed.), *The International Court of Justice: Process, Practice and Procedure*, BIICL, London, 1997, p. 9.

[61] ILM (1998) 360 and 1202; 120 ILR 143. For ITLOS, see p. 301 above.

[62] 205 CTS 233; UKTS (1901) 9 and (1907) 26.

[63] Its address is: Peace Palace (where it is collocated with the ICJ), Carnegieplein 2, 2517 KJ, The Hague (bureau@pca-cpa.org; tel: ++ (31) (70) 302 4165; fax: ++ (31) (70) 302 4167), or www.pca-cpa.org/).

These days, the PCA secretariat (the International Bureau) is very active. The PCA's name is misleading. It is *not* a court, but a permanent facility (with a courtroom, chambers, offices, library, secretariat services, model arbitration rules and a list of potential arbitrators) available to States and international organisations to help them conduct arbitrations, whether under the 1899 or 1907 Hague Conventions, or indeed otherwise. The cost of its services are met by the parties in dispute, although they are less than those of other arbitrations because the basic running costs of the International Bureau are met by the 109 parties to either of one or the other, or both, of the 1899 or 1907 Conventions. Since 1902, the PCA has provided various types of services to arbitrations. More recent examples include the *US* v. *UK Heathrow User Charges Arbitration* 1988–93[64] and the *Eritrea–Yemen Arbitration* 1996–2002.[65] The PCA has developed model clauses and procedural rules for fact-finding, conciliation and various types of arbitration.[66] Whatever the nature of the dispute, the parties are free to determine most aspects of the procedure and to decide the extent to which the International Bureau should be involved. It is increasingly involved with international commercial arbitrations between States or international organisations and private persons or entities, with the PCA Secretary-General often being called upon to designate arbitrators in default of their appointment by the parties. He is also the appointing authority in commercial arbitrations conducted under the UNCITRAL Arbitration Rules.[67] Until relatively recently the PCA was not that busy. But, by the end of 2008, the PCA had over thirty pending cases. Although some were between States, most were between States and non-State entities.

Mixed arbitral tribunals[68]

A mixed arbitral tribunal is so-called because it is established to deal with disputes that are not between two States, but between a corporation (and sometimes a natural person) and a foreign State (hence 'mixed'). Their most distinguishing feature is that the State of nationality and the other State have agreed that a claim can be brought *direct* to the tribunal; thus there is no need for the State of nationality of the claimant to be involved. And, generally, local remedies do not have to be exhausted.[69] ICSID and other tribunals dealing with investment disputes are the best known.[70]

Two important standing mixed tribunals were set up in the last quarter of the twentieth century to deal with the aftermath of very grave international situations. Both are still in existence (see below).

[64] 102 ILR 215. [65] 114 ILR 1 and 119 ILR 417.
[66] For example, the Optional Rules for Arbitrating Disputes between Two States 1992 (ILM (1993) 575).
[67] See p. 359 above. The International Bureau also services arbitrations under those Rules.
[68] See S. Troope, *Mixed International Arbitration*, Cambridge, 1990.
[69] See p. 406–7 above. [70] See p. 350 above.

Iran–United States Claims Tribunal[71]

Between 1979 and 1981, Iran held 52 US nationals (mostly diplomats) hostage[72] and expropriated US property. The United States responded by freezing Iranian assets, many of which had already been attached by US courts. Iran also had claims against the United States. The Tribunal was established by the so-called Algiers Accords 1981,[73] consisting of a General Declaration by Algeria setting out the commitments made to it by Iran and the United States and Undertakings by the two States, which altogether constituted a treaty.[74] Each State had to terminate all pending litigation between its nationals and the other State that had arisen out of the crisis, and prohibit further such litigation. The claims would then be dealt with solely by the Tribunal. The United States nullified attachments of Iranian assets. Assets frozen by the United States were transferred to the Netherlands Central Bank to be held in escrow, all but US$1 billion being released to Iran on the safe departure of the hostages. The sum retained was to satisfy awards by the Tribunal to US nationals, being topped up by Iran when it fell below US$500 million, which has been done many times. (The United States did not have to deposit money.) The United States revoked all trade sanctions and prohibited the pursuit of all prior or future claims against Iran which were not attributable to it.[75]

The Tribunal has jurisdiction over claims: (a) by Iranian nationals against the United States, and US nationals against Iran, arising out of the consequences of the hostage crisis, most claims being by corporations; (b) certain inter-State contractual claims of Iran and the United States; and (c) interpretation of the General Declaration. The jurisdiction is limited to claims about debt, contracts, expropriation and other property rights. Personal injury and property losses directly arising from the hostage-taking are excluded.

The Tribunal has nine judges, three appointed each by Iran and the United States and three by those six. But, in practice, it has been necessary for the PCA Secretary-General, as the Appointing Authority, to make some of the appointments. The Tribunal usually sits in chambers of three. It applies public international law and private international law, as appropriate.[76] It follows the procedure set out in the UNCITRAL Arbitration Rules,[77] modified to deal with a standing arbitration body handling a large number of claims. The Tribunal's awards are enforceable in the courts of any State.

[71] See www.iusct.org/. The address is Parkweg 13, 2585 JH, The Hague, Netherlands. See G. Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal*, Oxford, 1996; the some forty volumes of the *Iran–US Claims Tribunal Reports* (Iran–US CTR), from 1981 onwards, and now published by Cambridge University Press; and Collier and Lowe, pp. 73–83, for a concise but very useful overview.

[72] See the *US Consular and Diplomatic Staff in Tehran, ICJ Reports* (1980), p. 1; 61 ILR 502.

[73] See 1 Iran–US CTR 3; or ILM (1981) 223. [74] See p. 52 above.

[75] Such as certain acts by the revolutionary students. See pp. 379–82 above on attribution.

[76] See p. 1 above for an explanation of the difference. [77] See pp. 359–60 above.

Claims are presented by the nationals themselves, except that those under US$250,000 that are presented by the State of nationality, even though the claim remains that of the national. Some 3,800 claims were filed by the 1982 deadline, about 1,000 being for more than US$250,000. By the end of 2008, there had been nearly 4,000 awards, decisions or orders leading to over US$2 billion payable to US claimants, and over US$1 billion to Iranian claimants.

UN Compensation Commission[78]

Following the end of the (first) Iraq conflict, Security Council Resolution 687 (1991), paragraph 16, reaffirmed Iraq's liability under international law for any direct loss, damage or injury to other States, nationals and corporations as a result of its invasion and occupation of Kuwait, and paragraph 19 directed the Secretary-General to report on the establishment of a compensation fund and a commission to administer it.[79] By Resolution 692 (1991), the Council accepted his report and established the Fund and the UN Compensation Commission, located in Geneva. This was the first time the United Nations had set up such a body. Financing for the Fund is provided by a levy on the annual value of exports of oil by Iraq. Resolution 706 (1991) set this at a maximum of 30 per cent, later reduced to 25 per cent by Resolution 1330 (2000) and, following the second Iraq conflict, Resolution 1483 (2003), paragraph 21, reduced it to 5 per cent, which is paid into a UN account.

The Commission is a subsidiary body of the Security Council and administered by a Governing Council of fifteen, representing the current members of the Security Council, and has its own secretariat. Experts in law, accountancy, insurance, etc., nominated by UN Secretary-General, were appointed by the Governing Council as commissioners. Acting in their personal capacity, they sat on three-member panels to examine the claims. If there is no specific guideline in the Decisions of the Governing Council,[80] questions of international law were decided by the panels.[81]

Unlike the Iran–US Claims Tribunal (see above), the Commission's procedures differ from those of an arbitration, the basic question of liability having already been decided by the Security Council. The Commission is 'a political organ that performs an essentially fact-finding function of examining the claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims'.[82] It is therefore more like a national claims commission administering compensation received from another State responsible for an

[78] See www.uncc.ch/for the basic documents, rules, decisions and facts and figures. See also 109 ILR (all of it), and Collier and Lowe, pp. 41–4.
[79] See S/22559, and ILM (1991) 1703.
[80] See the website for Decisions, or 109 ILR 553–65 for Decisions 1–40.
[81] See, for example, *Egyptian Workers' Claim*, 117 ILR 195.
[82] Report of the UN Secretary-General, 2 May 1991 (S/22559), para. 20, and reproduced, with Guidelines, in ILM (1991) 1703.

international wrong done to the nationals of the injured State,[83] except that the amount available is not fixed.

Claims were usually submitted by States on behalf of their nationals. After a preliminary assessment by the secretariat, they were considered in private by the panels on the basis of the papers. There were formal hearings only in large or complex cases. The Governing Council then reviewed the recommendations of the panels and could modify the compensation. There was no appeal from the decisions of the Governing Council. Payment is in instalments, although the smaller claims have often been paid in full.

The most innovative aspect was the division of claims into six categories. Category 'A' claims were those by individuals who had to leave Iraq or Kuwait between 2 August 1990 and the ceasefire on 2 March 1991, compensation being fixed at US$2,500 per individual and US$5,000 for families; category 'B' claims were those by individuals for serious personal injury or death of a spouse, children or parents, with compensation set at US$2,500 for individuals and up to US$10,000 for families; category 'C' claims were those by individuals for up to US$100,000; category 'D' were those by individuals for over US$100,000; category 'E' were those by private or public corporations; and category 'F' were those by governments and international organisations. Category A and C claims were the largest in number and category F claims the largest in amount. Over 2.6 million claims (including those of about one million Egyptian workers) from some 100 States were submitted amounting to some US$300 billion. A bit less than 15 per cent of the amount claimed has so far been awarded. Claims in categories 'A' to 'C' were generally dealt with first and paid as a priority. The process of examining claims finished in 2005, and all payments to *individuals* were completed in 2007. By October 2008, over 2.68 million claims had been resolved, over US$52.5 billion awarded, and about one-half of this amount paid out.[84]

International Court of Justice[85]

(*Note*: Unless otherwise indicated, references in this section to articles are to those of the Statute of the Court.)

The International Court of Justice (ICJ) is the *principal judicial organ of the United Nations*, its Statute being an integral part of the UN Charter (Charter

[83] See p. 167 above.

[84] See www.uncc.ch/ for up-to-date information on the Commission's activities.

[85] Most of the material mentioned in this part can be found on the court's excellent website, www.icj-cij.org/. Its address is Peace Palace, Carnegieplein 2, 2517 ICJ, The Hague, Netherlands, tel; (31) (0) 70 302 2323; fax: (31) (0) 70 364 9924; for email, go to the website's home page and click on 'contact.' See also S. Rosenne, *The Law and Practice of the ICJ*, 3rd edn, The Hague, 1997; Collier and Lowe, pp. 124–85; Brownlie, pp. 701–25; Bowett (ed), *The ICJ: Process, Practice and Procedure*, BIICL, London, 1997 (n. 60 above); R. Jennings, 'The Internal Judicial Practice of the ICJ' (1988) BYIL 31; Lowe and Fitzmaurice (eds.), *Fifty Years of the ICJ*, Cambridge, 1996.

Article 92). Thus, those who work for the Court, including even the judges, are employed by the United Nations. But, like more recent international (but criminal) courts such as the ICTY and ICTR, which are *subsidiary bodies of the UN Security Council*, the ICJ zealously guards its independence from political interference. Nevertheless, and in particular when giving an advisory opinion requested by another organ of the United Nations, the judges have shown that they nevertheless appreciate the political aspects of the question posed. This may be why its advisory opinions can sometimes be controversial.[86]

The seat of the ICJ is the Peace Palace at The Hague, although it can sit elsewhere, and has undertaken a site visit abroad.[87] These days, there is much confusion among the public who, not surprisingly, confuse the ICJ with the ICC or even the ICTY – both of the latter being, to the delight of the Dutch, also in The Hague.

Being a permanent body, the ICJ has certain distinct advantages over arbitral tribunals. It is always available to hear cases, and the parties do not have to pay anything towards the costs of the ICJ itself, apart from what they pay anyway as part of their annual contribution to the UN budget. Although the ICJ has been criticised for being leisurely, it probably takes no more time to dispose of a complex case (and most cases coming before the ICJ are complex) than would an arbitral tribunal, yet at much less direct cost to the parties. Developing-country litigants may also be able to have part of their legal costs met from a trust fund administered by the UN Secretary-General, if the dispute is submitted to the ICJ by *compromis*.[88] The scope of the jurisdictional competence of the ICJ should be known in advance, as well as its procedure and practice. Moreover, since the ICJ has built up a huge body of jurisprudence, and the judges serve for nine-year renewable terms, States and their advisers may be somewhat better able to predict how it may deal with a particular dispute.

All these factors should enable the proceedings to take place more quickly, with less trouble to the parties and more cheaply, if that is what the parties want. In the two *Lockerbie* cases (begun in 1992), none of the three parties was keen to have an early trial on the merits, although for different reasons. Nor were some of the judges that keen. The ICJ therefore agreed to generous deadlines. Before a date was fixed for the trial on the merits, the cases were after eleven years discontinued by consent in 2003. This was to the great relief of the parties (and no doubt to the other permanent members), but most disappointing for the onlookers (and some of the judges) in view of the fundamental UN constitutional legal issue involved.[89]

Despite the number of new international or regional courts and tribunals established in recent years, the ICJ has never been busier. In July 1971, the ICJ

[86] See pp. 427–9 below and the advisory opinions on the *Legality of Nuclear Weapons*, *ICJ Reports* (1996), p. 226, para. 14; 110 ILR 163; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ICJ Reports* (2004), paras. 43–65; 129 ILR 37: ILM (2004) 1009.

[87] See *Gabčíkovo–Nagymaros Project*, *ICJ Reports* (1997), p. 3; 116 ILR 1; ILM (1998) 162.

[88] See www.un.org/law/trustfund/trustfund.htm.

[89] See p. 424 below.

had no cases pending. On 1 November 2007 the President of the ICJ told the UN General Assembly that the ICJ had essentially cleared its backlog of cases. But the number of cases is growing steadily, compared with thirteen at the end of 2004,[90] at the end of 2008, there were seventeen pending cases. This may not look that many, but all involve difficult points of law and fact.

Composition of the ICJ

Each of the fifteen judges sits for a nine-year term or, if he replaces a judge who dies or resigns before the end of his term, for the remainder of that term. A judge may be re-elected more than once, and have been. The seats are filled in accordance with an informal regional arrangement that ensures that the ICJ represents all the main legal systems of the world. The judges are usually three from Africa (one each representing civil law, common law and Islamic law), three from Asia, two from Eastern Europe, two from Latin America and the Caribbean and five from Western Europe and other (Western) States. In practice, there is always a judge of the nationality of each permanent member of the Security Council. Most of the judges have been either professors of law, appeal court judges or foreign ministry legal advisers. Some have not been specialists in international law, but that is not a requirement for election, or necessarily desirable.

Elections for five seats are held every three years at the autumn meeting of the General Assembly, the next being in 2011, the new judges taking office on 6 February of the following year. Elections for casual vacancies are held as necessary. Candidates are nominated usually by the national groups of each UN Member. To be elected, a candidate needs to have an *absolute* majority of the votes in both the General Assembly and the Security Council, but the veto does not apply (Article 10(2)). The two bodies vote simultaneously but separately, but because the Council is so much smaller the Assembly will always know how the Council voted. If not all places are filled by the first round of voting, further rounds are held. The ICJ elects its President and Vice-President for three-year, re-electable, terms.

A judge who is a national of a party to a case can still hear the case (Article 31 (1)). If the ICJ hearing the case does not include a judge of the nationality of a party, that party (often both parties) has the right to choose a judge ad hoc, who has all the powers of a substantive judge (Article 31(2), (3) and (6)). Since it would be improper for a judge to sit on a case if, for instance, he had advised on the dispute before he joined the ICJ, he must therefore recuse (i.e. excuse) himself (Article 24(1)). So, when Rosalyn Higgins (a UK national, and the first and, so far, only female ICJ judge and later President of the ICJ) joined the ICJ, she had to recuse herself from sitting on the *Lockerbie* cases, as well as others

[90] The cases brought by the Federal Republic of Yugoslavia against certain NATO Member States over the use of force during the Kosovo crisis have been counted as one.

where she has been counsel for one of the parties. From 1997, the United Kingdom therefore had a judge ad hoc in the *Lockerbie* cases.[91] Since Libya did not have a judge of its nationality on the ICJ, it also had a judge ad hoc.

Chambers

The ICJ can also sit in Chambers (Articles 26–28), the hearings also being in public. A Chamber has all the powers of the full ICJ, there being *no* appeal from its decisions to the full ICJ.[92] The ICJ can form Chambers of three or more of its judges to deal with particular categories of cases (Article 26(1)). In 1993, the first (and so far only) such Chamber, consisting of seven judges, was formed to hear environmental cases. At the time, it was fashionable in some circles to talk of the need for an international environmental court. Yet, all international environmental disputes involve several areas of international law, and so are better heard by the full ICJ, which has judges with wide knowledge and experience of international law in general, rather than be treated as special subjects to be sent to a judicial ghetto. This was well demonstrated in the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*[93] and *Fisheries Jurisdiction (Spain* v. *Canada)*[94] cases. In practice, most environmental disputes are not referred to international adjudication, most multilateral environment treaties providing at most for the parties to choose between dispute settlement by the ICJ or international arbitration.[95] It is therefore not surprising that the environmental Chamber heard no cases, and has now been abolished.[96]

The ICJ can also form Chambers ad hoc to deal with a particular case, and determining the number of judges with the approval of the parties (Article 26 (2)). The first ad hoc Chamber, of five judges, was formed in 1984 for the *Gulf of Maine (Canada/United States)* case. Although neither the Statute nor the Rules of ICJ appear to give the parties the right to choose which of the judges should sit, that is what happened.[97] Three other cases have been heard by ad hoc Chambers. Chambers have no apparent advantage over the full ICJ, and are no cheaper for the parties.

Jurisdiction

Only States can be parties to cases before the ICJ. It has no criminal jurisdiction, nor is it a court of appeal. Although the ICJ receives on average about 1,000 applications per year from individuals to deal with their case, neither they nor corporations, or even international organisations, can be parties to cases before

[91] See the preamble to the judgment on preliminary objections, *ICJ Reports* (1998), p. 9; ILM (1998) 587; 117 ILR 1.
[92] *Land and Maritime Frontier (El Salvador* v. *Honduras)*, *ICJ Reports* (1990), p. 3, at p. 4. Cf. the European Court of Justice and the Court of First Instance, pp. 438 et seq. below.
[93] *ICJ Reports* (1997), p. 3; 116 ILR 1; ILM (1998) 162. [94] *ICJ Reports* (1998), p. 432; 123 ILR 189.
[95] Although see p. 304, text to n. 4, above on the MOX litigation.
[96] See B, B & R, pp. 255–7. [97] Collier and Lowe, pp. 127–8.

the ICJ. The ICJ can request an international organisation to provide it with information relevant to a case before it, and must receive such information sent to it by an international organisation on its own initiative. Whenever the interpretation of the constituent instrument of an international organisation, or of a convention adopted under it, is in question before the ICJ, it must notify the organisation and send it all the written pleadings (Article 34).

Basis for jurisdiction

The ICJ has plenary subject matter jurisdiction in that, under Article 36(1), its jurisdiction 'comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties or conventions in force'. It is therefore not restricted to handling particular categories or types of civil disputes. All UN Members are *ipso facto* parties to the Statute of the ICJ. But that does *not* mean that they have agreed to the ICJ deciding any dispute between them and other UN Members. In more than the sixty years of its existence, the ICJ has had some 115 cases referred to it. This may not seem much, but each case is big and there is much in the way of pleadings and documentation. In the past there were many lean years, but now the ICJ is busier than ever before, particularly with disputes between developing States.

As with any other international tribunal, the ICJ can exercise jurisdiction only if that has been conferred on it by the parties to the dispute.[98] This can be done by one of the several means described at pp. 415 et seq. above, and which are encapsulated in Article 36(1). In practice, its jurisdiction has been founded roughly equally on compromissory clauses, *compromis* and reciprocal declarations, or two of such bases. In the 1980s, most cases decided on their merits were brought under *compromis*. In the last decade, jurisdiction has been based overwhelmingly in whole or in part on compromissory clauses. As to when there may be more than one basis for ICJ jurisdiction, see the speech of 31 October 2008 to the Sixth Committee of the UN General Assembly by the ICJ President.[99]

Reciprocal declarations

The Statute has a provision that parties to it have the option of making a declaration under Article 36(2) accepting, in relation to any other State accepting the *same* obligation, the compulsory jurisdiction of the ICJ. No *compromis*

[98] See the separate joint declaration by seven of the judges criticising the court's reasoning (although not its decision) in finding that it had no jurisdiction in *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)* (Preliminary Objections), *ICJ Reports* (2004). Cf. this judgment with one where the ICJ ruled that it *did* have jurisdiction (which is generally so): *Genocide: Convention on the Prevention and Punishment of the Crime (Croatia v. Serbia)* (Preliminary Objections), *ICJ Reports* (2008).

[99] See the ICJ website for the text.

is needed. At present only some sixty-six declarations have been made, although these are by less than one-third of UN Members, they constitute a wide geographical spread of States, half of them by developing countries. In only fifteen cases were declarations invoked as the sole basis for the ICJ's jurisdiction. Recently, the ICJ has accepted jurisdiction under the principle of *forum prorogatum*.[100]

From the date a declaration is deposited it creates obligations between the State making it and other States that make such declarations.[101] Once a State has deposited its declaration, it is said to have accepted the compulsory jurisdiction of the ICJ; although whether the ICJ has jurisdiction in a particular case depends on various factors. In practice, most disputes have been referred to the ICJ under compromissory clauses in some forty-seven cases, by *compromis* in sixteen cases and two on the basis of *forum prorogatum*. Jurisdiction established by matching declarations is not displaced by consent to other means of dispute settlement.[102]

Meaning of reciprocity

For the ICJ to have jurisdiction on the basis of two declarations under Article 36 (2), a declaration by one State requires that the other accept 'the same obligation'. Thus the essence of the ICJ's jurisdiction on this basis is reciprocity: a State can rely not only on its own reservations (see below), *but also on any made by the other State*. So, if two States have a dispute that arose in, say, 1990, and the declaration of one of them excludes disputes arising before 1995, the ICJ will not have jurisdiction.[103] In essence, therefore, jurisdiction amounts to the lowest common denominator of the two reservations.

Reservations

Article 36(5) recognises that conditions (usually referred to as reservations) may be attached to declarations, but this is implicit in the unilateral nature of the declarations. In fact, most declarations have been made subject to reservations. But, if the ICJ does not have jurisdiction because of a reservation, it may nevertheless have jurisdiction on another basis.[104] A limitation on the ICJ's jurisdiction under a compromissory clause, but not in a declaration, does not affect a declaration.[105]

[100] See p. 404 above.

[101] Although a declaration is a unilateral act, since the effect is to create bilateral agreements between the States, the declarations are registered by the United Nations under Art. 102 of the Charter, as to which see pp. 102 et seq. above. See *UN Multilateral Treaties*, C. I.4, at http://treaties.un.org/Pages/UNTSOnline.aspx, Ch I.4 and 654 UNTS 335 (No. 9370).

[102] *Cameroon v. Nigeria (Preliminary Objections)*, *ICJ Reports* (1998), p. 275, paras. 48–73.

[103] *Interhandel*, *ICJ Reports* (1959), p. 6, at p. 23; 27 ILR 475.

[104] *Nicaragua* v. *US* (Jurisdiction), *ICJ Reports* (1984), p. 392, paras. 77–83; 76 ILR 104; and *Guinea-Bissau* v. *Senegal*, *ICJ Reports* (1991), p. 53, paras. 22–9; 92 ILR 1.

[105] *Cameroon* v. *Nigeria* (Preliminary Objections), *ICJ Reports* (1998), p. 275, paras. 61–73.

The United Kingdom is the only permanent member of the Security Council to maintain a declaration. France and the United States withdrew theirs in 1974 and 1985, respectively. China, as represented by the PRC Government, did not recognise the declaration made previously by the Republic of China (Taiwan). The USSR/Russia has never made a declaration.

The previous UK declaration of 1 January 1969 illustrates some of the reservations that can be made. The declaration accepted, as compulsory *ipso facto* and without special agreement, on condition of reciprocity, until such time as notice might be given to terminate the acceptance, the jurisdiction of the ICJ over all disputes arising after 24 of October 1945, with regard to situations or facts subsequent to the same date, *other than*:

(i) any dispute which the United Kingdom
  (a) has agreed with the other party or parties thereto to settle by some other method of peaceful settlement; or
  (b) has already submitted to arbitration by agreement with any State, which had not at the time of submission accepted the compulsory jurisdiction of the International Court of Justice.
(ii) disputes with the government of any other country that is a Member of the Commonwealth with regard to situations or facts existing before the 1st of January 1969.
(iii) disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the ICJ's compulsory jurisdiction on behalf of any other party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the ICJ.[106]

The declaration also reserved the right at any time either to add to, amend or withdraw any of the reservations, or any that might later be added. On 5 July 2004, the UK declaration was replaced by a new one accepting the jurisdiction of the ICJ as before, but only in respect of disputes arising after *1 January 1974*, with regard to situations or facts subsequent to that date, other than:

(i) any dispute which the United Kingdom has agreed with the other party or parties thereto to settle by some other method of peaceful settlement;
(ii) any dispute with the government of any other country that is *or has been* a Member of the Commonwealth;
(iii) [as before].

The new (2004) declaration broadens the scope of the Commonwealth exclusion to cover not only any dispute with a Commonwealth country but also with

[106] The 1974 Declaration by India is to the same effect. In *Aerial Incident (Pakistan* v. *India)*, *ICJ Reports* (2000), p. 12, paras. 30–46; ILM (2000) 1116, the Court held it was effective to prevent it from having jurisdiction on the basis of Art. 36(2).

a *former* Commonwealth country.[107] The reason for this was that Mauritius had said that it was considering taking to the ICJ its dispute with the United Kingdom over the Chagos Archipelago.[108] But, since the ICJ would not have jurisdiction under the 1969 declaration (because of the first part of paragraph (ii) ruled out the jurisdiction of the ICJ in any dispute with a Commonwealth country), Mauritius had said publicly (and rather rashly) that it was considering leaving the Commonwealth so that the ICJ would have jurisdiction under the 1969 declaration. The new cut-off date for disputes (1 January 1974) replaced that of the entry into force of the UN Charter, so excluding any claim arising before 1974.[109]

When jurisdiction is based on declarations, the question of jurisdiction has of course to be decided by the ICJ. We will now look at the main types of reservation.

Exclusion of certain categories of dispute

Canada's declaration excludes disputes concerning certain fishing conservation measures taken by Canada, and their enforcement.[110] New Zealand excludes disputes about its rights in respect of the marine living resources within its EEZ. These represent just one general category of exclusions; a trawl through all the declarations will show other categories.

Resort to other means of settlement

A common reservation is on the lines of paragraph (i) of the (two) UK declarations to ensure that another State does not go 'forum-shopping'. But reliance on such a reservation has so far not been successful.[111]

Exclusions by reference to time

It is common to restrict the declaration to disputes arising, or facts or situations, subsequent to a certain date.[112] The effect of the chapeau and paragraph (ii) of the UK's 1969 Declaration was effectively to preclude the ICJ having jurisdiction in most disputes between the United Kingdom and former British territories concerning the colonial period. The UK's 2004 declaration also withdrew its consent to jurisdiction over any dispute arising before 1 January 1974.

[107] For the text of the current declaration, since it is not easy to navigate to find the text, it may be better to look at 2271 UNTS 285 (No. 9370).

[108] Formerly part of Mauritius, but detached from Mauritius in 1965 (when Mauritius was still a colony) to form, with some islands that had been detached from the (then) colony of the Seychelles, the British Indian Ocean Territory which was set up for defence purposes.

[109] *Hansard* (HC) 6 July 2004, WS 32, and (HL) 7 July 2004, WS 35.

[110] See *Fisheries Jurisdiction (Spain* v. *Canada)*, *ICJ Reports* (1998), p. 432, para. 14 et seq.; 123 ILR 189.

[111] See *Certain Phosphate Lands in Nauru*, *ICJ Reports* (1992), p. 240; 97 ILR 1.

[112] See *Interhandel*, *ICJ Reports* (1959), p. 6, at pp. 10–11; 27 ILR 475; and the other cases described in Collier and Lowe, pp. 146–8.

Self-judging reservations

The US declaration of 1946 (withdrawn in 1985) included the so-called Connally amendment that purported to exclude from the ICJ's jurisdiction disputes that were essentially within US domestic jurisdiction 'as determined by the United States'.[113] Other States have made similar reservations. Their validity has been considered in a few cases, but the ICJ has not yet ruled definitively whether they are invalid and, if so, what the consequences are.[114] The second question raises a problem similar to certain reservations to treaties: whether (a) the ICJ could sever the invalid reservation from the declaration; or (b) the whole declaration is tainted by it, and therefore is invalid and provides no basis for jurisdiction.[115] The latter alternative is instinctively unattractive to any court, but is probably correct. Although a declaration creates bilateral obligations, it is a unilateral act. The State has said it will accept the jurisdiction subject to that reservation. If it is held to be invalid, but the State refuses to withdraw it, then an essential condition for the State's acceptance of the ICJ's jurisdiction has not been met.

Vandenberg amendment

The US declaration also included the so-called Vandenberg amendment concerning disputes arising under a multilateral treaty: the ICJ would not have jurisdiction 'unless (1) all parties to the treaty affected by the decision are also parties to the case before the ICJ or (2) the United States of America specially agrees to jurisdiction'. The United States invoked this reservation in the *Nicaragua* case, arguing that, since Nicaragua argued that the US was in breach of the UN Charter, all UN Members would have to be parties to the case. The ICJ held that the reservation applied *only* to States whose rights and obligations would be affected by its judgment. As El Salvador would be affected, yet was not a party to the proceedings, the ICJ decided that it could not exercise jurisdiction on the basis of the Charter, but nevertheless could do so on another basis.[116]

Variation of declarations

A State can vary the terms of its declaration only if it has reserved the right to do so (as in the UK declarations).[117] If it has not reserved that right, it would have to withdraw the whole declaration and replace it with a modified one. If a declaration is for an indefinite period, it can be withdrawn either in accordance

[113] On similar, and more recent, US so-called constitutional reservations to treaties, see p. 70 above.

[114] See Collier and Lowe, pp. 143–6. [115] See p. 69 above.

[116] *Nicaragua* v. *US* (Military and Paramilitary Activities) (El Salvador Intervention) (Order), ICJ Reports (1984), p. 215; (Jurisdiction) (1984) *ICJ Reports* (1984), p. 392, paras. 6, 68–74, 87; 76 ILR 104

[117] See *Right of Passage*, *ICJ Reports* (1957), p. 6; 24 ILR 840; and *Nicaragua* v. *US*, *ICJ Reports* (1984), p. 392; 76 ILR 104.

with a reservation to that effect in the declaration or, if not, by analogy with a treaty,[118] only after the expiry of a reasonable notice period.[119] If a declaration is withdrawn or lapses[120] this will not affect the ICJ's jurisdiction if it has already has been seised of the case.[121]

Admissibility

This topic has been dealt with at p. 406 above. Respondents often plead that a claim is inadmissible, but the argument rarely succeeds. But, there are a few cases where the ICJ decided that it could not exercise its evident jurisdiction. The jurisprudence of the ICJ shows that it will reject claims that are hypothetical and lacking any real purpose,[122] those which have become moot[123] or those in which the applicant State has no legal interest.[124]

It will also decline to exercise jurisdiction if a State that is not a party to the proceedings has a legal interest that would put it at the centre of the case. The *Monetary Gold* case concerned the ownership of gold removed by Italy from Albania in 1943, but Albania was not a party to the proceedings. Since Albania's legal interest was the 'very subject matter' of the decision the ICJ was being asked to make, the ICJ refused to exercise jurisdiction.[125] In the case of *East Timor* (then a Portuguese colony annexed unlawfully by Indonesia), Portugal brought proceedings against Australia concerning the latter's treaty with Indonesia purporting to delimit the continental shelf between Timor and Australia. Applying the *Monetary Gold* judgment, in 1995 the ICJ refused to exercise jurisdiction as the 'very subject matter' of its judgment would have been to determine whether Indonesia could have concluded the treaty, yet Indonesia was not a party to the proceedings.[126] But, in the *Certain Phosphate Lands* case, the ICJ did not find that the interests of non-parties (New Zealand and the United Kingdom), which might well be affected by its judgment, were the 'very subject matter' of the case. In that event, a third party has the option of intervening.

Intervention by third parties

Article 62 gives the ICJ discretion to allow a third State to intervene in proceedings if it has 'an interest of a legal nature which may be affected by the decision in the

[118] But see *Fisheries Jurisdiction (Spain* v. *Canada)*, *ICJ Reports* (1998), p. 432; 123 ILR 189.
[119] See *Nicaragua* v. *US*, *ICJ Reports* (1984), p. 392, at p. 420, paras. 52–66; 76 ILR 104.
[120] Article 36(3) allows declarations to be made for a certain time (duration).
[121] *Nottebohm*, *ICJ Reports* (1953), p. 121, at p. 123; 20 ILR 567.
[122] *Northern Cameroons*, *ICJ Reports* (1963), p. 15; 35 ILR 353.
[123] *Nuclear Tests*, *ICJ Reports* (1974), (Australia) p. 253, paras. 21 et seq.; and (New Zealand), p. 457, paras. 21 et seq.; 57 ILR 348.
[124] *South West Africa*, *ICJ Reports* (1966), p. 6; 37 ILR 243.
[125] *ICJ Reports* (1954), p. 32; 21 ILR 399. [126] *ICJ Reports* (1995), p. 90, paras. 33–6; 105 ILR 226.

case'. Article 81(2) of the Rules of ICJ requires the third State to specify the interest, the precise object of the intervention, and any basis of jurisdiction that is claimed to exist between the third State and the parties, even though this last stipulation is not required by Article 62. The legal interest must be specific to the applicant, not merely general. So far, the ICJ has agreed to an intervention only twice. In 1990, in the *Land, Island and Maritime Frontiers* case,[127] a Chamber allowed Nicaragua to intervene on one of the five matters it had raised in respect of which it had demonstrated a legal interest that might be affected by the judgment. In particular, and despite what the Rule says, the Chamber did not require the applicant to show any jurisdictional link with the parties, such a link not being necessary since an intervener does *not* become a party to the case. It has only the right to be heard, and in any event decisions of the ICJ bind only the parties and in respect of the particular case (*res judicata*) (Article 59). In 1999, the ICJ authorised Equatorial Guinea to intervene in the *Land and Maritime Boundary between Cameroon and Nigeria* case,[128] but in 2001 the ICJ refused the request by the Philippines to intervene in *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/ Malaysia)*, as it had not demonstrated a legal interest.[129]

The applicable law

Article 38(1) requires the ICJ to decide cases in accordance with international law, and lists the sources.[130] Article 38(2) allows the ICJ to decide a case *ex aequo et bono*, if the parties agree. This is not the same as following equitable principles, but involves compromise and conciliation. So far, the ICJ has not been asked to decide on this basis.[131]

Non-appearance

If one of the parties fails to appear before the ICJ,[132] or to defend its case, the other party may call upon the ICJ to decide in its favour (Article 53). When this has happened – five times so far – the ICJ has always given judgment. But, it must first be satisfied that it has jurisdiction (or not merely prima facie jurisdiction), and that the claim is well founded in fact and in law.[133]

Provisional measures/interim measures of protection[134]

The Statute uses the term 'provisional measures', which means interim measures of protection, and are sometimes called that. The purpose of such measures

[127] *ICJ Reports* (1990), p. 92; 97 ILR 154. [128] *ICJ Reports* (1999), p. 1029.
[129] *ICJ Reports* (2001), p. 579. [130] See p. 5 above. [131] See Brownlie, pp. 26–7 and 720.
[132] 'Appearance' is a legal term for a formal act acknowledging an application made to the Court, but the act does not prevent a challenge being made by the 'actor' to the jurisdiction of the Court.
[133] See further Collier and Lowe, pp. 180–2.
[134] See S. Rosenne, *Provisional Measures in International Law*, Oxford, 2004.

is similar to an injunction in domestic law: to prevent the respondent from doing something that might render any eventual judgment more or less futile. Article 41 gives the ICJ power 'to indicate any provisional measures which ought to be taken to preserve the respective rights of either party'. There 'must be an imminent risk of irreparable prejudice to the rights of' the requesting party.[135] The applicant may seek such measures urgently at the start of the proceedings, and they can be granted so long as the ICJ considers that prima facie it has jurisdiction.[136] Even when there is no clear need for such measures, given that the hearing of the next stage could be two or more years away, an applicant may find it a useful way of publicising its complaint early on. Requests for provisional measures have proliferated in recent years. In the ten years between 1974 and 1983, only one request was made; in the twenty years between 1984 and 2004, there were fourteen, although this partly reflects the increasing number of cases before the ICJ.

The ICJ is willing to order provisional measures if there is a real possibility that without them the rights of the applicant would be affected. In *Genocide Convention (Bosnia* v. *Yugoslavia)*, the ICJ ordered the respondent to take all measures within its power to prevent genocide.[137] In contrast, in *Lockerbie*, the ICJ (by eleven to five) declined to order provisional measures. Libya had asked for them in order to prevent the United Kingdom and the United States from seeking a Security Council resolution requiring Libya to surrender the two accused of the sabotage and imposing sanctions until it did. Three days after the hearing of the application, and before the ICJ could give its decision, the Security Council adopted just such a resolution (Resolution 748 (1992)). The ICJ found that, in view of Articles 25 and 103 of the UN Charter, all the parties were bound by the resolution and that prima facie it prevailed over the parties' obligations under the Montreal Convention (the subject of the case), and so the rights claimed by Libya under the Convention could not now be regarded as appropriate for protection.[138]

In contrast, the ICJ can order provisional measures if it finds that, prima facie, it has jurisdiction over the dispute. This is just commonsense. Even if there may be some doubt as to the whether the ICJ really does have jurisdiction (which issue may not be resolved for some years), that is no reason not to protect the applicant by provisional measures when to refuse them because of some doubt over jurisdiction could cause it harm.[139]

[135] See *Pulp Mills (Argentina v. Uruguay)*, *ICJ Reports* 2007, p. 1, esp. paras. 49–50; ILM (2006) 1025.

[136] See *Cameroon* v. *Nigeria*, *ICJ Reports* (1996), p. 13, at p. 21, paras. 30–1.

[137] *ICJ Reports* (1993), p. 3; ILM (1993) 888; 95 ILR 1.

[138] *ICJ Reports* (1992), p. 3, at paras. 30–43; ILM (1992) 662; 94 ILR 478. The decision in the parallel proceedings brought against the US was the same.

[139] *Case concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Request for the Indication of Provisional Measures *ICJ Reports* (2008), p. 1, esp. paras. 141–8.

Previously, it was not clear if the ICJ's indication of provisional measures was *legally binding*, several having been ignored. In *La Grand*, the ICJ declared that it is binding.[140] This is particularly important since Article 41(2) requires the ICJ to inform the Security Council of the measures. Now that it is clear that they are binding, the Council may wish in suitable cases to adopt its own measures to reinforce those ordered by the ICJ.

Judicial review?

The two *Lockerbie* cases[141] raised the issue of whether the ICJ could judicially review the substance of decisions of the UN Security Council, in particular legally binding measures adopted under Chapter VII, and hold them *ultra vires* the Charter. Although the cases had begun in February 1992, they were discontinued by consent in September 2003, and so the matter was never decided. Nevertheless, despite the enormous amount of academic speculation,[142] all the indications are against the ICJ having this power. Neither the Charter nor the Statute suggests that it has such a power, and the San Francisco Conference rejected a Belgian proposal to give the ICJ such a power.[143] The ICJ has already denied that it has such a power.[144] If it did have the power, it could severely hamper the effectiveness of the Security Council; one would never know if and when the substance of a resolution might be questioned before the ICJ, which might be many years after the resolution had been adopted.

Procedure and practice

The Registrar of the ICJ is the source of all knowledge on procedure and practice and should be consulted at all important stages of the proceedings. But any State contemplating proceedings should also study carefully the ICJ's Statute, Rules of ICJ (which set out the procedure in detail) and, most importantly, the current Practice Directions.[145] In recent years, the ICJ has tightened

[140] *La Grand Case (Germany v. United States)* ICJ Reports (2001), p. 466, para. 109; 134 ILR 1; ILM (2001) 1069. See also *Case concerning Avena and other Mexican Nationals (Mexico v. United States)*, ICJ Reports (2004), p. 12, paras. 69–70; 134 ILR 95; ILM (2004) 581. See also (2002) ICLQ 449 and (2002) LQR 35. Under Art. 290 of the UN Convention on the Law of the Sea 1982, provisional measures prescribed by ITLOS are clearly binding (see pp. 301–2 above).

[141] See n. 41 above.

[142] See the references in Shaw, p. 1268, n. 316.

[143] France, the USSR, the UK and the US were all opposed. See Doc. 2, G/7(k)(l), 3 UNCIO Doc. 335, 336 (1945); Doc. 433, III/2/15, 12 UNCIO, Docs. 47 (1945), at p. 49 and Doc. 498, III/2/19, 12 UNCIO, Docs. 65 (1945), at pp. 65–6.

[144] *Expenses* (Advisory Opinion), *ICJ Reports* (1962), p. 151; 34 ILR 281; and *Namibia*, *ICJ Reports* (1971), p. 6; 49 ILR 2. Both were *advisory* proceedings where an UNSC resolution was in issue, an additional reason which suggests that there would be no grounds for a power of judicial review in *contentious* proceedings.

[145] All this material, judgments, and much else about the Tribunal, are on the court's excellent website, www.icj-cij.org/ under 'Basic Documents'. On working methods, see Bowett (n. 60 above); and R. Higgins, 'Running a Tight Courtroom' (2001) ICLQ 123–32. See also Riddell and Plant, *Evidence before the ICJ*, BIICL, London, 2009.

its procedure and practice to deal with the inordinate length of many written and oral pleadings, and so speed up its work.

The applicant must lodge with the Registrar a concise written application outlining the facts and the legal basis for the proceedings, a joint application being made if the case comes by means of a *compromis*. The parties must each appoint Agents. In practice, the Agent is often more of a formal figure, the day-to-day running of the case being done by the deputy-agent, and the pleadings often drafted by outside counsel.[146] (The international bar has predominantly been a coterie of anglophone or francophone international jurists who appear in most of the cases.) The applicant will then submit a memorial, to which the respondent responds with a counter-memorial. These are followed by a reply and a rejoinder. But, preliminary objections to the jurisdiction or admissibility are frequently raised by the respondent following receipt of the applicant's memorial, and could be lodged at any time before the filing of the counter-memorial. But, since 1 February 2001, ICJ has required that, in all cases submitted to it thereafter, any preliminary objections must be made not more than three months after delivery of the memorial. Today, the ICJ does enforce its rules.

After receiving the response of the applicant, the ICJ will hear oral arguments on the preliminary objections and take a decision,[147] although sometimes it will leave those oral arguments for the merits stage. Although *simultaneous* written pleadings may appear to save time, the procedure is generally not efficient, as each side has to anticipate as best it can the arguments of the other, and so another round of pleadings is usually necessary. Although simultaneous written pleadings have been used in proceedings brought under a *compromis*, the ICJ strongly discourages them in *all* cases.

Oral pleadings will also be held on the merits. Unless there is oral evidence (not that usual), the hearings consist of set speeches. It is fairly rare for any of the judges to ask a question during the oral pleadings. Any questions are generally read out by the judges only at the completion of oral arguments, the parties being then given a couple of weeks to reply in writing. Judgment is given at a further public hearing. Each judge can, and often does, also make a separate declaration or give a separate concurring or dissenting opinion.

The official languages of the ICJ are English and French, and each party can use whichever language it prefers. The ICJ can, at the request of a party, authorise the use of another language (Article 39), but any text in that language must be accompanied by a translation into English or French. If oral pleadings or evidence are given in an unofficial language, the party concerned must

[146] See also Bowett (n. 60 above), pp. 12–18.

[147] Sometimes the ICJ will deal with at least some of the merits as part of a decision on preliminary objections, but only when it has enough of the facts: *Territorial and Maritime Dispute (Nicaragua v. Colombia) Preliminary Objections*, *ICJ Reports* (2007), p. 1, paras. 50–2; ILM (2007) 1053.

arrange, at its own expense, for interpretation into one of the two official languages.

Judgments

Effect, interpretation and revision

Since its inception in 1946, the ICJ had delivered over 100 judgments. This may not seem many when compared to a senior national court, but the basis of jurisdiction is very different, and only latterly has the ICJ been actively used by States to settle their disputes. Article 59 provides that a decision (e.g. judgment) of the ICJ has no binding force except between the parties and in respect of the particular case. In other words, it is *res judicata*.[148] Article 60 provides that a judgment of the ICJ is 'final and without appeal'. If there is a dispute between the parties as to its meaning, either can ask the ICJ to construe it, but it will only do so in respect of questions decided in the judgment.[149] It will revise the judgment only if there is a new fact that was not discoverable at the time of the case, and is of such a nature as to be a decisive factor that would mean revision of at least part of the judgment.[150]

The ICJ has been criticised for not providing sufficiently reasoned arguments for its decisions.[151] This may have been due to the civil law approach of some of the judges who felt that the role of the ICJ was to make decisions, not to develop the law. That is now changing, although, as the 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[152] shows, sometimes the reasoning can be rather brief, although this may just reflect deep disagreements on what are highly (and politically) charged issues.[153]

Compliance and enforcement[154]

Each UN Member is obliged to comply with a judgment of the ICJ in any case in which it is a party, but, unlike the Members of the Council of Europe, the European Union or the World Trade Organization, UN members are not obliged even to be parties to an ICJ case unless they have consented to its jurisdiction.[155] But that does not mean that compliance will always be quick or

[148] See the discussion by the ICJ of *res judicata* in its final judgment in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports* (2007), p. 1, paras. 114–40.

[149] *Asylum*, *ICJ Reports* (1950), p. 395, at p. 402; 17 ILR 339. See also, Request for Interpretation of the Judgment of 31 March 2004 in *Avena (Mexico* v. *United States)*, *ICJ Reports* (2009), p. 1, esp. paras. 11–20.

[150] *Tunisia/Libya Continental Shelf*, *ICJ Reports* (1985), p. 192. paras. 11–40; 84 ILR 419.

[151] See, for example, A. Aust, 'The Future of the Judicial Function' (1998) *Finnish YB of International Law* 81.

[152] *ICJ Reports* (2004), paras. 13–65; 129 ILR 37; ILM (2004) 1009.

[153] See p. 208, n. 78 above on the way the self-defence issue was handled, or rather, mishandled.

[154] See C. Schulte, *Compliance with Decisions of the International Court of Justice*, Oxford, 2004.

[155] On consent, see pp. 401 et seq. above.

that the dispute will not erupt again. Despite the judgment in *Temple of Preah Vihear*,[156] forty-five years later, in 2008, the territorial dispute between Cambodia and Thailand began again. The dispute is long-standing and concerns a piece of jungle only some 1.8 sq. m. large, of which ownership was not decided by the judgment. Nigeria only handed over the Bakassi peninsular to Cameroon some four years after the ICJ had found for Cameroon.[157] If it fails to comply, the other party may ask the Security Council to take action (Article 94). If the Council determines that the non-compliance is a threat to international peace and security, it can adopt a binding measure under Chapter VII requiring compliance and, if necessary, imposing sanctions.[158] The Council has not yet exercised this power. In 1986, the United States twice vetoed draft resolutions calling on it to comply with the ICJ's judgment in *Nicaragua* v. *United States*.[159] Security Council Resolution 915 (1994) established an observer group to monitor Libyan withdrawal from a previously disputed area in accordance with an agreement by the parties on implementation of the ICJ's judgment in *Libya* v. *Chad (Territorial Dispute)*.[160] Mr Meddelin was executed in Texas on 5 August 2008, the US Supreme Court having decided that Texas was not bound by the ICJ judgment.[161]

Advisory opinions

Article 65 authorises the ICJ to give 'an advisory opinion on any legal question' at the request of whatever body may be authorised by, or in accordance with, the Charter to make such a request. If the matter is urgent, the ICJ can give an opinion quickly, even within a couple of months as in the PLO case (see below). But, the ICJ has a *discretion* not to give an opinion, although so far it has always done so when the request was proper.

Under Article 96 of the Charter, the General Assembly and the Security Council may request advisory opinions. Other UN organs and UN specialised agencies, if so authorised by the General Assembly, may also request advisory opinions 'on legal questions arising within the scope of their activities'. The request of the World Health Organization for an opinion on the legality of the use by a State of nuclear weapons, was not proper since it was not 'within the scope of [the WHO's] activities'. The WHO was only entitled to consider the effects of the use of such weapons on the environment and health; it was not authorised to concern itself with the legality of their use.[162] But the ICJ did accept and advise on a similar request from the General Assembly, since that UN organ it is entitled to concern itself with questions of legality.[163] The ICJ has so far given twenty-five advisory opinions.

[156] *ICJ Reports* (1962), p. 6; 33 ILR 48.
[157] See (*Cameroon v. Nigeria*) (*Merits*), *ICJ Reports* (2002), p. 302. [158] See further p. 195 above.
[159] See S/18250 and records of meetings 2704 and 2718. [160] *ICJ Reports* (1994), p. 4; 100 ILR 1.
[161] *Medellin* v. *Texas* S. Ct 1346 (2008). [162] *ICJ Reports* (1996), p. 66, para. 20; 110 ILR 1.
[163] See p. 184 above.

A State cannot ask for an advisory opinion, but all States are entitled to address the ICJ in writing or orally about a request for an opinion, and any international organisation considered by the ICJ as likely to be able to furnish information on the question is notified of the request. They can then file with the ICJ written statements or make oral statements at a public hearing of the ICJ. They may also comment, in writing or orally, on the statements of others (see Article 66).

Requests for opinions may concern disputes between States or between a State and an international organisation. On some occasions, a party to a dispute is an international organisation, and where there is a treaty providing that disputes about the interpretation or application of the treaty may be referred to the ICJ for an advisory opinion, the treaty may also provide that the opinion shall be binding on the parties. In the *Cumaraswamy* case, the request was made under section 30 of the General Convention on the Privileges and Immunities of the UN 1946, which provides that if the ICJ is asked to give an advisory opinion on a dispute between the UN and a Member, the opinion 'shall be accepted as decisive'.[164]

The ICJ's approach to requests was discussed comprehensively in the 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[165] Article 68 provides that in exercising its advisory functions the ICJ shall further be guided by the provisions of the Statute which apply in contentious cases to the extent that it recognises them to be applicable. Article 102(2) of the Rules of ICJ requires the ICJ to 'above all consider whether the request … relates to a legal question actually pending between two or more States'. But the ICJ has not refused to give an opinion even when the rights of a State were in issue. Provided the request is about a legal question, the political context in which the request is made is relevant only to the 'propriety' of giving the opinion.[166] An opinion given to the United Nations is to help it in its work, so there must be 'compelling reasons' to decline a request.[167] But, the fact that in the *Legality of Nuclear Weapons* Advisory Opinion the ICJ split evenly on the most difficult question (which was then decided only by the casting vote of the President) illustrates the difficulties inherent in asking the ICJ to advise on matters which are most unlikely to be resolved by any formal legal process, but rather by politics, which is even more difficult.[168] The legal issue may well be only one aspect of a multifaceted

[164] See *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Advisory Opinion* ('Cumaraswamy Case'), *ICJ Reports* (1999), p. 62; 121 ILR 405.

[165] *ICJ Reports* (2004), paras. 13–65; 129 ILR 37; ILM (2004) 1009. See article by S. Breau (2005) ICLQ 1003–13.

[166] *Western Sahara*, *ICJ Reports* (1975), p. 12, paras. 23–74; 59 ILR 14.

[167] *Legality of Nuclear Weapons*, *ICJ Reports* (1996), p. 226, para. 14; 110 ILR 163; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ICJ Reports* (2004), paras. 43–65; ILM (2004) 1009.

[168] *Legality of Nuclear Weapons* (n. 167 above), para. 105(2) E.

dispute, and the question may lack balance. This is exemplified by the advisory opinion on the *Legality of Nuclear Weapons*.

The fact that a request for an opinion requires only a simple majority of those actually voting in the UN General Assembly (abstentions do not count) means that, unlike most treaties adopted by the General Assembly these days, a question which has a large political element will very often not reflect a consensus of the membership.[169] In Resolution A/RES/63/3 of 8 October 2008 (i.e. early in the session) the UN General Assembly asked the ICJ for an advisory opinion on whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was in accordance with international law. The request had 77 votes for it, 6 against and 74 abstentions. It is instructive to analyse the voting. All but about 14 members who voted for the resolution were developing States. Of those 14, many had secession problems. Of the 74 who abstained, there were the some 36 developing States and 38 western States. The 28 who were absent were overwhelmingly developing States.

The ICJ acceded to the request, but will not give its opinion until at least 2010. If they are wise, the judges may restrict themselves to an exhaustive survey of the two main theories of recognition; state the facts, both incontrovertible and disputed, of this case; and then leave each State to draw its own conclusion.

Unless the basis for the request provides otherwise,[170] an advisory opinion is not binding, but is usually influential with the States that are directly affected by it, as was the case with the PLO opinion.[171] It may also result in steps being taken by the General Assembly or the Security Council.

Although there are other permanent universal international courts or tribunals, in contrast to the ICJ their jurisdiction is restricted by their constituent instruments to more specific areas of international law.

[169] See UNGA Res. ES-10/14 of 8 December 2003. [170] See *Cumaraswamy* (n. 165 above).
[171] *ICJ Reports* (1988), p. 12; 82 ILR 225; ILM (1988) 808.

23

The European Union

The immense popularity of American movies abroad demonstrates that Europe is the unfinished negative of which America is the proof.[1]

Wyatt and Dashwood's European Union Law, 5th edn, London, 2006 ('Wyatt and Dashwood')
European Communities Legislation: Current Status, Butterworths, London, 3 vols., loose-leaf
http://europa.eu

Introduction

Beginning in 1958 with only six Member States, the European Union (the Union) had by the end of 2009 developed into a partnership of twenty-seven States. Although the Union has only 7 per cent of the world's population, it has some 20 per cent of the world's imports and exports. The collective gross domestic product (GDP) of EU Member States has now overtaken that of the United States, and they have a greater combined population.[2] Just as a basic knowledge of the complexities of the US Constitution or the UN Charter, and how each actually works, is necessary for anyone concerned with international relations, so an understanding of the Union and its laws and procedures is just as important. Any company exporting to, or selling within, the Union must comply with EU law. Many non-EU States and some of their regions have offices in Brussels, as do many large, non-EU companies. Given the combined population of the Union, and the collective economic power wielded by its Member States, the Union has for some time been an important player in international relations, although perhaps not as effective as it could be. Having established itself as a regional international organisation worthy of being a party in its own right to certain universal treaties, it is of particular interest as a subject of international law.

[1] Mary McCarthy, *New York Times*, 16 February 1980, p. 12.
[2] For more statistics, try the EU Statistical Office, Eurostat.

A brief history

The European Union has grown relentlessly from the modest proposal in 1950 of the French Foreign Minister, Robert Schumann (born appropriately in Luxembourg and who had a Franco-German education), for a fusion of the French and German coal and steel industries as a first step in building (as he envisaged) an eventual European federation that would make a future war between France and Germany impossible. The first founding treaty, to create the European Coal and Steel Community (ECSC) and so establish a common market in coal and steel, came into being in 1952 with France, Germany, Italy and the Benelux countries (Belgium, Luxembourg and the Netherlands) as the initial members. On 25 March 1957, the so-called Treaty of Rome, establishing the European Economic Community (EEC), and a treaty establishing the European Atomic Energy Community (Euratom), were signed, both entering into force the following year. The Treaty establishing a Single Council and a Single Commission of the European Communities 1965 (Merger Treaty) resulted in the three[3] European Communities being served by the same institutions.

The (Maastricht) Treaty on European Union 1992 (TEU) entered into force in 1993. It created a new overarching entity, the European Union, which it expressed to be 'founded on the European Communities, supplemented by the policies and forms of co-operation established by' the TEU, that is Title V, Common Foreign and Security Policy (CFSP), and Title VI, Police and Judicial Co-operation in Criminal Matters (PJCCM).[4] The TEU also renamed the EEC the European Community (EC). The Treaty of Amsterdam 1997 entered into force in 1999, its main successes being reform of the legislative process and the consolidation and renumbering of the separate texts of the treaties. The Nice Treaty 2001 made some small changes, which need not detain us.

A Treaty establishing a Constitution for Europe was formally adopted in 2004, but never entered into force. Instead, it was replaced by the so-called Lisbon Treaty 2007 (see page 446 below). It entered into force on 1 December 2009 after ratification by the Member States.[5] It will affect some of what now follows, including the numbering of articles. (See the end of this chapter for a summary of the main changes which the Lisbon Treaty makes.)

Member States

Denmark, Ireland and the United Kingdom[6] joined the original six members of the European Communities in 1973, Greece in 1981, Portugal and Spain in

[3] With the expiry of the ECSC Treaty in 2002, the EC Treaty applied also to coal and steel.

[4] PJCCM had previously been described as cooperation in the fields of Justice and Home Affairs (JHA), but later the Treaty of Amsterdam transferred visas, immigration, refugees and judicial cooperation in civil matters to Title IV of the EC Treaty.

[5] See p. 60 above on what ratification *really* means; and p. 432 below on nomenclature.

[6] French President de Gaulle had previously vetoed the UK's accession in 1963 and 1967.

1986, Austria, Finland and Sweden in 1995, and Cyprus,[7] the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in 2004.[8] Bulgaria and Romania joined on 1 January 2007. Croatia is the next in line. The accession of Turkey is problematical. An applicant State must conclude a treaty of accession with the existing members, which all the Member States must then ratify before the applicant can become a Member. A treaty of accession makes the necessary institutional changes and certain agreed modifications, including transitional provisions, to the obligations of the new Member State to accommodate its particular needs and situation.[9]

European Communities, European Community or European Union?

Given the complex arrangements outlined above, it is small wonder that there was some confusion as to what to call this regional organisation. It began as three separate organisations: the ECSC, EEC and Euratom (the three then being referred to collectively as the European Communities). Following the Merger Treaty 1965, the ECSC and Euratom became much less important as separate organisations. The TEU 1992 reflected this by renaming the EEC the European Community (EC). The TEU also established the new entity, the European Union (EU), *but it did not replace the European Communities*. Rather, it supplemented them by two new processes: the Common Foreign and Security Policy (CFSP) and the Police and Judicial Co-operation in Criminal Matters (PJCCM). It was generally the European Community that was party to treaties with third States.

The structure created by the TEU has been likened to a (rather badly designed) Ancient Greek temple having only three pillars surmounted by a pediment. The middle pillar (and certainly the fattest) represented the European Community, flanked by rather thin second and third pillars representing the CFSP and the PJCCM respectively.[10] The pediment (the triangular bit at the top) contained the common institutions, political values, objectives, and amendment and accession procedures. However, this deceptively simple image hid the fact that the common institutions operated with different powers, procedures and legal consequences, depending on the substance of the matter, so the image of a Gothic cathedral might have been closer to the complex reality.

But the heart remained the first pillar, the European Community, without which the edifice would have collapsed. Unlike the CFSP and the PJCCM, the

[7] Since the northern part of Cyprus is still under Turkish occupation (see p. 19 above), at present only the southern part, controlled by the Government of the Republic of Cyprus, is in fact within the EU.

[8] Apart from Iceland, Liechtenstein, Norway and Switzerland, all the other members of the European Free Trade Area (EFTA) established in 1960 (that is Austria, Denmark, Finland, Sweden, Portugal and the United Kingdom) have left it and joined the European Union.

[9] For example, Denmark was allowed to keep its serious restriction on ownership by foreign nationals (including EU nationals) of land in Denmark.

[10] For an unforgettable image, see Wyatt and Dashwood, p. 328 (10–005).

work of the European Community covered several large subject areas, and the resulting acts by the Council of Ministers were subject to the sophisticated legal order created by the EC Treaty and the judgments of the European Court of Justice, in particular the primacy of EC law and its direct effect.

But, now that the Lisbon Treaty has entered into force, the correct term is now the European Union, or simply, the Union. Therefore, in a spirit of optimism – and for simplicity – like the EC website (which had rather jumped the gun), *this book refers primarily to the European Union and EU bodies*, even though, as a matter of law, and in contrast to the European Community, the European Union (as established by the Maastricht Treaty) was very much smaller and weaker than the European Community. Furthermore, in the past the European Union was not generally accepted as having international legal personality. Accordingly, in contrast to the European Community, it was party to few treaties. References in this chapter to 'the Treaty' is therefore primarily to the EC Treaty, as amended. Now that the Lisbon Treaty has entered into force, for matters happening thereafter most references to 'the Treaty' will then be to that treaty and the changes that it makes to both the EC and EU treaties. I hope that is clear? It is all a bit of a mess.

Note: article numbers are of the *consolidated* versions of either the amended EC Treaty, or the Treaty on European Union (TEU), that were prepared after the Nice Treaty 2001 by the European Commission for illustrative purposes. Unless otherwise indicated, articles cited are those of the consolidated EC Treaty. (For the consolidated texts of the treaties, go to http://europa.eu> the click on your language >The EU at a glance >Treaties and the law > and then scroll down to 'Complete consolidated texts').

Institutions

The fundamental aim of the European Union (the Union) is to bring its Member States closer together economically, socially and politically. The Union has become an extraordinarily complex regional organisation, in terms of the founding treaties, its procedures and its legislation. This chapter will therefore outline the structure of the Union and how it works. It will not attempt to describe the substantive law developed by the Union for more than fifty years in the areas of, for example, a customs union, the single market, competition, the common agricultural policy, free movement of persons, the right of establishment and social policy. For that, one must consult more detailed books.

The following is a description of the European Union *before* the Lisbon Treaty entered into force on 1 December 2009. (As explained at p. 446 et seq. below, it has changed with the entry into force of the Lisbon Treaty.) Five main institutions serve the Union: the Council of Ministers, the Commission, the European Parliament, the European Court of Justice and the Court of Auditors (for the European Council, see page 434 below). The Council of Ministers and the Commission are located in Brussels; the European Court of

Justice and the Court of Auditors in Luxembourg. The Parliament commutes (at great expense) between Strasbourg and Brussels. The powers of each institution are limited to those conferred on it expressly or impliedly by the founding treaties.

Council of Ministers

The Council of Ministers is composed of ministers from each of the twenty-seven Member States, the Presidency rotating every six months. The General Affairs Council is composed of foreign ministers, and the Economic and Financial Affairs (Ecofin) of finance ministers. The Council of Ministers also meets regularly to deal with agriculture, the environment, the internal market and transport, the relevant national ministers attending. The Council of Ministers (*not* the Commission or the European Parliament) has the final power of decision on primary legislation, such as regulations and directives. (Only Euro-sceptics think (or say) that the European Union is a federation and that we are ruled by faceless, unaccountable 'Brussels bureaucrats'.) But, unlike many international organisations, seeking consensus is not normal practice. A few decisions of the Council of Ministers require unanimity, which means only the absence of negative votes, abstentions not being counted.[11] But, most decisions are taken by qualified majority vote (QMV).[12] These days, the so-called Luxembourg compromise[13] is very rarely invoked. In practice, its effectiveness depends on a Member, which claims that a proposed decision subject to QMV would adversely affect one of its vital interests, persuading enough members constituting a blocking minority to abstain from voting.[14]

The Committee of Permanent Representatives (COREPER) prepares the work of the Council of Ministers, the groundwork being done by specialist working groups. The Council of Ministers, COREPER and the working groups are assisted by a General Secretariat, headed by the Deputy Secretary-General. The staff of the Secretariat is employed by the Council of Ministers and have their *own* legal service.

The Council of Ministers must not be confused with the *European Council*. The latter consists of the Heads of State or heads of government of the Member States, and was chaired by the Member State holding the Presidency of the Council of Ministers (Article 4 of the TEU). The European Council met at least once during each half-year. Its role was essentially political, providing strategic direction, and occasionally resolving major disagreements. It could also take important decisions having legal effect. The then Treaty, as amended, referred to the European Currency Unit (ECU). When in 1995 the Member States decided to replace the ECU with the euro, instead of amending the Treaty, which would have involved a lengthy ratification procedure and national parliamentary

[11] Cf. Voting in the UN Security Council, pp. 194–5 above. [12] See p. 445 below.
[13] *EEC Bulletin*, March 1966, pp. 8–10. [14] Wyatt and Dashwood, pp. 72–3 (3–010).

scrutiny, the European Council formally decided that instead of the generic term ECU, the specific name euro would be used. This effective amendment of the Treaty was possible under the law of treaties, since the members of the European Council represented, and were acting on behalf of, all the parties.[15]

Commission

The nominee for President of the Commission is agreed by the Member States by 'common accord', in effect by consensus. His appointment is subject to the approval of the Parliament. The other Commissioners are each nominated by their Member State, and are subject to the approval of the governments of the other Member States and the President-designate. The agreed nominees are then subject to the approval of the Parliament (Article 216). The Commissioners serve a five-year term, but can be reappointed. Although the Commission acts as one body, the President assigns each Commissioner a portfolio, such as transport, competition, trade, etc. The staff of the Commission is headed by the Secretary-General and are organised into Directorates-General and other services, including the Commission Legal Service.

The Commission, like the secretariat of any international organisation, is independent of the Member States. But, in contrast to other international secretariats, most decisions taken by the Council of Ministers under the Treaty are the result of an initiative by the Commission. Almost all legislation enacted by the Council of Ministers has been proposed and drafted by the Commission. But, under the TEU, the Commission has no exclusive right of initiative, but shares it with the Member States. The Commission also implements legislation when given this power by the Treaty or by the Council of Ministers (Articles 7(1) and 202). The Council of Ministers may also authorise the Commission to make subordinate legislation, such as for the common agricultural policy, or exercise coercive powers in relation to competition policy.

On matters for which the European Union (as properly so-called until the Lisbon Treaty entered into force) has exclusive competence, the Commission represented it internationally (see Article 300).

Parliament

Although it does not have all the powers of a democratic national parliament, and is not at all close to those who elect them, the Parliament has grown from a talking shop (until 1987 it was called the Assembly) to something more like a real parliament with actual power over the Council of Ministers and the Commission. The parliamentary term is fixed at five years.

[15] Conclusions of the Madrid European Council 1995 (*Bulletin of the EC*, 12–1995, p. 10). On the law of treaties point, see p. 85 above.

Since 1979, the European Parliament has been directly elected by universal suffrage in accordance with national electoral laws. In the present Parliament, elected in June 2009, the number of seats allocated to each Member State was reduced from 785 to 736, and allocated as follows: Germany (99), France, Italy and the United Kingdom (72), Spain and Poland (50), Romania (33), Netherlands (25), Belgium, the Czech Republic, Greece, Hungary and Portugal (22), Sweden (18), Austria and Bulgaria (17), Denmark, Finland and Slovakia (13), Ireland and Lithuania (12), Latvia (8), Slovenia (7), Cyprus, Estonia, and Luxembourg (6) and Malta (5). This was increased by the Lisbon Treaty to 750 seats at the next election in 2014 (see page 447 below).

The increase in the powers of the Parliament relates to three main areas. It now participates actively in the legislative process (see below); it exercises political supervision over the performance of the Commission, whose members attend parliamentary sessions and committees and are required to respond to written or oral questions (Article 197); and it constitutes the budgetary authority, in which role it is an equal partner with the Council of Ministers.[16] Although the Parliament has no right of initiative, in practice it can bring varying degrees of pressure on the Council of Ministers and the Commission. Ultimately, the Parliament can by a censure motion (carried by a two-thirds majority of the votes cast and representing a majority of the MEPs) force the resignation of all the Commissioners (Article 201). Although not yet used, it probably would have been if the Santer Commission had not resigned in March 1999 in response to pressure from the Parliament following a report by the Court of Auditors on fraud, mismanagement and nepotism within the Commission.

Court of Auditors

The Court of Auditors is governed by Articles 246–248. Its structure and status are in some ways similar to the Court of Justice, and it also sits in Luxembourg. Its twenty-seven members, one for each Member State, are chosen generally from persons who are, or were, members of national audit bodies. The Court of Auditors examines the accounts of the Union's revenue and expenditure, taking its decisions by a simple majority. The Court of Auditors has no disciplinary powers, but can withhold approval of the accounts, as it has done for the last several years.

(The Court of Justice is dealt with at p. 438 below.)

Legislative procedure

Given the areas covered by the Union, it has produced an enormous amount of legislation. The legislative process is elaborate and involves the Commission, Parliament and, lastly, the Council of Ministers. The procedure is specified in

[16] See Wyatt and Dashwood, pp. 44 et seq. (2.013).

the provisions in the Treaty that authorise action in particular areas, and is known as the 'legal basis'. Action usually requires an initial formal proposal by the Commission, which will then draft a text. But the final decision lies with the Council of Ministers. Although the Parliament has no role to play in legislation relating to the common commercial policy (Article 133), in other areas it either has a consultative role or exercises a power of 'co-decision' with the Council of Ministers.

Consultative procedure

Although this procedure has been largely superseded by co-decision, it still applies to legislation on, for example, the Common Agricultural Policy, indirect tax harmonisation, aspects of environmental protection and certain European Monetary Union matters. Although the Council of Ministers can consider the proposal by the Commission while the Parliament is also studying it, the Council cannot take a final decision until it has received the Opinion of the Parliament (even if that is delayed), unless it first invokes the emergency procedure (Article 196) or requests an extraordinary session of Parliament.[17] If the Commission later amends the substance of its proposal, or the Council of Ministers intends to amend the text, the Parliament must again be consulted, unless the change is to accommodate a wish of Parliament. There is also a procedure whereby the Parliament can request a meeting of a Conciliation Committee at which the Council of Ministers and Parliament can discuss proposed Council of Ministers' amendments.[18]

Co-decision procedure

Under this procedure (which is not formally described as 'co-decision'), the Commission submits its proposal to the Council of Ministers and the Parliament at the same time. There then follows an elaborate procedure, which may involve compulsory conciliation. If the process is eventually successful, the final text is signed by the Presidents of the Council of Ministers and the Parliament (Articles 251–254).[19] But, since 1999, most legislation has been adopted by QMV[20] in co-decision with the Parliament.

EU law

EU law consists principally of the Treaty and related treaties between the Member States, including accession treaties; EU legislation (for example, regulations and directives); judgments of the Court of Justice and the Court of First Instance; general principles of law, including fundamental human rights; treaties between the

[17] Ibid., pp. 57–61 (3–005). [18] Ibid., pp. 61–6 (3–006).
[19] The complex procedure is described with a helpful chart at ibid. p. 62. [20] See p. 445 below.

Union and third States; and treaties with third States binding on all the Member States where the responsibilities of the latter have been assumed by the Union.

The Treaty and legislation

The Member States have a legal obligation to comply with the obligations in the Treaty and with legislation made under it. The distinctive feature of EU law is that it is *directly applicable* in the Member States, and in many cases it has *direct effect* (Article 249(2)). *Direct applicability* means that, if a provision in the Treaty, or in EU legislation made under it, is capable of being applied in Member States without further action by them, it becomes part of their law without the need for it to be incorporated.[21] *Direct effect* means that a provision that gives rise to rights for natural or legal persons can be enforced against Member States in their courts,[22] and sometimes against other natural or legal persons.[23] Whether a provision has direct effect is a matter of interpretation. Although a regulation is *directly applicable* and Member States need do nothing to incorporate it, they have a duty to implement directives by legislation, the form and method being a matter for each Member State. But, until this is done, the directive will in law still have *direct effect*.[24] Member States must also enact supplementary domestic legislation if this is necessary to give full effect to EU legislation, including the creation of criminal offences for breaches of it.

Supremacy of EU law

It has long been established that EU law prevails over any inconsistent national law, present or future. A Member State cannot plead its national law to excuse a failure to comply with an obligation under EU law.[25]

Court of Justice[26]

One hears of Brussels bureaucrats ruling us. In fact, not only do those who work for the Commission not make legislation (that is done by the Council of

[21] Because of its dualist approach to treaties (see pp. 75–6 above), s. 2(1) of the UK's European Communities Act 1972 provides that Community law is enforceable in the United Kingdom without further action by Parliament. No doubt other EU Member States that have dualist constitutions did something similar.

[22] *Van Gend & Loos* (Case 26/62); [1963] ECR 1, at 12. But the annex to a regulation is not legally binding until it has been published in the EU Official Journal: see the decision of the ECJ of 1 April 2009 in *Gottfried Heinrich* (Case C-345/06).

[23] *Walrave & Koch* (Case 36/74); [1974] ECR 1405.

[24] See S. Prechal, *Directives in European Community Law*, Oxford, 2005; and see *Robins* v. *Secretary of State* (Case C-278/05) decided by the ECJ on 25 January 2007; and *Byrne* v. *Motor Insurers' Bureau* [2008] EWCA Civ 574.

[25] *Commission* v. *Italy* (Case 39/72); [1973] ECR 101; *Costa* v. *ENEL* (Case 6/64); [1964] ECR 585. And cf. Art. 27 of the VCLT 1969, p. 75 above.

[26] See, A. Arnell, *The European Union and its Court of Justice*, 2nd edn, Oxford, 2006.

Ministers), but the European Court of Justice (ECJ) ensures that rights under EU law are upheld. The ECJ sits in Luxembourg. It has twenty-seven judges (one for each Member State) assisted by eight Advocates-General. All serve six-year terms, renewable for up to two terms of three years. They have not necessarily held judicial office before, some having been practising lawyers or academics. The ECJ sits either as a Grand Chamber of thirteen judges, if a Member State or an EU institution so requests, or in chambers of three or five depending on the importance or difficulty of the case. The full Court of twenty-seven sits only for certain disciplinary matters or in cases of exceptional importance (Article 16 of the Statute of the ECJ).

The role of the Advocate-General is taken from the civil law system. He is treated as a Member of the ECJ, but does not take part in the judgment stage. Once the parties to the case have concluded their written and oral submissions, the Advocate-General prepares and presents to the ECJ an independent and impartial Opinion analysing the facts and the law, identifying the issues and recommending a decision. Often the ECJ's judgment will closely follow the Advocate-General's Opinion, sometimes adopting his reasoning completely. In practice, the ECJ seeks a consensus, but if this is not possible its judgment is decided by a simple majority. Unlike the International Court of Justice, there are neither dissenting nor separate judgments.[27]

The jurisdiction of the ECJ is threefold: (a) to hear claims by the Commission or a Member State that a Member State has failed to comply with an EU obligation, or for compensation for non-contractual liability (Articles 226–228 and 235);[28] (b) claims by EU institutions or natural or legal persons that an act of an institution is invalid (Article 230); and (c) preliminary rulings on a reference from a national court (see below).

When interpreting EU law, the ECJ looks more to the object and purpose (teleological approach) of a provision and its context.[29] This is partly because the text in the language of each Member State is equally authentic, and partly because of poor drafting and translation.[30] *Travaux préparatoires*[31] are seldom considered. When a case raises a matter of Union-wide importance, the ECJ may do a comparative analysis of the laws of the Member States.

The ECJ will usually follow its previous judgments (precedents), but is not required to do so. This means that even statements of law that are not necessary for the judgment can be equally persuasive.[32]

[27] See Wyatt and Dashwood, p. 396 (12–008).
[28] See *Commission* v. *Ireland* (Case C-459/03) decided on 30 May 2006. On ICJ jurisdiction, see p. 415 above.
[29] Cf. the approach of international tribunals to treaties, pp. 82 et seq. above.
[30] See *R.* v. *Bouchereau* (Case 30/77); [1977] ECR 1999, paras. 13–14. [31] See p. 87 above.
[32] On the ECJ's methods of working, see *Wyatt and Dashwood*, pp. 404–12 (12–014 to 018).

Court of First Instance

Since 1989, the ECJ has had under it a Court of First Instance (CFI), which also sits in Luxembourg. It has twenty-seven judges, one from each Member State. Their terms of appointment are as for the judges of the ECJ. The CFI seldom sits in plenary session, most of its business being conducted in Chambers of three or five judges giving, like the ECJ, a single judgment. Since 1999, a single judge can deal with simple cases. There are no advocates-general, although any of the judges (apart from the President) can be asked to perform the functions of an advocate-general, although this is rare. There is an appeal from a judgment of the CFI to the ECJ on a point of law only, and therefore preliminary rulings under Article 234 cannot be sought from the CFI (Article 225).

The CFI has jurisdiction in all cases brought by natural or legal persons against the Union or its institutions, and all such actions must be begun in the CFI. The CFI was created to relieve the ECJ of some of the burden of the increasing number of pending cases and so shorten the time it takes the ECJ to give its judgment. In 1988, pending cases had more than doubled as compared to 1980 (767, up from 328). It still takes the ECJ some two years to dispose of a case, and the CFI somewhat less. The CFI was also intended to engage in a more detailed investigation of the facts than the ECJ is able to do, and this the CFI has done.

The Court and the CFI can exercise only very limited jurisdiction over CFSP and PJCCM matters (Articles 35 and 46 of the TEU).

Preliminary rulings

Since most questions of EU law will be raised in the courts or tribunals of Member States, it is vital for the proper functioning of the EU legal order that there should be uniform interpretations. Article 234 provides a means whereby any court or tribunal (which is interpreted liberally)[33] may seek a 'preliminary ruling' from the ECJ (not the CFI) concerning (a) the interpretation of the Treaty, (b) the validity and interpretation of acts of EU institutions (regulations, directives, etc.)[34] and the European Central Bank (ECB) and (c) the interpretation of the statutes of bodies established by an act of the Council of Ministers where the statute so provides. The ruling is binding on the national court or tribunal and may require it not to apply even a subsequent national law. 'Preliminary' refers only to the fact that the court or tribunal must apply the ruling to the facts of the case when giving judgment, *not* that the ruling is provisional.

[33] *Vaassen* v. *Beamtenfonds Mijnbedriff* (Case 61/65); [1966] ECR 261.

[34] See *Apostolides* v. *Orams* (Case C-420/07) in which the ECJ, on a preliminary ruling, on held of 28 April 2009 that the court of a Member State could rule on the ownership of land in a part of that State over which the State did not exercise effective control. The State was Cyprus, and the land was in the TRNC: see p. 19 above.

The request (or reference) can be made only while proceedings are pending. Where a question of EU law is raised by a party to the case or by a national court or tribunal, and it considers that a decision on the point is necessary to enable it to give judgment, it may request a preliminary ruling. Although a court or tribunal therefore has a discretion, unless it has complete confidence that it can deal itself with the issue of EU law, it should make a reference.[35] But, where the question is raised before a court or tribunal against which there is no judicial remedy (*inter alia*, a final court of appeal), that court or tribunal *must* request a preliminary ruling. The reference by the national court or tribunal should be self-contained and self-explanatory, setting out the basic facts of the case and posing a general question of EU law, not the issue as it needs to be decided on the particular facts. It should plausibly explain why a ruling is needed or run the risk of the ECJ refusing to give one.[36] The parties, any Member States and the Commission may submit written and oral observations to the ECJ, as can the Council of Ministers, the Parliament or the European Central Bank if an act for which they are responsible is in issue.

Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters

The Council of Ministers plays a much more dominant role in CFSP and PJCCM. Although the Commission can take initiatives in those areas, in practice it is the Member States, in particular the Presidency, which take the lead. The Parliament has to be consulted, but is not directly involved in the decision-making. The Member States play a larger role due to the very different range of instruments available under these two pillars. Under the CFSP, the Council of Ministers adopts 'common strategies', 'joint actions' and 'common positions' (Article 12 of the TEU). Under the PJCCM, the Council of Ministers adopts 'framework decisions' and 'conventions' (Article 34(2)). The former are rather like directives in that they are binding on Member States, *but* leave it to each Member State how to implement them. The latter are treaties to which Member States are free to become, or not become, parties.

Furthermore, CFSP decisions on common strategies require unanimity (abstentions are ignored), although when *implementing* a common strategy, or adopting a joint action or common position, a qualified majority is all that is needed, unless the decision has military or defence implications. If a Member State declares that for 'important and stated reasons of national policy' it intends to oppose adoption of a decision by qualified majority, a vote must not be taken, although the Council of Ministers can, again by a qualified

[35] See Bingham MR in *R.* v. *Stock Exchange, ex parte Else (1982) Ltd* [1993] 1 All ER 420, at 426.
[36] See the Note for Guidance on References by National Courts for Preliminary Rulings 1996, [1997] All ER (EC) 1. For a recent example of a preliminary ruling, see *R. (Age Concern)* v. *Secretary of State* (Case C-388/07) of 5 March 2009.

majority, ask the European Council to take a decision by unanimity (Article 23 of the Treaty of European Union (TEU)). Under the PJCCM, the Council must act unanimously when adopting framework decisions and conventions. Unless it provides otherwise, a convention enters into force (for the ratifying States only)[37] once at least half of the Member States have ratified. Measures implementing conventions are adopted within the Council of Ministers by a majority of two-thirds of the parties.

Legal personality and treaties

Here we need revert to the 'old' wording to explain the point properly. The European Community and Euratom each had legal personality in the law of each Member State (Articles 281 and 282). (See below about the European Union now.) It is also now accepted by most non-Member States that the European Community and Euratom also had *international* legal personality in their particular areas.[38] Each would therefore conclude treaties with States on subjects for which it has competence, and did so on many occasions.[39] Where the European Community had *exclusive* competence, the Member States could no longer conclude treaties that deal only with those subjects.[40] It was for the European Community alone to enter into such treaties, provided of course that the other negotiating States agreed to this. But, where competence was shared between the European Community and its Member States, or where the area of application of a treaty included overseas territories of Member States,[41] both the European Community and the Member States can become parties. Such a treaty was known as a 'mixed agreement'. There are some treaties, such as ILO conventions, to which Member States are parties, but which do not allow for the European Community to be a party even if it had exclusive competence for the subject matter. In those cases, the Member States that are parties to the treaty had an obligation to protect the interests of the European Community. But these internal matters are of no direct concern to the other parties.

Where there was shared competence, such as for social security matters, the Member States could still conclude bilateral treaties with third States, or with each other, although in doing so they had to, ensure that the treaty is consistent with EU law. To protect Member States' rights when the European Community alone concluded a treaty on a subject of shared competence, the Member States usually insisted on the inclusion of what is known as a 'Canada Clause', which declares that the Member States retain power to enter into treaties on the

[37] See p. 73 above. [38] See p. 180 above.
[39] See generally, P. Eeckhout, *External Relations of the European Union*, Oxford, 2004.
[40] See p. 444 (competence) below.
[41] For example, the Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR), 402 UNTS 71 (No. 22301); ILM (1980) 837; UKTS (1982) 48; TIAS 10240; B&B Docs. 628.

subject.[42] Some treaties contain a provision under which the European Community could make a 'declaration of competence' about the respective competences of itself and its Member States with regard to the matters covered by the treaty.[43]

But the Treaty of European Union did not confer international legal personality on the European Union. Before the Lisbon Treaty entered into force the Union had no generally accepted international legal personality. This may well have been for political reasons, some Member States not wishing to enhance the status of the European Union in this way. So, when the Member States wanted to conclude a treaty with a third party within the CFSP and PJCCM fields, the Council of Ministers concluded it. This changed of course when the Lisbon Treaty entered into force.[44]

Human rights

Article 6 of the Treaty of European Union (TEU) confirmed what the Court of Justice had previously held, that the European Union must respect, as general principles of EU law, the fundamental rights guaranteed by the European Convention on Human Rights 1950 (ECHR). This is hardly surprising given that all Member States are also bound by the ECHR. Article 46(d) of the TEU gave the Court of Justice jurisdiction over human rights questions with regard to action by the institutions. Naturally, human rights must also be respected by Member States when implementing EU measures.[45] At present, the Union is not a party to the ECHR, and therefore the European Court of Human Rights has no jurisdiction over EU institutions. However, Article 17 of Protocol No. 14 to the ECHR provides for the European Union to accede to the ECHR, although this cannot happen until all the parties to the ECHR have ratified the Protocol. At present only Russia has yet to ratify the Protocol.

The Charter of Fundamental Rights was proclaimed on 7 December 2000 by the European Council.[46] Its fifty articles were not legally binding but reflected and confirmed human rights that are already legally binding on Member States as parties to the ECHR, or are taken from Council of Europe conventions or EU directives. Because the Charter included certain social and economic rights, the scope of which may still not be clear, it remained somewhat controversial. (See also pp. 197–8 above about Article 103 and the *Kadi* judgment.)

[42] See MacLeod, Hendry and Hyett, *The External Relations of the European Communities*, Oxford, 1996, pp. 234–5. The name of the clause has nothing to do with Canadian federalism, but because the clause was first used in a Canada – EC treaty of 1976, OJ 1976 L260/1.

[43] See Art. 5 of Annex IX to the UN Convention on the Law of the Sea 1982, 1833 UNTS 397 (No. 31363); ILM (1982) 1261; UKTS (1999); and Art. 47 of the Fish Stocks Agreement 1995, 2167 UNTS 3 (No. 37924); ILM (1995) 1542; UKTS (2004) 19.

[44] See p. 446 below. See Aust MTLP, pp. 417–19 for the previous position.

[45] *Wachauf* (Case 5/88); [1989] ECR 2609, para. 19.

[46] ILM (2001) 266.

There now follows short pieces on some of the more common terms and which you will find used when discussing EU institutions.

Acquis communautaire

This phrase (or '*acquis*' for short) only means what the European Community/Union has achieved and built upon: constituent treaties, legislation, general principles, judgments of the Court of Justice or Court of First Instance, treaties between the European Community/Union and non-Member States, etc. An applicant for membership therefore has to accept the *acquis*, subject only to those detailed modifications that are acceptable to the existing members and included in the accession treaty.[47]

Competence

This is shorthand for where power and responsibility for a particular matter lies: with the European Community/Union or Member States, or is shared (Article 5). The Lisbon Treaty should make this even clearer than it is now.

Comitology

Comitology means implementation of EU legislation by the Commission with the help of a specialist committee.[48]

European Economic Area

This confusing name was created by a 1992 agreement between the European Community/Union and the remaining members of the European Free Trade Area (EFTA),[49] under which the latter enjoy the benefits of the single market, but without the full privileges and responsibilities of EU membership. The EEA agreement now applies only to Iceland, Norway and Liechtenstein. Switzerland, a Member of EFTA, has not ratified the 1992 agreement.

Languages

The European Community/Union has twenty-one official languages: Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek,

[47] See the text to n. 9 above.
[48] See J. Klabbers, *An Introduction to International Institutional Law*, 2nd edn, Cambridge, 2009, pp. 161–3.
[49] See p. 432, n. 8, above.

Hungarian, Irish,[50] Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish and Swedish. EU legislation is issued in all the languages and, in principle, meetings are interpreted into all the languages. Working groups and other informal meetings are conducted in, at most, English and French. Much to French chagrin, in practice, English has generally become the main working language.

Qualified majority voting

Certain provisions of the founding treaties provide for adoption by the Council of Ministers of a proposal from the Commission to be done by qualified majority voting (QMV). This requires at least 255 votes cast in its support, provided they are cast by at least a simple majority of the members (i.e. fourteen) or, depending on what the treaty provides, the 255 votes must be cast by at least two-thirds of the members (i.e. eighteen). In addition, when a decision is to be adopted by QMV, any Member may request verification that the members constituting the majority represent at least 62 per cent of the total EU population. If they do not, the decision is not adopted.

The 345 votes in the Council of Ministers are allocated as follows: France, Germany, Italy and the United Kingdom (29 each), Poland and Spain (27 each), Romania (14), the Netherlands (13), Belgium, the Czech Republic, Greece, Hungary and Portugal (12 each), Austria, Bulgaria and Sweden (10 each), Denmark, Finland, Ireland, Lithuania and Slovakia (7 each), Cyprus, Estonia, Latvia, Luxembourg and Slovenia (4 each) and Malta (3). The Lisbon Treaty changes this (see below).

Schengen

This is shorthand for the 1990 Agreement[51] (signed in the Luxembourg town of that name) abolishing (internal) immigration checks on travellers between the EU Member States (and now also non-EU Member States, Iceland and Norway), except Ireland, the United Kingdom and the twelve new members who joined since 2004, once they have abolished their border controls with other Schengen States. The Schengen countries have a common visa policy for third-State nationals, who once they have entered a Schengen country with a visa issued by that country are then free to travel anywhere within the Schengen area. Under the Agreement, internal checks on anyone are allowed only for a limited period when they are necessary for national security or public order reasons.

Subsidiarity

This contrived term means merely that EU decisions should be taken as closely as possible to the citizen. Unless a matter is one for which the EU has exclusive

[50] Irish is used only in the founding treaties. [51] ILM (1991) 68.

competence, the EU should not act unless that would be more effective than action at the national, regional or local level (Article 5).

The Lisbon Treaty

The Treaty of Lisbon ('the Lisbon Treaty') amended the Treaty establishing the European Community and the Treaty on European Union by effectively merging the two. The Member States adopted the Lisbon Treaty on 13 December 2007.[52] It was intended to enter into force on 1 January 2009, but since an Irish referendum rejected it, a second referendum was held on 2 October 2009, which had a positive result. The Lisbon Treaty was duly ratified[53] by all twenty-seven Member States and entered into force on 1 December 2009.

Although it makes some important changes, the legal effect of the Lisbon Treaty is rather less than the Constitution for Europe 2004 (which was rejected in referendums in France and the Netherlands) would have made.[54] The Constitution would have replaced the current founding treaties, so making the changes look more radical than they would in fact have been. The Lisbon Treaty does not do this. Instead, it is in reality a simplified version of the Constitution, although not so user-friendly (see below). Despite what Euro-sceptics would have us believe, neither it nor the Constitution was a radical development. Neither would have given primacy to EU law, since that principle was established long ago; nor would either have made the European Union a State; nor would they have given competence to the Union in many new areas: decisions on tax harmonisation still need unanimity. But, the Lisbon Treaty makes it slightly clearer that the Union is the creation of the Member States who, by coming together, can pursue their common goals more effectively.

Although the Lisbon Treaty has only seven articles, they and the fifteen Protocols amend the present founding treaties (consistent instruments) of the European Community and the European Union. So, the Lisbon Treaty has to be read together with the founding treaties (constituent instruments) it amends. Thus, it is much more difficult to understand than the Constitution. Also, many of the articles of the founding treaties will change their number: see Article 5 of, and the Annex to, the Lisbon Treaty. So, *informal* consolidated texts have been produced, including Tables of Equivalences.[55] The main changes made by the Lisbon Treaty are:

- To merge the European Community and the European Union (but *not* Euratom) into one organisation, the European Union (the Union), with

[52] Go to http://europa.eu > The EU at a glance >Treaties and law.

[53] See p. 60 above on what ratification really means.

[54] For a comprehensive account of the abortive Constitution, see Piris, *The Constitution for Europe*, Cambridge, 2006.

[55] Go to: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML, the Tables being at p. 361 et seq. of the consolidated text, in English. (Nothing about the European Union is simple!)

one founding treaty, the Lisbon Treaty, yet retaining special procedures for foreign policy, security and defence.

- To confer legal personality on the Union, so that all treaties with States and other international organisations would be entered into by the Union.
- To provide that the *European Council* would comprise the Heads of State or Government of the Member States, the President of the Council and the President of the Commission. (The Lisbon Treaty does *not* replace the *Council of Ministers*, just changes its name – see below). The President of the European Council now holds office for a term of two-and-a-half years. The European Council takes decisions by consensus unless the founding treaties provide otherwise.
- To rename the *Council of Ministers* as the Council – which will be most confusing.
- To provide that from 2014, qualified majority voting (QMV) in the Council would be based on a double majority of Member States and people. Thus, adoption of a proposal would require the support of at least 55 per cent of the Member States (i.e. fifteen out of twenty-seven) representing at least 65 per cent of the population of the Union. For a minority to prevent adoption of a decision, it would therefore have to include *at least* four large Member States, so making it that much more difficult for them to block adoption. Also, Council members representing at least three-quarters of a blocking minority, whether at the level of Member States or population, could require a vote to be postponed so that discussions can continue for a reasonable time in an attempt to reach a broader basis for consensus.
- To create the High Representative for the Union in Foreign Affairs and Security Policy (i.e. EU Minister of Foreign Affairs). He or she takes part in the work of the European Council, but not in its decisions.
- To provide that, although there would be only one Commissioner per Member State, after 2014 the number of Commissioners would correspond to two-thirds of the Member States, the Commissioners being chosen according to a system based on a strict rotation among the Member States. The President of the Commission, and the High Representative for the Union in Foreign Affairs and Security Policy, would each be a Commissioner, the latter being a vice-president of the Commission.
- To limit the Parliament to a maximum of 750 seats, with a minimum of six (Malta) and a maximum of ninety-six (Germany) seats for each Member State.
- To strengthen the Parliament. It has more powers over legislation, the EU budget and treaties. Extending the co-decision procedure means that almost all EU legislation is now adopted jointly by the Council and the Parliament, so putting the Parliament on a more equal footing with the Council.
- To clarify how the competences are distributed; the Union has *exclusive* competence for monetary policy (but this would apply only to those Member States which have replaced their national currency with the euro),

the common commercial policy, customs union and Common Fisheries Policy (although as it is not effective in conserving fish stocks it *may* now be changed). The Union shares competence with Member States on, for example, the internal market, security and justice, agriculture, transport, energy, social policy, the environment and public health.
- To integrate the Charter of Fundamental Rights into the founding treaties, so giving it legal force.
- To provide that the Union can accede to the European Convention of Human Rights.[56]
- To provide for the withdrawal of a Member State from the Union, there previously being no express provision.

Documentation

Given the mass of documents, legal instruments and judgments, finding the one you want is not always easy. Perhaps the first port of call should be the official website, http://europa.eu, though it is by no means easy to navigate.

Regulations have the number first and then the year of publication (e.g. 423/2004 on cod stocks). In contrast, directives have the year of publication first and then the number (e.g. 2003/48/EC (now EU), on taxation of savings interest). Each case before the Court of Justice is given a number, and have for many years been preceded by 'C' and followed by the year (e.g. C459/03, *Commission* v. *Ireland*). A CFI case number is preceded by T (e.g. T264/97, *D.* v. *Council*). An appeal is marked with a 'P' (e.g. C310/97P, *Commission* v. *AssiDomän*). All judgments are published in the official *European Court Reports* (ECR). The *Common Market Law Reports* (CMLR) publishes the most important judgments of the Court and judgments on EU law by courts of Member States.

[56] This is dependent on Protocol 14 to the ECHR entering into force: see p. 219 above.

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